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THE

Weekly Reporter:

APPELLATE HIGH COURT.

CONTAINING

DECISIONS OF THE APPELLATE HIGH COURT IN ALL ITS BRANCHES, viz., IN CIVIL, REVENUE, AND CRIMINAL CASES, AS WELL AS IN CASES REFERRED BY THE MOFUSSIL SMALL CAUSE COURTS AND THE RECORDER'S COURTS; TOGETHER WITH LETTERS IN CRIMINAL CASES, AND THE CIVIL AND CRIMINAL CIRCULAR ORDERS ISSUED BY THE HIGH COURT; ALSO DECISIONS OF H. M.'S PRIVY COUNCIL IN CASES HEARD IN APPEAL FROM COURTS OF BRITISH INDIA.

By D. SUTHERLAND.

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If a zemindar sues an agent for rent due from an estate, this is no bar to the zemindars afterwards suing the principal for rent subsequently accrued due. But he cannot in the same suit sue both the principal and the agent: he must elect which of them he will proceed against ...*428

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But the issue laid down at defendant's request being whether plaintiff had a right to question the adoption, it was held that, as under a deed of compromise of 15th September 1839 plaintiff had an interest in showing that the adopted son was not an heir of G, or entitled to maintenance, or to divide any surplus after paying expenses provided for therein, he had a right to question the validity of the adoption.

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In this country there are no formalities to be gone through in order to the constitution of a valid will, and all that is required is, that the intention of the testator should be ascertained in whatever way it may be ascertained, whether by word of mouth or in writing, clearly and unmistakeably.

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The present suit was brought by *G* to recover the mohuntship and the lands belonging thereto. Held, on a construction of the will, that it did not give *G* an absolute, positive, unqualified right at any time to the mohuntship, even on the incapacity of *L* to perform the duties of ——; that, until *L* became incapable, no trust or duty is suggested; that, even when *L* became incapable, it was no more than a gift in the nature of a precatory trust. Held also that on the evidence *G* had failed to establish *his own title* to be ——, and that the present suit was so framed that he could not in it recover the mohuntship *on the mere infirmity of the defendant's title* ... 25

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(1) In a suit by a Mahomedan wife, who had left her husband's protection on account of ill-usage, for recovery, among other property, of certain securities belonging to her which had got into the husband's possession, and the detention of which he justified on the ground that he had purchased them from her, and on their endorsement and delivery to him had paid the full value for them, the correct principle as to —— is that, although the wife may have failed to establish affirmatively the precise case alleged by her, her husband, having admitted the receipt of the securities from her, was bound to show something more than mere endorsement and delivery; that, the relation of the parties being what it was, it lay upon him to prove that the transactions which he set up were *bonâ fide* sales and purchases, and that he actually gave full value for what he received from her; and where it was proved that the wife had the securities while under her husband's protection, and some of them had passed from her to him, and others to his creditors, and that the wife left her husband's house in destitution, the proof adduced by the husband as to the sale for full consideration to him must be full and clear, and such as to satisfy a Court of Justice that the transactions were conducted fairly and properly, and with a due regard to the rights and interests of the wife ...
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The Weekly Reporter,

APPELLATE HIGH COURT.

The 1st June 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. P. Hobhouse, *Judge.*

Limitation—Section 4, Act XIV. of 1859—Acknowledgment in writing.

Reference to the High Court by Mr. W. W. Linton, Judge of the Court of Small Causes at Kooshtea.

Budoobhoosun Bose, *Plaintiff*,

versus

Enaet Moonshee, *Defendant.*

Section 4, Act XIV. of 1859, is confined to an acknowledgment in writing signed by the debtor himself, and not by his agent.

Case.—The action has been brought by the plaintiff to recover the sum of Rupees 22-11 on an account stated, alleged to have been acknowledged and signed by the defendant through the plaintiff's gomastah.

The plaintiff's pleader admits that, but for the account stated, the plaintiff's claim would be barred by the Statute of Limitation. The defendant pleads not indebted, and denies having given any authority to the plaintiff's gomastah to acknowledge and sign the account on his behalf.

I am of opinion that the plaintiff's claim is barred by limitation, there being no acknowledgment in writing signed by the defendant. Section 4 of Act XIV. of 1859 enacts: "If, in respect of any legacy or debt, "the person who, but for the Law of Limita- "tion, would be liable to pay the same, shall "have admitted that such debt, legacy, or "any part thereof, is due by an acknowledg- "ment in writing signed by him, a new "period of limitation according to the "nature of the original liability shall be "computed from the date of such admis- "sion."

Looking at the words of the Section above alluded to, it is confined in terms to an acknowledgment signed by the debtor, and not by his agent; and I would be legislating, not interpreting, if I extended its operation to acknowledgments signed, not by the party chargeable thereof, but by his agent. The safer course, therefore, would be to confine myself to the plain and unambiguous meaning of the words contained in Section 4.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—We concur in the view expressed by the Judge of the Small Cause Court, and think that there is nothing sufficient to take the case out of the Statute of Limitation.

The 1st June 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. P. Hobhouse, *Judge.*

Certificate under Act XXVII. of 1860.

Reference made to the High Court by J. Coryton, Recorder of Moulmein, under Section 22, Act XXI. of 1863.

Awkinfee, representative of the estate of the late Mewsoon, *Plaintiff*,

versus

Mee Nay, *Defendant.*

A certificate under Act XXVII. of 1860 authorizes the holder of it to collect debts due to the deceased, but not to recover property which belonged to the deceased from a person wrongfully in possession.

Case.—THE present plaintiff, Awkinfee, is the eldest son of the late Mewsoon, a Chinaman, by one Tan Nan Nyoung, who is still living. The defendant was a subsequently married wife of the said Mewsoon.

On Mewsoon's death, litigation ensued with reference to the grant of a certificate under Act XXVII. of 1860. The result of such litigation was that a certificate issued to Awkinfee. Awkinfee now sues Mee Nay to recover certain gold leaf, property belonging to the testator's estate.

The Recorder submits for the opinion of the High Court the question whether, under Act XXVII. of 1860, the holder of a certificate is entitled to recover other property than money-debts due to the deceased at the time of his death.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—A certificate under Act XXVII. of 1860 authorizes the holder of it merely to collect debts due to the deceased. It does not entitle him to recover property, either moveable or immoveable, which belonged to the deceased from a person wrongfully in possession. The person seeking to recover such property must prove his title independently of such certificate.

The 1st May 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. P. Hobhouse, *Judge.*

Hindoo widow—Continuance of suit for immoveable property by—Certificate under Act XXVII. of 1860.

Reference made to the High Court by Mr. J. Coryton, Recorder of Moulmein, under Section 22, Act XXI. of 1863.

Sevinthia Pillay, *Plaintiff,*

versus

Mootoosawmy and another, *Defendants.*

A Hindoo widow, as holder of a certificate under Act XXVII. of 1860, is not necessarily the proper person to continue a suit for the recovery of immoveable property; though she is entitled to do so as heir of the deceased, if he died without issue, and was the sole owner of the property.

Case.—SEVINTHIA PILLAY, the plaintiff in this suit (a Hindoo), has died. This suit has been revived by the holder of a certificate to his estate under Act XXVII. of 1860. The certificate-holder is widow of the deceased, and not, therefore, entitled to the whole of the beneficial interest in the estate of the said Sevinthia Pillay. An objection is taken by the defendant that the widow is not such a legal representative as is contemplated by Section 103 of Act VIII. of 1859.

The Recorder submits for the opinion of the High Court the question whether the widow, either in her capacity of widow or as certificate-holder under Act XXVII. of 1860, is entitled to continue the suit for the recovery of immoveable property.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—We are of opinion that a widow, as holder of a certificate under Act XXVII. of 1860, is not necessarily the proper person to continue a suit for the recovery of immoveable property. The certificate confers no right to sue for immoveable property, but only to collect or sue for debts. But as the widow, according to Hindoo Law, was the heir of the deceased if he died without issue, she, as widow, was the proper person to continue the suit. The fact whether the deceased died without issue is not stated in the case; and, as the deceased is not stated to be a co-sharer, we assume that he was the sole owner of the property.

The case of Kattama Nanchear *versus* the Raja of Shivagunga in the Privy Council (reported in Vol. II., p. 31, of the Weekly Reporter, Privy Council Cases) shows (*see* page 37) what is the power of a widow of a Hindoo dying without issue as regards suits for immoveable property.

The 1st June 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Pre-emption (by right of vicinage).

Case No. 163 of 1867.

Special Appeal from a decision passed by Mr. Ainslie, Judge of Patna, dated the 30th January 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 25th April 1866.

Nirput Muhtoon and others (Defendants), *Appellants,*

versus

Mussamut Deep Koonwar (Plaintiff), *Respondent.*

Baboo Chunder Madhub Ghose for Appellants.

Baboos Onookool Chunder Mookerjee and *Nil Madhub Sein* for Respondent.

Quære.—Whether, as between owners of adjacent plots of land, pre-emption can exist by right of vicinage.

Norman, J.—THIS is an appeal from the decision of Mr. Ainslie, the Judge of Patna, remanding the case to the first Court for a trial on the merits. The suit is a claim of pre-emption, the right alleged being founded on vicinage. The objection taken is that, inasmuch as the plaintiff and defendant are shareholders in adjacent mouzahs, these mouzahs paying Government revenue separately, and being wholly unconnected with each other, no right of pre-emption by reason of vicinage, and by reason of the two plots of land owned by plaintiff being adjacent to that in which the defendant has a share, can exist.

A decision of the Full Bench, page 145 of the Special Number of the Weekly Reporter, and another from the 2nd Volume of the Weekly Reporter, page 262 of the Civil Rulings, have been cited before us. We are not prepared at present to lay down broadly the proposition that in *no case* as between owners of adjacent plots of land can pre-emption by right of vicinage exist. It is certainly possible that cases may occur which may come within the rules laid down at page 476 of Baillie's Digest of Mahomedan Law. We think it more satisfactory that the case should go back to the Moonsiff, who will ascertain the facts exactly, giving a plan, if necessary, of the plots of land belonging to plaintiff and defendant, showing their relative situations, stating their value and any considerations that may make it desirable that the owner of one should be the owner of the other. He will record any circumstances which seem to show that the right of pre-emption does not exist.

The costs of this special appeal will abide the ultimate result of the suit.

The 3rd June 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. P. Hobhouse, *Judge*.

Probate or Letters of Administration—British-born subjects dying in Moulmein.

Reference made to the High Court by Mr. J. Coryton, Recorder of Moulmein, under Section 22, Act XXI. of 1863.

E. Saunders, Executrix of the late H. B. Saunders, by her recognized agent R. C. Saunders, *Plaintiff*,

versus

Nga Shoay Geen and another, *Defendants*.

In the case of a British-born subject dying and leaving assets in Moulmein, but no assets in Calcutta, and a will, dated 5th August 1865, before Act X. of 1865 came into effect—HELD that the executrix could not obtain probate or letters of administration with will annexed from the High Court in Bengal.

Case.—THE plaintiff, as the widow and executrix of the late H. B. Saunders, sues the defendants to recover the amount of a promissory note executed by the defendants in favor of the late H. B. Saunders, who died at Moulmein on the 6th March 1866, leaving a will dated 5th August 1865, and property in Moulmein, British Burmah, and in England, but no property in Calcutta or Bengal.

The plaintiff, on the 23rd August 1866, as sole executrix, obtained probate of the will in the Court of Probate in England, but she has not taken out probate or letters of administration with will annexed in India.

The defendant at the hearing objected to the suit, as the plaintiff had not taken out probate in India, and the English probate, though stamped correctly for the amount within the jurisdiction of the English Court of Probate, is not sufficiently stamped to cover the amount of the present claim.

I hold that the plaintiff under the English probate has shown such representation as entitles her to sue in this Court, subject to such limitations as to the stamp or other

provisions as may have been prescribed for representation of parties who have died leaving assets in this country.

I find, as a fact, that the deceased was a British-born subject; that he has assets in Moulmein and England, but no assets within the Calcutta or Bengal jurisdiction of the High Courts; and that, the will being dated before the 1st January 1866, Act X. of 1865 does not apply, but the law relating to wills executed before the 1st January 1866 is the law applicable to the case; and that this Court has not the power of granting probate or letters of administration.

Under the old law, probates or letters of administration were granted by the Supreme Court in Bengal in regard to the estates of all British-born subjects dying and leaving assets within the countries and provinces attached to the Bengal Presidency. Allowing that Moulmein belongs to the Presidency of Bengal, I have come to the conclusion that plaintiff can obtain probate from the High Court at Calcutta, and cannot sue in this Court without such probate or letters of administration from the High Court at Calcutta.

Having some doubt on this point, I submit the following question to the High Court:—

Whether in the case of a British-born subject dying and leaving assets in Moulmein, British Burmah, but no assets in Calcutta or Bengal Proper, and a will dated the 5th August 1865, the executrix of such testator can obtain probate or letters of administration with will annexed from the High Court in Bengal.

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—We are of opinion that, in the case of Mr. Saunders, a British-born subject, who died on the 6th of March 1866, leaving assets in Moulmein in British Burmah, but leaving no assets in Calcutta or Bengal Proper, and a will dated the 5th August 1865, before Act X. of 1865 came into effect, the executrix cannot obtain probate or letters of administration with will annexed from the High Court in Bengal.

The Provinces of Arracan and Tenasserim are part of British Burmah, and not part of the Presidency of Bengal, *see* Act XII. of 1862; and Moulmein is part of the Tenasserim Provinces.

The 3rd June 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Limitation—Suit for balance of accounts (limited dealings).

Case No. 428 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Midnapore, dated the 11th January 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 30th June 1866.

Gopal Chunder Shaha and others (Plaintiffs), *Appellants,*

versus

Mrs. K. Sinaes and another (Defendants), *Respondents.*

Baboo Roop Nath Banerjee for Appellants.

Baboos Otool Chunder Mookerjee and *Gopeenath Mookerjee* for Respondents.

A suit for balance of account in respect of dealings of a limited nature is governed by the limitation of six years.

Seton-Karr, J.—This was a case in which the plaintiff sued the defendant to recover Rupees 783 as the balance of account. The defendant pleaded limitation, the suit not having been brought within three years from the date of the last payment or the last account.

The Sudder Ameen held that limitation did not apply, as the two parties had carried on business together; and, as the sum of Rupees 99 had been paid in 1270, and after the accounts had been closed in the year 1269, the Sudder Ameen held that Section 8 of Act XIV. of 1859 applied, but decided the case on the merits in plaintiff's favor.

The Principal Sudder Ameen overruled this decision. Both parties, it seems, appealed, the defendant urging that limitation barred the suit, and the plaintiff contending that he was entitled, not to 3, but to 6 years. The Principal Sudder Ameen ruled that the plaint did not disclose a trading business between the parties; that their dealings were of a limited nature; and that the period of three, and not of six, years applied to the suit.

We have looked at the plaint and at the chief documents filed, and we think that the Principal Sudder Ameen was not legally correct in ruling that the parties were not traders. Wine and other

articles appear to have been taken by the defendant at various times, and not in the way of ordinary and private consumption, but evidently for the objects of a limited trade on her own account.

The cases quoted seem all on one side, and favor the contention of the plaintiff that he is entitled to six years. *See* Weekly Reporter, Vol. III., page 24, Small Cause Court Rulings; and the ruling of Mr. Justice Macpherson, quoted at page 57 of Mr. N. Thompson's Work on Limitation, and the Appendix of the same work, page 242, at the bottom of the page. No cases on the other side have been brought to our notice, for the case reported at page 68 of Vol. VII., Weekly Reporter, is not in point.

Under these circumstances, we think it right to follow the rulings above quoted, and we remand the case to the Principal Sudder Ameen for a decision on the merits, holding that the plaintiff is entitled to the limitation of six years.

Norman, J.—I entirely concur.

I think we ought to follow the cases which have been decided on this point, which are cited above, as I believe that the construction there put down on the 8th and 9th Sections has been generally adopted and acted upon. Items beyond six years are, of course, barred.

The 4th June 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Special Appeal—Issues.

Case No. 2743 of 1866.

Special Appeal from a decision passed by Mr. James Reilly, Principal Sudder Ameen of East Burdwan, dated the 7th July 1866, reversing a decision passed by the Moonsiff of that District, dated the 13th May 1865.

Shaikh Ahmed Mundul (Defendant), *Appellant,*

versus

Shaikh Sonaoollah (Plaintiff) and others (Defendants), *Respondents.*

Moulvie Syud Murhumut Hossein for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondents.

A party was not allowed on special appeal to go behind the issues by which he was content to abide in the Lower Courts.

Phear, J.—This was a suit to recover possession of a piece of land. The Court of first instance dismissed the plaintiff's claim, but the Lower Appellate Court upheld it. In both Courts the only issues tried were whether the plaintiff had purchased the land, and whether he had been dispossessed by the defendant. The issue in the first Court did not mention the name of any vendor, but in the Lower Appellate Court the question was specially "whether the plaintiff bought the land of Tufuzal Hossein."

The defendant now appeals specially on the ground that the Lower Appellate Court ought to have enquired into the title of the plaintiff's vendor, because it was denied in his, the defendant's, written statement. We are of opinion that this ground cannot now be taken. The defendant had ample opportunity in the Lower Courts of raising all the issues upon which his case depended. And, if either of the Lower Courts had refused to entertain any material issue suggested by him, it would have afforded him good ground of complaint against their proceedings. But nothing of this kind is alleged here, no doubt because it could not be alleged with truth; and we cannot now allow him to go behind the issues by which he was content to abide in the Court below, and which were actually tried there with apparent propriety.

The 4th June 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Presumption under Section 4, Act X. of 1859.

Case No. 3030 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by Mr. F. B. Simson, Judge of Mymensing, dated the 31st July 1866, affirming a decision passed by Mr. F. F. W. Smith, Deputy Collector of that District, dated the 16th March 1863.

Muneekurnicka Chowdhrain (Defendant), *Appellant*,

versus

Anund Moyee Chowdhrain (Plaintiff), *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

The presumption under Section 4, Act X. of 1859, of holding at a uniform rate from the Permanent Settlement need not be specifically pleaded, but (unless rebutted) arises as a matter of course on proof of uniform payment for 20 years.

Bayley, J.—After fully hearing Counsel, we are clearly of opinion that there was a substantial pleading by defendant (special appellant) that his tenure was one held at a fixed rent.

In such a case, it was for the Court to see, first, whether the presumption contemplated by Section 4, Act X. of 1859, existed—that is, whether it was proved by defendant that he had paid at an uniform rate for 20 years before the suit; because, if so, then the presumption would be that defendant had paid at an uniform rate from the Permanent Settlement, unless something was on the record, or discovered in the evidence adduced by either party, to rebut the presumption.

It is urged on us that the presumption available under Section 4 should be *specifically* pleaded; but we are of opinion that, according to the later and concurrent rulings of this Court, the pleading in this case is quite sufficient to raise the issue, and, indeed, it was orally pressed by the vakeel in the Lower Appellate Court.

But not only did the Lower Appellate Court not fix this important issue, but it also expressly declined to consider the point, which is an error in law on its part.

The case is, accordingly, remanded to the Lower Appellate Court, that it may re-try it with reference to the above remarks.

The 14th June 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Section 180, Act VIII. of 1859—Local Investigation—Irregularity—Special Appeal.

Case No. 216 of 1867.

Special Appeal from a decision passed by Mr. F. J. Cockburn, Judge of Sylhet, dated the 26th November 1866, reversing a decision passed by Moulvie Syud Ahmed Buksh, Principal Sudder Ameen of that District, dated the 30th April 1866.

Ram Doss Koondoo (Plaintiff), *Appellant*,

versus

Nil Kanto Dhur and others (Defendants), *Respondents.*

Baboo Otool Chunder Mookerjee for Appellant.

Baboos Chunder Madhub Ghose and *Greesh Chunder Ghose* for Respondents.

Section 180, Act VIII. of 1859, makes it imperative on a Court to employ in the first instance the regular officer of the Court to hold a local enquiry; but non-compliance with this requirement of law is not *per se* a ground of special appeal.

Glover, J.—This suit arises out of a boundary-dispute between the Mouzahs of Kamrapattun and Rampassah, a dispute that has been going on between the proprietors for a long time. It was apparently once supposed to be definitively settled by the arbitration of one Nawab Ali who fixed the boundary-line; but changes in the course of the river, which formed one of the points of departure, rendered the position of the boundary uncertain, and the dispute between the proprietors at once revived.

The Court of first instance decreed in favor of the Kamrapattun proprietors; but the Judge on appeal reversed that decision. Previous to disposing of the case, he again deputed an Ameen to the spot (selecting for this purpose one Ahmud Ali, a vakeel of his Court, and the person who had once before been employed in the local enquiry before Nawab Ali's arbitration had taken place), and on his report and evidence, in conjunction with the other evidence on the record, decided in favor of Rampassah.

Against this decision, the owner of Mouzah Kamrapattun appeals specially, urging:—

(1.) That the Judge had no authority to depute any one but the regular officer of his Court to hold the local enquiry; and

(2.) That his judgment proceeds on an entirely mistaken view of the facts of the case.

On the first point, we think that the Judge acted irregularly. Section 180, Act VIII. of 1859, allows a Civil Court to issue a commission to the "officer of the Court appointed to execute such commission," in other words to the Civil Court Ameen, and, if "there be no such officer, to any suitable person." The words of the law make it imperative on the Court to employ in the first instance the regular officer of the Court who is attached to the Court for the particular duty in question, and, if he be not available, a discretion is allowed on behalf of some other suitable person. It is not denied that there was a duly qualified Civil Court Ameen attached to the Judge's Court at Sylhet, and we think that the Judge ought to have employed him.

But, although we consider that the Judge's action in this matter was irregular, we do not hold it to be a sufficient ground of special appeal, inasmuch as it did not affect either the merits of the case, or the jurisdiction of the Court, and therefore, by Section 350 of the Procedure Code, is no reason for modifying or reversing the Lower Appellate Court's judgment.

With regard to the second ground of special appeal, we think that the Judge was wrong. He starts his judgment with a fact admitted on all hands, namely, that the boundary-line laid down by the arbitrator Nawab Ali is the correct boundary, and the only point for decision was, "where was that line?"

The boundary, we observe, ran due east and west, starting from the southern extremity of a bend in the river. The Judge has, on the evidence, fixed the whereabouts of this starting point, and has settled the boundary by drawing a straight line from it due west. It is urged by the special respondent that the decision of the Judge is a finding of fact on evidence which cannot be disturbed in special appeal. But, if it can be shown that the facts themselves are erroneous, the evidence in support of them will not make the decision a final one.

Now, in this case, the line, as laid down by Nawab Ali, passed, as appears from the map and kyfeut, to the north of certain land and homestead belonging to one Suleem, and through a tank situate north of Suleem's house. This is an admitted fact, as is also the fact that the line now laid down passes a considerable distance to the south of both places; and Ahmud Ali, the Commissioner, sent out by the Judge to lay down Nawab Ali's line, admits in his evidence that his line does not correspond with that formerly defined by the arbitrator.

It appears to us perfectly clear from these admitted facts that the present starting point cannot be the same as that fixed by Nawab Ali. The fact is, that the Judge has chosen the shifting landmark of a river's bank instead of places like Suleem's homestead, and tankmarks which admittedly exist now, in the same state and in the same relative positions as they did when the arbitrator marked them down in his boundary.

There is, moreover, we observe, an "Akra," or religious house, noted in Nawab Ali's boundary, a little to the west of the tank, a place admittedly in existence, and a good landmark for discovering what was the line that the arbitrator did lay down.

We think, therefore, that, as the point at issue was the position of Nawab Ali's boundary, and that as Ahmud Ali in his deposition admits that in some places at least his line did not correspond with his predecessor's, the Judge was wrong in law in deciding the case wholly on the report and evidence of the Commissioner without taking into consideration the evidence noted above, evidence about which there could be no manner of doubt.

Were the case before us now in regular appeal, we should have no difficulty in laying down the boundary-line between the two estates as defined by Nawab Ali.

The case is remanded to the Judge to decide clearly on all the evidence adduced, the position of the boundary fixed by the arbitrator.

Costs will follow the result. The same order is passed in Special Appeals Nos. 217 and 219, which are admittedly governed by the decision in this case.

The 4th June 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Onus probandi—Suit to contest notice of enhancement—Section 14, Act X. of 1859.

Case No. 77 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judicial Commissioner of Gowalparah, dated the 26th July 1866, affirming a decision passed by the Deputy Commissioner of that District, dated the 17th April 1866.

Prithee Ram Chowdry Roy Bahadoor (Defendant), *Appellant,*

versus

Chidam Chunder Shaha (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

In a suit brought by a ryot under Section 14, Act X. of 1859, to contest a notice of enhancement, the *onus probandi* is on the ryot.

Kemp, J.—THIS was a suit brought by a ryot under the provisions of Section 14 of Act X. of 1859.

It is clear that a ryot is not obliged to take the initiative in a suit of this description. He has the option of taking action by complaint of excessive demand of rent, or he may wait until a suit for recovery of arrears is brought at the enhanced rate of rent by the landlord.

In this case, the ryot went into Court, and the *onus* was on him. Confining the suit to the only ground upon which the notice under Section 13 proceeds, *viz.*, that the quantity of land held by the ryot has been proved by measurement to be greater than the quantity for which rent has hitherto been paid by him, the ryot must prove by production of his pottah, by oral evidence, or in any other way which may be in his power, that he does not hold more land than he originally held.

The zemindar is not bound to prove that there is an excess until the ryot has started his case. The Court below has thrown the *onus* on the zemindar.

We quite concur in the view taken by the Court below that the notice proceeded on the one ground of excess of area in the occupation of the ryot.

Case remanded; the *onus* will be placed on the ryot.

The 4th June 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Section 230, Act VIII. of 1859—Onus probandi.

Case No. 176 of 1867.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 23rd November 1866, reversing a decision passed by the Moonsiff of Russoolgunge, dated the 27th June 1866.

Mahomed Ausur and others (Defendants), *Appellants,*

versus

Prokash Chunder Sha and others (Plaintiffs), *Respondents.*

Baboo Woomesh Chunder Banerjee for Appellants.

Baboo Greesh Chunder Ghose for Respondents.

Section 230, Act VIII. of 1859, only gives an applicant the right, without instituting a separate suit, of contesting the decree-holder's right to dispossess him, but does not exempt the applicant from the *onus* of proving his case.

Glover, J.—THIS was an application under Section 230, Act VIII. of 1859.

The plaintiff alleged that he had been dispossessed of certain land belonging to his talook by the defendant who held a decree for possession of an adjoining talook.

The first Court found for the defendant. But the Judge on appeal reversed the decision, holding that the plaintiff had proved his anterior possession, and that the defendant had not been able to show that the land was comprehended in his decree.

We think that this was a wrong view of the law. Section 230 prescribes that, after an applicant has proved anterior possession and subsequent dispossession, and that the land was not included in the decree, &c., his application shall be treated as a suit, and shall be determined in the same manner as other suits.

In other words, that an applicant under this Section, on proving the preliminary points of his case, is allowed to have a summary method of relief against an encroaching decree-holder, and is not put to the expense and trouble of instituting a separate suit. But there is no further privilege accorded, and he is most certainly not exempted from the general law that every plaintiff must prove his own case and succeed upon his own title.

The Judge has held that, because the defendant's decree was without boundaries, therefore he had not shown that the disputed land was included in his talook; but there were other ways of proving this point had it been necessary for the defendant to do so. And we think that the special respondent was the person on whom the *onus* lay, and that, before the defendant could be called upon to prove anything, the former was bound to show by evidence that the land formed part of his talook. The question between the parties was a disputed boundary, and special respondent was bound to prove his case. The law, as we understand it, only gave him the privilege of contesting the other side's right without the trouble and delay of a regular suit.

The case must, therefore, be remanded for the Judge to try whether the special respondent can prove that the disputed land formed part of his talook. Costs will follow the result.

The 5th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Execution—Mesne-profits—Section 232, Act VIII. of 1859—Notice.

Case No. 22 of 1867.

Miscellaneous Appeal from an order passed by the Officiating Judge of Nuddea, dated the 6th December 1866.

Sharoda Moyee Burmonee (Judgment-debtor), *Appellant,*

versus

Wooma Moyee Burmoonee (Decree-holder), *Respondent.*

Mr. R. T. Allan and *Baboo Chunder Madhub Ghose* for Appellant.

Baboos Mohinee Mohun Roy and *Umbika Churn Banerjee* for Respondent.

Separate applications to execute the same decree do not constitute separate causes or suits. Thus, when a Judge, *ex necessitate rei,* executes the decree of a Principal Sudder Ameen, he is at liberty to carry out that execution to whatever extent may be necessary.

A decree for mesne-profits to be ascertained in execution is a decree for money within the meaning of Section 232, Act VIII. of 1859; and there is no irregularity in the decree-holder applying for attachment of the judgment-debtor's property pending the ascertainment of the mesne-profits.

A judgment-debtor, who, while objecting before the Judge as to what had been done by the Ameen in the enquiry as to the mesne-profits, raised no objection as to the want of notice of the Ameen's enquiry, was not allowed to raise the latter objection in appeal.

Jackson, J.—I HAVE no doubt in this matter as to the conclusion at which we ought to arrive.

Mr. Allan, who has argued this case very ably for the appellant, his client, has taken four objections to the order of the Judge. The first objection, perhaps, that we ought to notice is that which goes to the Judge's jurisdiction.

It appears that this was a decree of the Court of the Principal Sudder Ameen; but, the proceedings in execution having been before the Judge, it is contended that these proceedings were *coram non judice.* It is, perhaps, sufficient to say upon this objection that the very same point was taken upon the objection of another defendant in this suit before our learned brethren Mr. Justice Loch and Mr. Justice Macpherson, and was by them overruled. I entirely concur in the view taken by those learned Judges, and I think that the Judge had jurisdiction in this matter. It appears that, at the time when the plaintiff first proceeded to execute this decree, there was not at Kishnaghur any Court of a Principal Sudder Ameen, and that, *ex necessitate rei,* he made application to the Judge, and the Judge thereupon put the decree in execution. It is contended, however, that, allowing the Judge to have been regular in executing the decree upon that occasion when application was first made to him, when he had disposed of that particular application, his function was at an end; and that, as the further application to execute this decree in respect of wassilat was made on the 30th December 1864, at which time the Court of the Principal Sudder Ameen had been re-constituted in Kishnaghur, the Judge ought not to have then proceeded in the matter, but ought to have referred the matter to the Court so re-constituted. It appears to me that this cause, having been brought into the Court of the

Judge under the circumstances stated, for the purpose of executing the decree, became from that time a cause in the Judge's Court, and that all further proceedings in executing that decree were properly had in the Judge's Court. I do not think that separate applications to execute the same decree constitute separate causes or suits; they are merely further proceedings in the same cause. I, therefore, think that the Judge was quite regular in executing this decree on the second occasion as well as on the first.

The next objection is to the legality of the sale. It is contended that there was no legal attachment of this property previous to the sale. Now, Mr. Allan has certainly not convinced me in the first instance that an attachment is at all an essential preliminary in sales in execution of decree. Attachment is a measure resorted to by the decree-holder for his own protection and the protection of purchasers of the property to be sold, and it consists in the case of immoveable property merely in a prohibition by the Court by which the judgment-debtor is restrained from alienating the property previous to the sale. This, therefore, being merely a measure for the protection of the decree-holder and the purchasers of the property, the absence of it is not, it appears to me, an objection which the judgment-debtor is competent to raise. But, moreover, it appears to me that there was a legal attachment in this case. A decree was passed against this petitioner and other persons, making her liable to restore to the plaintiff possession of certain landed property, and making her with them jointly and severally liable to pay wassilat. The amount of wassilat was not ascertained before the Judge; it was (as it very commonly is) reserved for ascertainment in execution of decree. This decree, it seems to me, was a decree for money within the terms of Section 232 of the Civil Procedure Code, and, that being so, I see no irregularity in the decree-holder applying for attachment of the judgment-debtor's property, so that the property might be held in attachment, and protected from alienation pending the ascertainment of wassilat, that is, of the precise amount of money due. This, it appears, is precisely what happened in the present case. The enquiry into the amount of wassilat was going on, and the property was held under attachment, and when the amount of wassilat had been determined, and not until then notice of sale was issued, and the sale took place. The sale, therefore, at any rate was in satisfaction of a decree for money of which the amount had been by that time ascertained.

The next objection is that the defendant (the appellant before us) had no notice of the Ameen's enquiry by which the amount of wassilat was ascertained. Now, when we find that the Judge has proceeded upon the enquiry by the Ameen as if it had been held duly and properly made in the presence of the parties, I think that, in the first instance, we should be inclined to assume, unless we were shown the contrary, that notice had been issued. Also, more specially, we should expect to find that the objection of no notice having been given would have been taken at the very earliest opportunity. Now, in this case, what happens? The Ameen was appointed in June 1865. The enquiry may be presumed to have begun soon after. The enquiry was one of considerable magnitude, and seems to have lasted down to January. In January, the Ameen presented his report, and on the 5th February 1866 I find that the appellant presents her petition of objections. In that petition, there is not one single word of the absence of notice; on the contrary, the enquiry is dealt with as if it had been made in the presence of this person as well as of the other parties concerned. She makes a great number of objections in her petition, and these objections are clearly divisible into two heads: one is as to the conclusions at which the Ameen had arrived; the other as to the petitioner's liability under the decree. In respect of the objection to the Ameen's conclusion, she endorses wholly the objections of her co-defendants, and in fact refers for a statement of those objections to the petition of her co-sharer and co-defendant Wooma Moyee. As to her liability under the decree, that is a matter to which I shall refer presently, because it constitutes the last objection to the Judge's order. Now, it is quite clear that, if this enquiry had been conducted behind the back of the petitioner, the very first word we should have found—a petition objecting would proceed to mention that "I utterly protest "against the whole of these proceedings, "inasmuch as they were conducted behind "my back. I have had no notice of them. "I had many things to urge which I might "have urged. I am not aware of the grounds "upon which the Ameen has arrived at "his conclusions; and I, therefore, demand "that a fresh enquiry be held in my "presence." There is not a single word

of the kind. Not until the petition of the 6th December — some ten or eleven months later—is that question raised for the first time. Under these circumstances, it appears to me to be utterly impossible to attach any weight to it; it is an objection which, if made, ought to have been made at the earliest moment. If not so made, I think we must presume that the appellant had full notice of what was going on. Any objections which the petitioner did raise in that petition of 5th February were effectually disposed of by the Judge in his order of the 15th of the same month. On this appellant's petition, he recorded the order that "this will be considered together with "the other petitions of the parties (judgment-"debtors) concerned in the matter," and he accordingly afterwards says that, "for "the reasons stated in my order upon the "petition of Wooma Moyee Burmonee, I "overrule this petition, and reject it."

Then the last point raised is that the petitioner complains that she has been unjustly made liable for this amount of wassilat. Now, there may be or may not be a good deal in the objection which she has stated—it may be that she has been unjustly made liable for the acts of other persons —that she has derived no benefit from the unjust and unlawful possession of the plaintiff's property. But that was a question which had been before the Court which made the decree. The question has been then disposed of; it was impossible to reopen it in the execution-proceedings, and it is impossible for us to consider it here.

For these grounds it appears to me that this appeal must be dismissed with costs.

Hobhouse, J.—I concur in my learned colleague's judgment in this case.

I think on the first point—the point of jurisdiction—that, when once the Judge had, out of the necessities of the case, executed the decree of the Principal Sudder Ameen, he was at liberty to carry out that execution, to whatever extent was necessary. When he had to execute that decree for costs and possession, he was then entitled to carry out that execution so as to include also the question of wassilat.

Then, as to the attachment, I think that this decree was, in reality, a decree for money. It did not and could not have stated the exact amount of money; it did state that a certain amount of wassilat or mesne-profits to be represented by money was hereafter to be ascertained and obtained. That being so, it was a decree for money, and, being a decree for money under Sections 232 and 235 of the Civil Procedure Code, an attachment properly followed upon the decree.

Then as to the question of the notice. It seems to me that the proper time to have taken that objection was in the petition of the 5th February 1866, in which petition this lady objected to what had been done by the Ameen in the investigation as to wassilat. She did not take that objection then, and the Judge, on the 5th February 1866, overruled the objections which she had taken. Not having taken that objection then, it seems to me that she was not at liberty to take it at some time after that, namely, on the 6th December 1866, which is the first time that objection is taken at all.

On the last point, that is, the question of Saroda's liability, when once she had been made liable under the decree, it appears to me that that is a question which this Court cannot deal with. The point was decided at the time of the decree once and for all.

The 5th June 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,

Judges.

Section 10, Act VI. of 1862 B. C.—Measurement (by Putneedar).

Case No. 252 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 30th November 1866, reversing a decision passed by the Assistant Collector of that District, dated the 8th June 1866.

Dwarkanath Chuckerbutty and others (Objectors), *Appellants,*

versus

Bhowanee Kishore Chuckerbutty and others (Plaintiffs), *Respondents.*

Baboos Sreenath Doss and *Nuleet Chunder Sein* for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

Section 10, Act VI. of 1862 B. C., contemplates the case of a proprietor of an estate who, by reason of inability to ascertain who are the persons liable to pay rent to him, is unable to measure his estate; but not that of a putneedar, who knows who is liable to pay rent to him, and whose attempt to get the Collector's assistance in a minute measurement of the lands held by each of the ryots is simply with a view to harass and oppress them.

Kemp, J.—THIS was an application under the provisions of Section 10, Act VI. of 1862, Bengal Council.

The Court of first instance rejected the application. On appeal the Judge reversed the decision, and held that the applicant was entitled to measure, unless expressly restrained from so doing by the terms of his lease.

The prayer of the application was that the ryots' holdings might be separately measured, and their names and the rent payable by them recorded.

It is admitted that the plaintiff is the putneedar. We are informed, at the hearing of the appeal, that he has also acquired the zemindaree-title by purchase. Between him and the ryot there is the dur-putneedar and the shikmee talookdars (the special appellants).

Now, the ryots are not liable to pay rents to the plaintiff. They pay to the shikmee talookdar who pays to the dur-putneedar, who again pays to the putneedar. Section 10, in our opinion, contemplates the case of a proprietor of an estate, who, by reason of inability to ascertain who are the persons liable to pay rent to him, is unable to measure his estate.

The plaintiff cannot be ignorant of the person who is liable to pay rent to him, as he has given a dur-putnee, and his attempt under Section 10 to get the Collector's assistance in a minute measurement of the lands held by each ryot is simply with a view to harass and oppress them. He may be entitled to make a general survey of the land comprising the dur-putnee under Section 9 of the Act, but this he has not asked for.

We restore the decision of the Court of first instance, and reverse that of the Judge with costs of all Courts and interest payable by the respondent.

The 5th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Certificate (under Act XXVII. of 1860)—Procedure.

Case No. 122 of 1867.

Miscellaneous Appeal from an order passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 24th December 1866.

Kaleenath Dutt, *Appellant.*

Baboo Nil Monee Sein for Appellant.

When an application is made for a certificate under Act XXVII. of 1860, the Judge, instead of enquiring whether any debts are due, and whether or not those debts are barred by limitation, ought simply to determine the right to the certificate, and, if there be such a right, to grant the certificate.

Jackson, J.—THE appellant in this case applied to the Judge for a certificate under Act XXVII. of 1860. The Judge remarked upon this petition: "This application is "made by Kaleenath Dutt, who says that he "is the son of the deceased. He applies for a "certificate of administration to the estate "of Kisto Kant under Act XXVII. of 1860. "But Kisto Kant died in 1250, and a certi- "ficate of administration to the estate was "granted to his widow Bissessuree under "Act XX. of 1841. She died, it is said, in "Magh last. After the lapse of 23 years, "I cannot, under the first-named law, grant "a certificate of administration to the "estate of Kisto Kant, and the applicant "declines to take a certificate of adminis- "tration to the estate of his mother." Now, it might have been an objection with some degree of plausibility in it to this petitioner's application, if the Judge had said that "the "previous grant by this Court of a certifi- "cate to collect debts due to the estate of "the deceased to the widow debars me from "granting a further certificate in the same "estate to another person. It seems to me "doubtful whether, under the terms of the "law, Act XXVII. of 1860 (although the "Sudder Court might supersede the certi- "ficate granted by the Zillah Judge, and "grant a fresh certificate to another party), "whether the Zillah Judge, having once "granted a certificate, can grant another cer- "tificate to a different person for the same "estate." The Judge says that, "after the "lapse of 23 years, I am not competent to "grant a certificate of administration to the "estate of a person who died so long ago," and he seems to have required the applicant to

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take a certificate of administration to the estate of his mother. Now, the mother, it is obvious, having a son, could not have received any certificate as heir of the deceased father, but she could only have taken it as guardian of her son. Consequently, the certificate now granted to the son would be a certificate to the same purport as the certificate originally granted. The Judge appears to have had in his mind some question connected with the Law of Limitation, and may have been actuated by the notion that the collection of debts due to an estate of a person dead so long ago would be barred. That, however, is not a circumstance, as it seems to me, for his consideration. It is quite possible there may be honest debtors, persons owing money to the estate of the deceased, as, for instance, the Government in this case, who do not desire to plead the Law of Limitation, and who will be ready, on being satisfied that the applicant is the proper heir, to pay their debts to him.

I have also to observe that this is not the first time that this question has come up on appeal from the decision of the same Judge. I find that I was one of two Judges who, on the 7th February 1866, overruled an order of Mr. Beaufort, the Judge of the 24-Pergunnahs, refusing a certificate to a party under circumstances very like the present. It appears to me that, with that decision before him—for it was not only a decision upon appeal from his own Court, but it was reported in the 5th Volume of the Weekly Reporter, page 20—the Judge ought not to have refused this application.

The Judge should consider that, by passing orders of this description in disregard of the precedents of this Court, he puts parties to the expense of coming up to this Court in appeal against his orders. In the present case, there is no one from whom the appellant could recover the costs of this appeal.

The order is reversed, and the Judge will entertain the application.

Hobhouse, J.—I concur with my learned colleague that the Judge should have entertained the application for the grant of a certificate.

I observe that Act XXVII. of 1860 is an Act for facilitating the collection of debts and for the security of parties paying debts to the representatives of deceased persons. I further observe that, by Section 3 of that Act, all that the Courts have to do is this—they have to determine, in the words of the Act, the right to the certificate. It is not for them to enquire whether any debts are due, and whether or not those debts may or may not be barred by the Statute of Limitation. All that they have to determine (in my view of the case) is the right to the certificate, and, if there is such a right, to grant the certificate.

The 5th June 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Hindoo Law of Inheritance—Joint Family.

Case No. 309 of 1866.

Regular Appeal from a decision passed by the Judge of Rajshahye, dated the 23rd June 1866.

Bisheswar Chakravarti and others (Defendants), *Appellants,*

versus

Shitul Chundra Chakravarti (Plaintiff), *Respondent.*

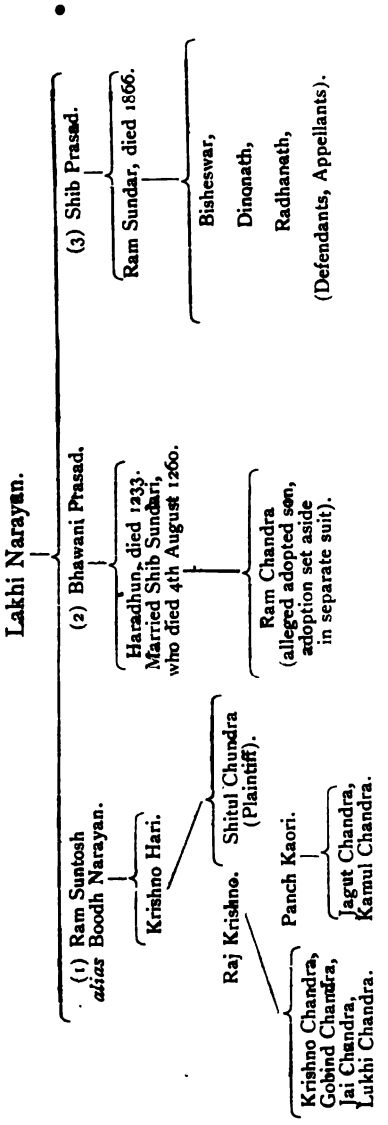
Baboos Dwarkanath Mitter and *Mohinee Mohun Roy* for Appellants.

Baboos Onookool Chunder Mookerjee and *Sreenath Doss* for Respondent.

Suit laid at Rupees 6,995-14-11-1.

The Court declined to extend to all the remote branches of a Hindoo family, separate in mess and estate, and having no common interests like those of brothers, the doctrine laid down in a solitary case in which an elder brother, who recovered certain property by his own money and labor, was awarded two-thirds of a property, and the younger brother obtained only one-third.

Seton-Karr, J. — * To understand the merits of this case, it is first necessary to set out the family-tree, which is as follows:—



Shitul Chundra sues the defendants, on the allegation that his father died on the 2nd of Magh 1260, or about 2 months after the death of Shib Sundari, the widow of Haradhun. The death of Shib Sundari is admitted by all parties to have occurred at Dacca on the 4th of Agran 1260, but the main contention of the defendants is that Krishno Hari died, not two months after Shib Sundari, but about 10 months before her, or in Pous 1259. If, then, Shib Sundari died before Krishno Hari, it is admitted that the plaintiff would be entitled to one-half of the estates which would descend to the families of the two brothers of Haradhun in equal shares. If, on the other hand, Krishno Hari, the plaintiff's father, died before Shib Sundari, then the plaintiff's branch of the family would get nothing. * * *

Before us, the contest has been limited to two points, of which the first is the material issue:—

1st.—Did the plaintiff's father die before Shib Sundari, or after her?

2nd.—Cannot the defendants, under Hindoo Law, claim more than an eight-annas share of the whole property of Shib Sundari, on the ground that, at their own expense and by their own exertions, they recovered the same from the wrongful possessor, Ram Chandra, by a separate suit? * * * * * * * * * * *

As regards the second point of Hindoo Law, we are referred to Macnaghten, Volume II., pages 157-158, Case No. 11, and to the Vyavasta Durpon, pages 419-423. It seems that, in one case only, an elder brother who recovered certain property by his own money and labour was awarded two-thirds of a property, and the younger brother obtained only one-third. But we cannot hold that we are bound to extend this doctrine to all the remote branches of a Hindoo family, separate in mess and estate, and having no common interests like those of brothers. * * * * * *

The appeal is dismissed with costs.

The 6th June 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Section 9, Act VI. of 1862 B. C.—Right of Measurement—Stamp-duty.

Case No. 260 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 27th November 1866, affirming a decision passed by the Deputy Collector of that District, dated the 13th July 1866.

* So much of this judgment (a long one) as proceeds on the merits of the case has been omitted.

Ooma Churn Biswas, Gomashtah on behalf of Bamun Dass Mookerjee, and others (Plaintiffs), *Appellants*,

versus

Shibnath Bagchee and others (Defendants), *Respondents*.

Baboo Sreenath Doss for Appellants.

Baboo Nuleet Chunder Sein for Respondents.

There must be some express restriction before a zemindar can be precluded from the benefit given him by Section 9, Act VI. of 1862, B. C., of measuring the lands in the possession of his ryots.

Where a zemindar values his right to measure at a certain amount, the petition of appeal must be written on a regular stamp according to such valuation, and not upon a stamp used for miscellaneous petitions.

Glover, J.—THIS was a suit by the plaintiff, a zemindar, under Section 9, Act VI. of 1862, Bengal Council, to measure the lands in the possession of his ryots.

Both Lower Courts dismissed the case, the Judge holding that the long possession of the ryot at a fixed rate of rent raised the presumption that, when the zemindar gave the lease, he had no intention of ever interfering with it, or of measuring the land thus granted.

In special appeal, it is contended that the words of Section 9 are imperative, and that, unless the special respondent can show that the zemindar is restrained from measuring by express engagement, his defence must fail.

We have no doubt that this is so. The words of the law are perfectly clear. There must be some express restriction before a zemindar can be precluded from the benefit given him by Section 9, and no presumption, even if one were raised by the long possession of the ryot, which it is not, would be sufficient. There is no contention in the present case that such express restriction exists, and therefore there was no reason why the zemindar should not measure.

It is further argued by the special respondent that, as he is the mokurrureedar with ryots under him, he is the person in receipt of rent, and entitled to measure. And in support of his position we have been referred to the case of Haradhun Dutt *versus* Hazee Mahomed, 6 W. R. (Act X.) 14. But this case has nothing whatever to do with the present one. In that there was a dispute about title between two contending under-holders. Here there is no denial of the ryot's mokurruree, and the special respondent himself admits that he pays rent to the zemindar. The objection appears to us altogether frivolous. Were this the law, every mokurrureedar might, by locating under-ryots on his holding, defeat the law and prevent the zemindar from measuring.

We have no doubt that the special appellant must succeed, and be declared entitled to measure his tenant's holding.

Another point is raised by the special respondent on the question of costs. He urges that the petition of appeal was unnecessarily written on a stamp of Rupees 100 instead of on one of 2 rupees, whereby the costs have been improperly increased for the losing party.

In support of this contention, special respondent refers to the case of Smith *versus* Baboo Nundun Lall, 6 W. R. (Act X.) 13. But this case refers to a matter where there was no valuation made of the subject of suit; and, as the Judges were unable to fix it, they considered that the stamp in use for Miscellaneous petitions would be sufficient, in other words, a stamp of 2 rupees. But, in this case, the plaintiff valued his right to measure at 3,000 rupees; and with reference to Section 10, Act VI. of 1862, B. C., read in conjunction with Section 161 of Act X. of 1859, the proper stamp was undoubtedly a hundred-rupee one, and this objection therefore fails.

The appeal must be allowed, and the Lower Court's decision reversed, with costs on the special respondent.

The 7th June 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. B. Trevor,* G. Loch, L. S. Jackson, and A. G. Macpherson, *Judges*.

Hindoo Law (Mitakshara)—Partition—Son's right in ancestral property—Limitation—Misjoinder.

Cases Nos. 228, 240, 241, 249, 252, and 255 of 1865.

Regular Appeals from a decision passed by the Principal Sudder Ameen of Sarun, dated the 31st May 1865.

Raja Ram Tewary and others (Defendants), *Appellants*,

versus

Luchmun Pershad and another (Plaintiffs), *Respondents*.

Judgment was orally delivered on 11th August 1867, *when Trevor, J., concurred in it.

Mr. R. T. Allan and *Baboos Dwarkanath Mitter* and *Nilmonee Sein* for Appellants.

Baboos Unnoda Persad Banerjee and *Mohesh Chunder Chowdhry* for Respondents.

According to the Mitakshara Law, a son acquires by birth a right in ancestral property, and has a right during his father's lifetime to compel a partition of such property. The father cannot, without the consent of the son, alienate such property except for sufficient cause; and the son may not only prohibit the father from so doing, but may sue to set aside the alienation if made. The cause of action to the son accrues when possession is taken by the purchaser. A new cause of action does not accrue, upon the subsequent birth of a younger brother, either to the elder brother alone, or to him and his brother jointly.

Courts should reject plaints against several defendants for causes of action which have accrued against each of them separately, and in respect of which they are not jointly concerned.

These appeals were referred to a Full Bench by Peacock, C. J., and L. S. Jackson, J., under the following order:—

Referring Order.—DURING the interval which has elapsed since this case was argued yesterday, the Court has had time to consider the case, and their present impression is that the action is barred by limitation. But, considering that there are a number of cases in the late Sudder Court, and a case* decided in this Court in which the contrary view is taken, the Court think that this case ought to be referred to a full Bench for a decision on the question of limitation.

* Dabee Protabnarain Singh *versus* Monohur Doss, 8 Sevestre's Reports, p. 105.

Regular appeals Nos. 240, 241, 249, 252, and 255 of 1865, are also referred for the consideration of a Full Bench.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—This is a suit brought by Luchmun Pershad, the son of Jeetun Loll, on account of himself and as guardian of his minor brother Radhamohun Pershad. The appeal is from a decision of the Principal Sudder Ameen of Sarun. The suit was brought on the 5th October 1863, and is to recover possession of certain lands by reversal of certain deeds, some of those deeds being deeds of absolute sale and some of conditional sale.

I wish to remark, before I enter into the merits of the case, that it is very inconvenient that a suit of this nature should be brought against a number of defendants whose interests are altogether distinct from each other. Section 8, Act VIII. of 1859, allows causes of action to be joined in the same suit by and against the same parties. But there is no Clause which authorizes different causes of action to be joined in one suit against parties, where each of those parties has a distinct and separate interest. In this case, the validity of the different deeds depends each upon its own merits. It would be just as reasonable to sue four different defendants on bonds given by each of them, or even to join them with a few other defendants for trespassing on the plaintiff's lands, as it was to join all the defendants in the present suit. Such a joinder in one suit of distinct causes of action against different defendants, each of whom is unconnected with the cause of action against the other, complicates the case before the Judge, and renders it exceedingly difficult for him in dealing with the case of each defendant to exclude from his consideration those portions of the evidence which may not be admissible against him, though admissible against one or more of the others. Moreover, it is vexatious and harassing to the different defendants. Such a procedure renders it almost compulsory on all the defendants to be present, either in person, or by their pleaders, whilst the case is going on against the others in respect of matters in which they are not interested; and, moreover, it is harassing and inconvenient as regards the attendance of the witnesses of the several defendants, as it renders it necessary for the witnesses of each to be present, and to be detained whilst the case of the others is being heard and determined. Again, in appeal each case must be argued as a separate and distinct case.

I think, therefore, that the Judges below ought to be more careful, and to reject plaints when brought against several defendants for causes of action which have accrued against each of them separately, and in respect of which they are not jointly concerned.

In a case of this nature, which was brought before the Court in the exercise of original jurisdiction, Mr. Justice Norman rejected the plaint. An appeal was preferred to a Division Bench, and the decision of Mr. Justice Norman was upheld.

I observe that, in this very case, one ground of objection was that the suit was informal, because some persons, in whose favor deeds had been executed and their heirs were not made co-defendants, and a distinct issue was raised upon the subject.

Having made these remarks, I now proceed with the case with reference to the defendant in appeal No. 241, which is a

separate appeal, although the case is mixed up with others, and forms part of only one action in the Court below.

The suit against this defendant is to set aside an absolute deed of sale of ancestral immoveable property executed by the plaintiff's father Jeetun Lall in 1848. Possession was taken by the purchaser at that date, so that more than 12 years from the date of the deed and the taking of possession under it had expired when the suit was commenced on the 5th October 1863. Luchmun Pershad was born about 1837, and consequently more than three years had expired since he became of full age. The Principal Sudder Ameen decided upon the issue of limitation that the suit was not barred, upon the ground that limitation ran from the death of Jeetun Lall, the father, and not from the time of the execution of the deed of sale or from the time when the defendant entered into possession under it. He puts the case simply on the ground that the Statute of Limitation commenced to run from the date of Jeetun's death on the 3rd Bhadur 1264 Fuslee, corresponding with 8th August 1857.

The case came before the first Division Bench, and the point being one of considerable importance, with reference to which there were conflicting decisions, the Division Bench referred it for the decision of a Full Bench. The question has now been very ably and fully argued on both sides.

The question turns upon the Mitakshara Law, that being the law of the district in which the lands are situate.

We are of opinion that Luchmun Pershad's cause of action accrued at the time when possession was taken under the deed of sale notwithstanding the father of Luchmun Pershad was then living.

It appears clear that, according to the Mitakshara Law of Inheritance, a son acquires a right in ancestral property during the life of his father, *see* Chapter I., Section 1. "The term heritage signifies that "wealth which becomes the property of "another solely by reason of relation to the "owner" (para. 2).

"It is of two sorts: unobstructed (apro-"tibandhá); or liable to obstruction (sa-"protibandhá). The wealth of the father "or of the paternal grandfather becomes "the property of his sons or of his grand-"sons in right of their being his sons or "grandsons; and that is an inheritance not "liable to obstruction. But property de-"volves on parents (or uncles), brothers, "and the rest, upon the demise of the "owner if there be no male issue; and "thus the actual existence of a son and "the survival of the owner are impediments "to the succession; and, on their ceasing, "the property devolves on the successor "in right of his being uncle or brother. "This is an inheritance subject to obstruc-"tion. The same holds good in respect "of their sons and their descendants" (para. 3).

The property in this case was ancestral, and not the self-acquired property of Jeetun Lall. The plaintiff upon his birth, therefore, as the son of Jeetun Lall, acquired a right in the property, even during his father's lifetime, for the case was one of unobstructed heritage.

The author of the Mitakshara goes on to speak of partition, and shows that rights acquired by unobstructed heritage exist before partition.

He says in para. 4:—

"Partition is the adjustment of divers "rights regarding the whole by distributing "them on particular portions of the aggre-"gate."

Para. 5. "Entertaining the same opinion, "Nareda says: 'Where a division of the "paternal estate is instituted by sons, that "becomes a topic of litigation called by the "wise partition of heritage.'"

In para. 7 he discusses the question, whether property arises from partition, or whether the partition is of pre-existent property. He says: "Does property arise from partition; "or does partition of pre-existent property "take place? Under this head of discussion, "proprietary right is itself necessarily ex-"plained; and the question is, whether "property is deduced from the sacred in-"stitutions alone or from other and temporal "proof."

The author then examines the arguments as to whether property is temporal or not. In the course of the discussion, he states that "an owner is by inheritance," and that unobstructed heritage is here denominated 'Inheritance' (paras. 12 and 13); and, after discussing the arguments on both sides, he comes to the conclusion that property is temporal. He explains in para. 16 the object of the disquisition, and he proceeds in para. 17.

"Next, it is doubted, whether property arise from partition, or the division be of an existent right."

In paras. 18 to 22 he states the arguments urged by his adversaries against his position that property exists before partition, and in paras. 23 to 26 he answers those objections, and then in para. 27 comes to the conclusion that property in the paternal or ancestral estate is acquired by birth, although the father, during the minority of his sons, has power to dispose of it for indispensable acts of duty, and for other purposes prescribed by law. He says: "Therefore it is a settled point that property in the paternal or ancestral estate is "by birth, although the father have independent power in the disposal of effects "other than immoveables for indispensable "acts of duty and for purposes prescribed "by texts of law, as gifts through affection, "support of the family, relief from distress, "and so forth; but he is subject to the "control of his sons, and the rest, in regard "to the immoveable estate, whether acquired by himself or inherited from his father "or other predecessor, since it is ordained, "though 'immoveables or bipeds have been "acquired by a man himself, a gift or sale "of them should not be made without convening all the sons. They who are born, "and they who are yet unbegotten, and they "who are still in the womb, require the "means of support; no gift or sale should "therefore be made.'"

"An exception to it follows: 'Even a "single individual may conclude a donation, "mortgage, or sale of immoveable property "during a season of distress for the sake of "the family, and especially for pious purposes.'"

He proceeds: "The meaning of that "text is this—while the sons and grandsons are minors and incapable of giving "their consent to a gift, and the like; "or while brothers are so and continue "unseparated, even one person, who is "capable, may conclude a gift, hypothecation, or sale of immoveable property if "a calamity affecting the whole family require it, or the support of the family "render it necessary; or indispensable "duties such as the obsequies of the father, "or the like, make it unavoidable." *See* paras. 27, 28, and 29.

In para. 30 he points out that separated kinsmen should join, not because it is necessary, but because it is convenient that they should do so in order to avoid future doubts. The paragraph is as follows: "The following passage, 'Separated kinsmen, as those "who are unseparated, are equal in respect of "moveables; for one has not power over "the whole to make a gift, sale, or mortgage,' must be thus interpreted: 'Among "unseparated kinsmen the consent of all is "indispensably requisite, because no one is "fully empowered to make an alienation "since estate is in common; but among "separated kinsmen the consent of all "tends to the facility of the transaction "by obviating any future doubt, whether "they be separate or united; it is not required on account of any want of sufficient power in the single owner; and the "transaction is consequently valid even "without the consent of the separated "kinsmen.'"

Then in para. 33 he says:—

"In respect of the right by birth "to the estate, paternal or ancestral, "we shall mention a distinction under a "separate text," referring to Section 5, para. 3.

In Section 5 the Commentator points out in paras. 1 and 2 that, among grandsons by different fathers, the allotment of shares is according to the fathers.

He says: "The distribution of the paternal estate amongst sons has been shown. "The author next propounds a special rule "concerning the division of the grandfather's "effects by grandsons: 'Among grandsons "by different fathers, the allotment of shares "is according to the fathers.'"

"Although grandsons have by birth a "right in the grandfather's estate, equally "with sons, still the distribution of the "grandfather's property must be adjusted "through their fathers, and not with reference to themselves. The meaning here "expressed is this: If unseparated brothers "die leaving male issue, and the number of "sons be unequal, one having two sons, and "another three, and a third four, the two "receive a single share in right of their "father, the other three take one share "appertaining to their father, and the remaining four similarly obtain one share "due to their father. So, if some of the sons "be living, and some have died leaving male "issue, the same method should be observed: the surviving sons take their own allotments, and the sons of their deceased "brothers receive the shares of their own "fathers respectively. Such is the adjustment prescribed by the text" (*see* para. 2).

"If the father be alive and separate from "the grandfather, or if he have no brothers, "a partition of the grandfather's estate "with the grandson would not take place; "since it has been directed that shares shall "be allotted in right of the father, if he be "deceased; or, admitting partition to take "place, it would be made according to the "pleasure of the father, like a distribution "of his own acquisitions. To obviate this "doubt, the author says: 'For the owner-"ship of father and son is the same in land "which was acquired by the grandfather, "or in a corrody, or in chattels (which be-"longed to him).'"

The author then proceeds to point out a distinction between ancestral estate and that which was self-acquired by the father. He says:—

"In such property which was acquired "by the paternal grandfather through accept-"ance of gifts, or by conquest, or other means, "as commerce, agriculture, or service, the "ownership of father and son is notorious, "and therefore partition does take place. For "or because the right is equal or alike, there-"fore partition is not restricted to be made "by the father's choice, nor has he a double "share" (para. 5).

In para. 6 he goes on:—

"Thence also it is ordained by the pre-"ceding text that the allotment of shares "shall be according to the fathers, although "the right be equal."

In para. 7 he says:—

"The first text, 'when the father makes "a partition,' &c. (Sec. 2, para. 1), relates to "property acquired by the father himself. "So does that which ordains a double share, "'Let the father, making a partition, reserve "two shares for himself.' The dependence "of sons, as affirmed in the following pas-"sage, 'While both parents live, the control "remains, even though they have arrived "at old age,' must relate to effects acquired "by the father or mother. This other pas-"sage, 'They have not power over it "(the paternal estate) while their parents "live,' must also be referred to the same "subject."

In para. 8 he says:—

"Thus, while the mother is capable of "bearing more sons, and the father retains "his worldly affections, and does not desire "partition, a distribution of the grand-"father's estates does nevertheless take place "by the will of the son," that is, the son of the father or the grandson.

Sir William Macnaghten in his Principles of Hindoo Law says that, when the mother is incapable of bearing more sons, distribution of the grandfather's estate takes place by the will of the son, from which it was contended that it is to be inferred that, in his opinion, it would not take place, whilst the mother was capable of bearing children. But Macnaghten does not refer to para. 8, but only to a former para., which relates to self-acquired property.

In para. 9, the Commentator of the Mitakshara goes on to say: "So likewise the "grandson has a right of prohibition, if his "unseparated father is making a donation, or "a sale of effects inherited from the grand-"father, but he has no right of interference "if the effects were acquired by the father. "On the contrary, he must acquiesce, be-"cause he is a dependant."

The words "the grandson has a right of prohibition" do not mean merely that the son can prevent his father from making a gift or sale of the property by injunction. If he has power to prohibit, he must have a right in the property and a right to set aside the sale, if made.

In para. 10 the author proceeds:—

"Consequently, the difference is this: "Although he," that is, the son, "have a "right by birth in his father's and his grand-"father's property, still, since he is dependent "on his father in regard to the paternal estate, "and since the father has a predominant "interest, as it was acquired by himself, "the son must acquiesce in the father's "disposal of his own acquired property; "but since both have indiscriminately a "right in the grandfather's estate, the son "has a power of interdiction if the father "be dissipating the property."

Here, then, is a clear expression of the grandson's right to prevent his father from alienating ancestral property.

Para. 11 was cited to show that the father was not bound to divide ancestral estate; but it does not establish that point. In that paragraph the Commentator refers to Menu as an authority that the father, however reluctant, must divide the grandfather's property; and he points out a distinction as regards ancestral wealth recovered by the father, which is put upon the same footing as self-acquired property, and he holds that Menu, by the declaration, shows that the

father was bound to divide other ancestral property.

It is clear, then, that a son by birth alone acquires a right in ancestral property, and that he has a right during his father's lifetime to compel a partition of such property; that the father cannot, without the consent of the son, alienate such property except for sufficient cause; and that the son may prohibit the father from so doing. It has been held that the son has not merely the right to prohibit, but that he may sue to set aside the alienation if made.

In the Sudder Decisions for 1853, page 344, it was held that the sale of joint undivided property in a Mithila family without necessity was void, unless made with the consent of all the joint sharers, and that it was not valid even for the seller's own share; and it was stated by the Judges to have been repeatedly so held.

In Stokes's Reports, Vol. I., page 277, it was held that a member of an undivided Hindoo family may alienate the share to which, if a partition took place, he would be individually entitled.

It is not necessary for us to determine which of the two doctrines is correct. All that we have to do is to determine when the cause of action accrued.

If the sale was valid as to the father's share, it must have operated as a severance of the joint-interest in the property included in the conveyance. If so, Luchmun, the only son living, might have sued the purchaser for a partition of the property, or to recover his own share of it. The father's death in that case would not alter his rights.

If the sale was invalid as regards the father's share, the son might have sued in the father's lifetime for a partition, or to recover the whole estate to be held as joint-family estate. It can scarcely be supposed that the father could join as a co-plaintiff to set aside his own alienation for a valuable consideration, or that he would be entitled to share the profits of the estate when recovered by the son to be held as joint-family estate.

It is not necessary to determine these points, or to consider whether the father, if living, would have had to be made a co-defendant, if he could not be made a co-plaintiff in such a suit; or whether the purchaser, if not entitled to hold the father's share of the property conveyed, or to compel a partition of the property, might not be equitably entitled to the father's share of the profits when collected. The determination of these points do not appear to affect the question of limitation.

Even if the son would, upon the father's death, become entitled to the father's share by survivorship, and consequently entitled to a greater interest in the estate than he had in his father's lifetime, that would not necessarily affect the question of limitation.

If the son might have sued in the father's lifetime, either with or without joining the father as a co-plaintiff, and have recovered in that suit all that he was entitled to, the death of the father could not create a new cause of action. If the son might have joined the father as a co-plaintiff, and the suit would not have abated by the father's death, but would have survived to the son, it seems that the cause of action must have been complete in the father's lifetime.

If three joint tenants are dispossessed of an estate, they may join in an action to recover it back from the wrong-doer. When recovered, the estate belongs to the three jointly. If one of them dies, the two survivors may sue for it, and, when recovered, the estate would belong to the two jointly. Yet no one would contend that, if they all three lived for 20 years, a new cause of action would accrue to the survivors upon the death of the one, because they had a greater interest after his death than they had in his lifetime. The cause of action is the same, notwithstanding that the two, by survivorship, have a greater interest in it than they had before. The cause of action in such a case would accrue at the time of wrongful dispossession.

This is merely put as an illustration. It is not intended to say that a joint Hindoo family are the same as joint tenants under the English Law.

So in a case under the Mitakshara Law, if a father and a son of full age should be dispossessed in the father's lifetime of ancestral property, the son could not, upon the father's death 20 years afterwards, sue to recover the estate upon the ground that limitation did not begin to run in the father's lifetime.

The inconvenience which would result from holding that, in cases like the present, limitation does not commence until the death of the father, would be very great. The death might happen 20 or 30 years after the sale

and after the property has been sold by the first purchaser, and passed successively into the hands of several subsequent *bond-fide* purchasers for valuable consideration, and when the last purchaser in possession might be wholly unable to prove whether the circumstances of the joint family at the time of the sale were such as to justify the sale by the father. Inconvenience could not be allowed to affect our decision if the law were clear, but it is a matter to be taken into consideration in determining what the law is.

The next question to be decided is, Did a new cause of action accrue upon the birth of Radhamohun, the younger brother, either to him alone, or to him and his brother jointly?

Luchmun Pershad was born in 1837. Radhamohun was not born until the end of 1856 or the beginning of 1857, only about 9 years after the sale in 1848, and not 12 years before the commencement of the suit. It seems clear that no new cause of action accrued upon his birth.

It is clear that, before his birth, his father and his brother might have made a partition of the estate; and, if they had done so, he would have had no interest in the share allotted to his brother (Mitakshara, Cap. 1, Sec. 6); and, before his birth, his father might have sold the share allotted to him. So, the father and his elder brother, or the father with the assent of the elder brother, might, before his birth, have sold the estate, and the sale would have been binding upon him. It is contended that, although Radhamohun would have been bound by a sale made by the father jointly with Luchmun Pershad, still he is not bound by a sale by the father alone without the consent of Luchmun.

If the father and Luchmun had been turned out of possession by a wrong-doer, the cause of action would have accrued at the time of the dispossession, and a new cause of action would not have accrued upon the birth of Radhamohun. Radhamohun succeeded to the estate as it was when he was born. He had no right to dissent from the sale, for he was not born at the time. The sale might have been invalid as against Luchmun, but the cause of action accrued to Luchmun immediately the purchaser took possession. If Radhamohun had been born at the time when the estate was sold, the father would have been entitled to only ½ of the estate upon partition; but, as it was, the father and Luchmun would each have been entitled to ½ if partition had been made at that time. If the case in Stokes's Reports is correct, the father might have lawfully sold ½ at that time; but, if Radhamohun on his birth acquired a new right against the purchaser, it was a right which, if partition had been made at that time, would have entitled him to ⅓. Now, if Luchmun had sued and recovered ½ before Radhamohun was born, could Radhamohun upon his birth have sued for ⅓? If so, the purchaser, instead of acquiring ½, would, in fact, be able to retain only ½ *minus* ⅓ of the property conveyed, or, in other words, $\frac{1}{6}$ instead of ½.

Whatever interest in the property Radhamohun became entitled to on his birth, he derived it by unobstructed heritage or inheritance from his father. He could not inherit anything which his father had lawfully conveyed away. If the father parted with his own share, he could not inherit any part of it. If the conveyance caused a severance of the joint interest of him and Luchmun, and passed his own half to the purchaser, Radhamohun, as heir of the father, could not inherit any part of the share which passed to the purchaser, neither could he inherit from his father any part of Luchmun's share. At most, he inherited only a cause of action; and it is difficult to see how he could even inherit that from his father unless his father had a right to set aside his own sale. Even if he took by inheritance from his father an interest in Luchmun's right of action against the purchaser, he must have inherited it subject to the operation of the Statute of Limitation upon it. At all events, Radhamohun's birth could not create a fresh interest or a new right of action in Luchmun, either alone or jointly with himself.

Luchmun is now suing upon a joint cause of action. Luchmun's interest in it is clearly barred by limitation. If there is any cause of action which is not barred, it must be a separate cause of action in Radhamohun. I do not think that a separate cause of action in Radhamohun was caused by his birth; but it is not necessary to determine that question, as the cause of action now sued upon is a joint cause of action in Luchmun and Radhamohun. Limitation is pleaded to a joint cause of action. If that issue is found against Luchmun, I should think he could not, as guardian of Radhamohun, be allowed, under the allegations in this suit, to recover upon a separate cause of

action, if any, accrued to Radhamohun on his birth. That would be a wholly different cause of action from that sued upon. It is clear that Radhamohun did not, upon his birth, inherit from his father a joint cause of action with Luchmun, and that Luchmun's cause of action did not accrue upon the birth of Radhamohun.

Appeal No. 241.—Therefore, we are of opinion that limitation did bar the suit so far as it related to the cause of action out of which appeal No. 241 arises. Consequently, the decision of the Principal Sudder Ameen as to that cause of action must be reversed with costs, and in respect of it a decree given for the defendant.

Appeal No. 255.—This decision applies also to the defendants who are interested in the lands to which the appeal No. 255 relates. The deed of sale in that case was executed, and possession taken under it in 1864, and consequently the suit was barred in 1863.

Appeal No. 249.—As to appeal No. 249, the deed was dated in 1838, and possession followed immediately. Consequently the suit is barred.

Appeal No. 228.—We now come to consider appeal No. 228. In that case the deed was dated 8th August 1847. There was a decree for foreclosure in 1849, and a decree for possession on the 9th January 1852. If the cause of action accrued upon the execution of the bill of conditional sale in 1847, it was barred. If it dates from foreclosure in 1849, it would also be barred. Neither Luchmun nor Radhamohun were parties to the foreclosure. If it dates from the time when possession was taken under the decree of 1852, then it is not barred.

We are of opinion that limitation began to run from the time when possession was taken, and not from the date of the mortgage-deed under which possession was not taken, nor from the date of the foreclosure. Prior to 1852, when possession was taken, all was on paper. The plaintiffs were no parties to the foreclosure-suit, and are not bound by it.

We are of opinion that the cause of action, if any, accrued when possession of the land was taken by the purchaser. Suppose a person not having any title to the land were to mortgage it, the owner of the land would not be bound to bring an action directly the mortgage-deed was executed.

Or suppose the mortgagee were to go on to foreclose the land, and not to make the owner of the land a party, he would not be bound to come in, nor would he be affected by the decree in that suit. He might very reasonably say: "Why should I be obliged to incur the costs and harassment of a suit when the property remains in my possession? It will be time enough for me to interfere when my possession is interfered with." That appears to be the time when his cause of action accrued, so far as the right to recover possession is concerned. The parties were not bound to bring a suit to set aside the deed. They might possibly have brought such a suit, if they had pleased to do so, that they might have the validity of it tried at once when witnesses were forthcoming to prove that there was no sufficient cause for the mortgage. The right to set aside the deed is a distinct right from the right to recover possession.

There is one case in which it was held by the late Sudder Court that the plaintiff's case was out of time under the Statute of Limitation, and his cause of action accrued at the date of the mortgage. It was, however, admitted in that case that the defendant's father, who was the original mortgagee, obtained possession at the time at which the deed was executed. The case is not in point, and we think that, as regards the appeal No. 228, the case was not barred.

Appeal No. 252.—The same reasons apply to appeal No. 252, in which case the decree for foreclosure was in 1854, and possession was not taken until afterwards.

The necessity of separating all these different cases in delivering judgment in appeal shows the difficulty and annoyance to which defendants must be put by being joined in one action in respect of different causes of action to set aside various deeds executed under different circumstances, and in respect of which they have no common interest.

It having been decided that in the cases out of which appeals Nos. 228 and 252 arise the Statute of Limitation did not apply, the appeals will go back to the Division Bench which referred them to this Court, to determine the appeals so far as the other issues are concerned.

Appeal No. 240.—It appears that, in appeal No. 240, no question of limitation arises. That appeal will, therefore, go back to the Division Bench to be determined on the merits.

The 7th June 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Limitation—Land for public purposes—Right of action for compensation paid to wrong party.

Case No. 3164 of 1866.

Special Appeal from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 6th August 1866, affirming a decision passed by Moulvie Syud Sukhawut Hossein, Principal Sudder Ameen of that District, dated the 29th March 1866.

Azroal Singh (Defendant), *Appellant,*

versus

Lalla Gopeenath and others (Plaintiffs), *Respondents.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

Suit to recover money paid by Government to the defendant as compensation for land taken for public purposes which the plaintiff alleged to belong to him and not to the defendant. HELD that the plaintiff's right of action against the defendant accrued at the time when the defendant first took the money from Government, and that the ignorance of the plaintiff in regard to the accrual of his right did not prevent the time from running against his suit, unless it had been brought about by the fraud of the defendant.

Phear, J.—THIS suit is brought to recover a sum of money, which was paid by Government to the defendant as compensation for certain land taken for public purposes which the plaintiff says belonged to him, and not to the defendant.

Amongst other things, the defendant pleaded that the suit was barred by the Limitation Act; and it is admitted by the plaintiff that more than six years elapsed between the time when plaintiff received the compensation-money in question and the filing of the plaint in this suit. The Lower Appellate Court decided the issue of limitation adversely to the defendant, and it is now objected that he was wrong in law in so doing.

It appears that after the compensation-money was paid by the Government to the defendant, and in ignorance that any money had been so paid, the plaintiff brought a suit against the defendant to recover from him a certain mouzah which originally included the land taken by Government. He succeeded in this suit, and the Lower Appellate Court holds that his right to demand the compensation-money for the taken land which the defendant wrongly received dates from the decree in this suit. We think that this is an error. The right of the plaintiff to sue for this money rests solely on the fact that the land compensated for belonged to him instead of to the defendant; and that the defendant, as soon as he received it, was bound in law to pay it over to him; in other words, the plaintiff's right of action against the defendant accrued at the time when the defendant first took the money from Government. The ignorance of the plaintiff in regard to the accrual of his right does not prevent the time from running against his suit unless it has been brought about by the fraud of the defendant, and there is nothing whatever to show that this was so. The pendency of the suit to recover the mouzah had no bearing on the operation of the Limitation Act.

We think the appeal must be allowed, and the suit dismissed with costs.

The 7th June 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Divorce.

Case No. 3148 of 1866.

Special Appeal from a decision passed by Baboo Modoo Soodun Ghose, Officiating Additional Principal Sudder Ameen of Chittagong, dated the 12th September 1866, reversing a decision passed by Baboo Kalee Churn Chatterjee, Moonsiff of Deang, dated the 24th February 1866.

Mussamut Waj Bibee and others (Defendants), *Appellants,*

versus

Azmut Ali (Plaintiff), *Respondent.*

Baboo Gopeenath Mookerjee for Appellants.

Baboo Debendro Narain Bose for Respondent.

An instrument of divorce signed by the husband in the presence of, and given to, the wife's father, was held to be valid, notwithstanding that it was not signed in the presence of the wife.

Phear, J.—THIS was a suit brought by a husband against his wife, her father, and mother, to recover possession of the wife, defendant. The first Court dismissed the suit; but the Lower Appellate Court decreed that "the Bibee defendant be restored to "the plaintiff from the possession of the "rest of the defendants, and that the costs of

"the plaintiff in both the Courts be paid "with interest by the Bibee defendant and "her father." It is almost needless to observe that this decree cannot be upheld in its present form. We might, however, if we saw fit, modify it as was done by this Court in the case of Chotun Bibee *versus* Ameer Chund, 6 Weekly Reporter, Civil Rulings, 105.

It is admitted by the plaintiff on the merits that the wife was legally divorced by him if a certain farkhutee signed by him and given to her father was legally binding upon him. The Lower Appellate Court holds that it was not so binding, because it was not signed in the presence of the wife herself, but only in the presence of her father. We think this ruling is incorrect; and, no authority to the contrary being cited to us, we see no reason for doubting the validity of the act of triple repudiation which the document sets forth. The appeal is decreed, and the decree of the first Court affirmed with costs.

The 7th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Appeal (by Surety for judgment-debtor).

Case No. 131 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Shahabad, dated the 21st December 1866.

Ghoree Lal Jha (Surety for Judgment-debtor), *Appellant,*

versus

Sheo Narain Singh and others (Decree-holders), *Respondents.*

Moonshee Ameer Ali and *Baboos Romanath Bose* and *Mohinee Mohun Roy* for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

A surety against whom the judgment-creditor is proceeding under Section 204, Act VIII. of 1859, is not debarred, by Section 11, Act XXIII. of 1861, from an appeal.

[On the vakeel for the appellant rising to open his appeal, a preliminary objection was taken by Baboo Romesh Chunder Mitter, to the effect that the surety against whom the judgment-creditor is executing his decree is, under Section 204 of Act VIII. of 1859, debarred, by the terms of Section 11 of Act XXIII. of 1861, from an appeal, whereupon the Court passed the following order:—]

Jackson, J.—It appears to me that there is nothing in the objection of Baboo Romesh Chunder Mitter who argues, I think, with more ingenuity than reason, that the surety, against whom the decree-holder is proceeding under Section 304 of the Civil Procedure Code, is debarred, by the terms of Section 11, Act XXIII. of 1861, from an appeal to this Court. It appears to me that he is no more barred from an appeal under that Section 11 than the decree-holder is barred by the same Section from proceeding against him. If we are to look at the terms of Section 11, the words, "arising between the parties to the suit in which the decree was passed, and relating to execution of the decree," I have no doubt that we should hold that, *for the purposes of that Section*, the party becoming surety, and who is being proceeded against under Section 204, is a party to the suit. He is a person who, by an arrangement between the parties, has made himself liable to satisfy the judgment against the original defendant. When the Act in the 204th Section provided that "a party who "had made himself liable as a surety for the "performance of the decree or any part "thereof was liable to have the decree execut-"ed against him to the extent to which he had "rendered himself liable in the same manner "as the decree may be enforced against the "defendant," I cannot doubt for a moment that it was intended that in every case where an appeal may be preferred by the original judgment-debtor against the decree-holder, in the like case the surety against whom proceedings were taken under that Section might prefer his appeal against the decree-holder.

For these reasons I think the objection must be overruled.

Hobhouse, J.—I concur with my learned colleague in overruling the preliminary objection taken by Baboo Romesh Chunder Mitter.

As I understand the case, the special appellant is surety within the meaning of Section 204 of the Civil Procedure Code in the place of defendant. That Section says: The decree may be executed against such person, that is, the surety of the defendant, as if he were defendant. Then, the defendant is a party to the suit; that being so, the surety, who stands in the place of the defendant, becomes also, in fact, a party to

the suit. That being so, he will come within the provision of Section 11, and, coming within that provision, his appeal undoubtedly lies to this Court.

[The appeal then proceeded, and, after hearing argument on both sides, the Court delivered judgment on the merits.]

The 7th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Minor—Certificate of Administration under Act XL. of 1858.

Case No. 92 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Rajshahye, dated the 20th December 1866.

Brohmo Moyee Chowdhrain, *Appellant,*

versus

Chittur Monee Chowdhrain, *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

No one for Respondent.

Where an application was made by a Hindoo female for a certificate of administration under Act XL. of 1858 in respect of an estate which she alleged to belong to an adopted son—HELD that the Judge ought merely to have enquired whether the boy was a minor, and whether the petitioner, being a near relative, was a fit person to be entrusted with the charge of the minor's property.

Jackson, J.—IT appears to me that the Judge has gone out of his way in the making of his order in this case.

An application being made by a Hindoo female for a certificate of administration in respect of the estate which she alleged to belong to an adopted son, the Judge appears to have entertained an objection on the part of a person who objected to the alleged adoption, and thereupon the Judge sent for the son in question, and, upon inspection, determined that the boy was at least 16 years of age, and, thereupon, observing that the application was supported by evidence which, upon this point, was manifestly false, he refused the certificate. Act XL. of 1858 provides in Section 3 that "every person "who shall claim a right to have charge of "property in trust for a minor under a will, "or deed, or by reason of nearness of kin, "or otherwise, may apply to the Civil Court "for a certificate of administration." Now, this lady appears to have claimed a right to have charge of the property in respect of this lad, whom she alleged to be the adopted son of her mother. On application being made under Section 6, the Court must issue "notice of the application, and fix a day for the hearing of the same." On the day so fixed, or as soon after as may be convenient, the Court shall enquire summarily into the circumstances, and pass orders in the case. Now, the enquiry the Court has to make under that Section, I presume, is an enquiry as to the fitness of the person making an application to act as regards the minor. There is no doubt he was competent to ascertain whether there was a minor or not; and, if he found from the evidence before him that the person in respect of whom application was made was not a minor, he would be competent to refuse. But, then, for the purposes of the Act, minority terminates at the full age of 18. The Judge merely records his impression that the boy was at least 16. He may be at least 16, and he may be 17, and yet he would be a minor in respect of whom it would be proper to grant a certificate.

Moreover, any enquiry as to the circumstances of the adoption (a point which the Judge appears to have gone into in this case at the instance of the objector) was manifestly premature. When the alleged adopted son or the mother on his behalf should bring any suit in a Civil Court, or should be found in possession of the property upon such alleged title, it will be the time for the Court in which the suit is brought to enquire into that matter.

The Judge will be directed to enquire whether this boy is a minor—whether, that is to say, he is under the age of 18 years; and, if so, whether the applicant is a proper person to be appointed guardian. If the Judge find these points in the affirmative, he should grant a certificate.

Hobhouse, J.—I concur. It seems to me that there were only two points for enquiry in this case: *first*, whether the boy was a minor within the meaning of Section 25 of Act XL. of 1858; and, *secondly*, whether the petitioner, being a near relative, was a fit person to be entrusted with the charge of whatever property there was. These two points having been found, there was no necessity for going into any other question, whether the boy was a properly adopted son or not.

The 7th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Assignment of decree—Allegation of Benamee.

Miscellaneous Appeal from an order passed by the Judge of Bhaugulpore, daied the 17th September 1866, affirming an order passed by the Principal Sudder Ameen of that District, dated the 23rd June 1866.

Khajah Mahomed Issa Khan (Purchaser of decree), *Appellant,*

versus

Mr. P. Onraet and others (Judgment-debtors), *Respondents.*

Baboos Ashootosh Dhur and *Mohinee Mohun Roy* for Appellant.

Mr. R. E. Twidale for Respondents.

Before shutting out a decree-holder who has taken by assignment, on the ground that he is a mere *benamee* holder from one of the judgment-debtors, it is necessary to be very careful, and to ascertain beyond a doubt that the fact is so.

Jackson, J.—BOTH the Lower Courts in this case profess to have decided it on the authority of the case decided in 5 Weekly Reporter, page 46.

I observe that the Principal Sudder Ameen has come to the conclusion that the decree had been purchased by one of the judgment-debtors in the name of Issa Khan upon grounds which amount to a mere suspicion. The Judge, on the appeal, ought to have tried the question as to whether the purchase had been really made as alleged or no. Reading his order, it does not appear that he exercised his own judgment or understanding in the matter. He simply follows the opinion of the Principal Sudder Ameen, and then says that "the decision referred to will apply." It is obvious that, before shutting out a decree-holder who has taken by assignment on the ground that he is a mere *benamee* holder from one of the judgment-debtors, it is necessary to be very careful, and to ascertain, beyond a doubt, that the fact is so, or else an innocent purchaser would be unjustly debarred from the benefit of the decree which he has purchased. In point of fact, the very case to which the Court below has made reference was one in which an enquiry on that point was expressly enjoined. The judgment-debtor there urged that a benamee purchase of this kind had been made, and the Court directed that that should be carefully enquired into.

I think, therefore, that the case must go back to the Judge, in order that he may carefully try this point; if he should find that the purchase was a mere sham as alleged, he will not be wrong in deciding the case under the authority of the precedent quoted, on the principle of which it is unnecessary for us to express any opinion.

Hobhouse, J.—I concur.

The 7th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Assignment of decree—Section 265, Act VIII. of 1859—Appeal—High Court (Powers of superintendence).

Case No. 50 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Rajshahye, dated the 24th January 1867.

Greesh Chunder Lahooree (Decree-holder), *Appellant,*

versus

Kasheessuree Debia (Judgment-debtor) and another (Purchaser of decree), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

Where a judgment-creditor seeks to attach and sell a decree on the allegation that the asignment of it was not a *bond-fide* conveyance, and the conveyance purports to be one of property specified in Section 265, Act VIII. of 1859, it is the duty of the Judge, under Section 246, to enquire whether the assignee of the decree was or was not in *bond-fide* possession of the property. If the Judge enquires into the facts, no appeal lies from his order. But, if he refuses an enquiry, the High Court, under its general powers of superintendence, can and ought to require the Judge to make the enquiry.

Jackson, J.—THE question at issue in this case is shortly this.

Two parties, Kasheessuree Debee and Greesh Chunder, had cross-decrees not in the same Court, and an attempt on the part of Greesh Chunder to have these two decrees set off, one against the other, had previously failed. It is now sought to have the decree, which Kasheessuree held, attached and sold for his benefit. It appears, however, that the decree of Kasheessuree has been assigned over to Fukeer Chand Khan, who accordingly appears on the record

of the Judge's Court as decree-holder in that case. The Judge was of opinion that this fact and the so-called recognition of Fukeer Chand Khan as decree-holder debars him from entertaining this application, and he, therefore, refused to do so. Greesh Chunder Lahooree appeals to this Court. If the Judge had enquired into the facts, I think it is certain that no appeal in this matter would lie. But, when the Judge has refused an enquiry which he ought to have made, I think that, under the powers of superintendence vested in this Court by the High Court's Act, we are competent, and we ought to require the Judge to make the enquiry. When he has made this enquiry, there is no doubt that his decision will be final. He must, therefore, proceed to enquire in the mode prescribed by Section 246 of the Code of Civil Procedure, whether this decree is held by Fukeer Chand Khan on his own account, or, as alleged by the petitioner, in secret trust for Kasheessuree Debee. This is undoubtedly the course to be followed in this case. This property, being a debt due to the judgment-debtor, is a property that is liable to be attached and sold at the instance of the judgment-creditors. That is pointed out by Section 265 as well as other Sections of the Code.

Hobhouse, J.—I concur with my learned colleague. I think that, when the allegation of a judgment-creditor was that the conveyance of Fukeer Chand was not a *bond-fide* conveyance, and when that purported to be a conveyance of property specified in Section 265 of the Civil Procedure Code, then, under Section 246 of the Act, it was the duty of the Judge to enquire whether Fukeer Chand was or was not in *bond-fide* possession of the property.

The 8th June 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Section 246, Act VIII. of 1859.

Case No. 435 of 1866.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 20th September 1866.

Mussamut Imam Bandee Begum (Plaintiff), *Appellant,*

versus

Mirza Mahomed Tukee Khan and others (Defendants), *Respondents.*

Messrs. R. V. Doyne and *C. Gregory* for Appellant.

Mr. R. E. Twidale, Moonshee Ameer Ali, and *Baboos Mohendro Lal Shome* and *Mohinee Mohun Roy* for Respondents.

Suit laid at Rupees 30,227-1-9.

When, under Section 246, Act VIII. of 1859, property which has been attached is ordered to be released, the order for release is made with reference merely as to the particular claimant who has obtained the order. The order is not to be looked on as a general decision (of which all the world can have the benefit) that the property does not belong to the judgment-debtor.

Macpherson, J.—The appellant before us was the plaintiff in the Court below.

The plaintiff, in May 1856, got a decree for a large sum of money (of which upwards of Rupees 30,000 are still unpaid) against one Fatima Begum, which decree was finally affirmed by the Sudder Court in 1859. At that time, the estates which are the subject of this suit were undoubtedly the property of Fatima Begum, as is admitted by all parties.

The plaintiff, having applied for execution of her decree, got an order for attachment on the 18th of May 1861. But it then appeared that Fatima Begum had, subsequently to the date of the decree of the Sudder Court, executed certain documents purporting to convey these estates to the principal respondents in this appeal, namely, Mussamuts Mussitee Khanum and Hosseinee Khanum. These documents were a mokurruree lease, dated the 23rd of January 1861, granted to Mussitee, in consideration of a bonus of 7,000 rupees, and of a rent reserved of 6,000 rupees, and a kubala or bill of sale three days later in date (*i. e.*, dated the 26th of January 1861), whereby Fatima professed to sell and transfer to Hosseinee all her remaining rights as zemindar for the sum of Rupees 4,500.

The property having been attached, Mussitee and Hosseinee claimed it under Section 246 of Act VIII. of 1859, and got an order for its release.

The object of the present suit is to obtain a declaration that the mokurruree and kubala were merely collusive and fraudulent deeds, not operating as real or valid transfers of the estate from Fatima to Mussitee or Hosseinee, but executed solely with a view of preventing the estate from being sold in execution of the plaintiff's decree. And the appellant prays that the property may be sold in satisfaction of her decree.

On the appeal coming on for hearing, two sets of vakeels appeared, each claiming to represent the respondent Hosseinee Khanum.

Baboo Mohendro Lal Shome on the one hand, and Mr. Twidale on the other, each claimed to represent the real Hosseinee, and stated that there were, in fact, two women each asserting herself to be *the* Hosseinee who is a party to this suit. Under the circumstances, and with the consent of Mr. Doyne, the Counsel for the appellant, we thought it best to allow both vakeels to appear, leaving any question arising between the two alleged claimants to be subsequently determined as might appear to be necessary.

The Lower Court, without going into the merits of the case, has dismissed the suit as barred by limitation. The Principal Sudder Ameen was of opinion that there had been an adjudication upon the claim of one Mussamut Bolakun under Section 246 of Act VIII. of 1859, and that the present suit was barred, not having been brought within one year from the date of that adjudication. It seems to us, however, that the suit is not so barred, and that the Lower Court has wholly misapprehended the object and effect of Section 246, and of the various proceedings which have led him to the conclusion that this suit was not instituted within such time as the law allows.

Upon the alleged sale to Hosseinee, Mussamut Bolakun came forward, and claimed the right of pre-emption as against her. The right not being admitted, she instituted a suit to have it established, and she got a decree in her favor on the 27th of April 1863. This decree was subsequently reversed by the High Court on the 8th of March 1864, on the ground that the necessary preliminaries had not been complied with. But, before its reversal, the Lower Court, having the decree of the 27th April 1863 before it, was of opinion that Mussamut Bolakun, by virtue of her right of pre-emption, was entitled to an order in her favor in proceedings which she had instituted against the plaintiff, claiming the property under Section 246; and the Court, accordingly, under that Section, passed an order (on Bolakun's claim) releasing the property from attachment. This is the order within one year of which (if at all) the Lower Court is of opinion that it was necessary for the appellant to sue to establish her right—an opinion which the pleaders for the respondents have attempted to support in argument before us.

But it is not the object of the present suit to establish any right as against Bolakun; nor was the order which the Lower Court passed on Bolakun's claim under Section 246 an order which in any way released the property in favor of Hosseinee or Mussitee; and of that order these latter persons can get no possible benefit.

When a claim is made under Section 246, and the property which has been attached is ordered to be released, the order for release is merely *quoad* the particular claimant who has obtained the order. The order is not a general order of which the whole world is to have the benefit; it is not an order in effect that the property cannot, as against persons other than the immediate claimant who has got the order, be attached and sold. There are, no doubt, general words in Section 246 as to the Court considering it proved that the property was not the property of the judgment-debtor. But those words, as every other part of the Section, must be read with reference only to the claim of the claimant who is proceeding under the Section, and not to the world at large. Were it otherwise, the Section would be open to this novel and highly dangerous construction—a construction opposed to every principle on which are based the rules which regulate the right of parties to demand the assistance of the Civil Courts—that a mere volunteer, having and claiming no possible interest in the property, might come in under Section 246, and cause property to be released on the ground that it did not belong to the judgment-debtor.

Then, it was contended that Hosseinee has a right to benefit by the proceedings in Bolakun's claim, because there is privity between her and Bolakun. Where the privity is, we are at a loss to conceive. Because Hosseinee said she had bought from Fatima, Bolakun claimed a right of pre-emption. This right Hosseinee disputed, and contested to the utmost, and successfully. The claim of Bolakun was at all times hostile and adverse to that of Hosseinee. There never was, nor could have been, any privity between them. Especially now that Bolakun's claim has been rejected by the High Court, and the right of pre-emption is declared never to have existed in her, the case is exactly, so far as any question of privity is concerned, as if Bolakun's name had never been put forward or heard of.

We do not think that Bolakun's claim or any of the proceedings under Section 246 connected therewith affect the appellant's right as against the respondents in the present suit, in any way. We, therefore, are of opinion that the suit is not barred, because

not brought within one year from the date of the order made on Bolakun's claim. It remains, then, to deal with the case on its merits.

On the merits, our judgment is entirely in favor of the appellant. We have gone carefully through all the evidence on the record (and many witnesses were examined on both sides); and we are of opinion that the transfers to Mussitee and Hosseinee were purely fictitious, and had no existence save on paper, being executed solely to preserve Fatima's estate from her creditors. The mokurruree and the sale both took place after the plaintiff had obtained her decree. And there is no reason why these transactions should have taken place at Monghyr, and not at Patna, unless it were to favor some collusive or fraudulent object. Mussitee and Hosseinee are both of them dependants of Fatima; no consideration really passed between the parties; it is not shown that either Mussitee or Hosseinee possessed any property of her own, such as would have enabled them to make the payments which they are respectively alleged to have made; no change in the possession or in the management of the property took place upon the supposed transfer to these women, and Fatima remained in possession up to the date of her death. Such are the facts of the case as they appear to us upon the evidence.

The case for the appellant is amply sufficient to put upon the respondents the *onus* of proving the *bona fides* and genuineness of the transactions which are questioned; and in our opinion none of the evidence for the respondents is at all satisfactory or reliable.

We reverse the decree of the Lower Court, and give judgment for the plaintiff—declaring that neither the mokurruree nor the kubala represents a real *bond fide* transaction, and that they are invalid and inoperative as against the plaintiff—declaring also that the plaintiff has established her right to have the property sold in execution of her decree.

The plaintiff will recover the costs incurred in the Court below, and also the costs of this appeal from the defendants Mussitee Khanum, Hosseinee Khanum, and Mahomed Mirza. The defendants, Mirza Mahomed Tukee Khan and Mirza Tossudduck Hossein Khan, have not disputed the plaintiff's right: they will, therefore, have to bear only their own costs.

The 8th June 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble W.* Markby, *Judge.*

Appeal (by Guardian of Minor)—Money-decree—Execution against land.

Case No. 308 of 1855.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Rajshahye, dated the 12th June 1855.

Mr. H. G. French, *Woolee* and *Woosee* of Miss Louisa French, minor (one of the Defendants), *Appellant,*

versus

Baranashee Banerjee (Plaintiff), *Respondent.*

Mrs. Stephenson, formerly Miss French, and Mr. Stephenson, her husband, Parties on review of judgment.

Mr. A. T. T. Peterson for Plaintiff, Respondent.

Mr. R. V. Doyne for Mr. and Mrs. Stephenson.

No one for Mr. French, Defendant, Appellant.

A guardian ought not to be allowed to appeal for the purpose of protecting himself against a decree by making the property of his minor liable under the decree in case of himself.

Land cannot be sold in satisfaction of a money-decree.

Peacock, C. J.—HAVING granted a review in this case, we have re-heard the appeal, Mrs. Stephenson (formerly Miss French) and her husband having been now duly represented. Mr. French has not appeared.

Baranashee Banerjee, who claimed as the assignee of a bond, sued Mr. French in two capacities, personally and as guardian of his minor daughter Miss French. It appears that the assignor of the bond had sold an estate to Mr. French as guardian of his daughter for Rs. 26,000, and that the bond was given to secure Rs. 8,000, part of the purchase-money which remained unpaid.

The bond rendered Mr. French liable personally to pay the Rs. 8,000 and interest, and it also mortgaged to the vendor, the assignor of the bond, an 8-annas share of the property as a security for the Rs. 8,000, the remaining portion of the purchase-money.

The plaintiff did not seek by the suit to render the mortgaged property liable for the debt.

Mr. French set up in answer to the plaintiff's claim that his daughter was not personally liable, and that he alone was liable, and he went on in his answer to state that the mortgage of the 8-annas share was not binding upon Miss French, his daughter and ward, who was a minor.

The Principal Sudder Ameen held that the daughter was not liable, and gave a decree against Mr. French personally. Mr. French then, as *woolee* and *woosee* of his daughter, appealed against the decision, and contended that the decree ought not to have been given against him personally, but that it ought to have been given against the 8-annas share of the estate which had been mortgaged.

That certainly was not a proper ground of appeal on behalf of Miss French, because it was directly against her interest. Her interest was that her estate should not be charged. The Principal Sudder Ameen had declared that she was not liable, and that her estate was not liable. Mr. French's interest was that the estate should be charged, and that he should be exonerated from personal liability. He, therefore, was not doing his duty as guardian in appealing for the purpose of protecting himself against the decree by getting his daughter's property charged; and I apprehend that, if the daughter had been properly represented, the order of the Sudder Court upon that appeal would have been simply to dismiss it, *first*, because the grounds of appeal were in direct opposition to the answer which Mr. French had set up in the Lower Court, and, *next*, because it was contrary to the interests of the daughter for whom he was appearing as guardian.

The plaintiff in the suit, who was the respondent in the case, set up in answer to the appeal that there was no necessity to enter into the question whether the estate was liable. He says in para. 2 of his answer to the grounds of appeal: "As the ikrar "purporting bond was executed and made "over by Mr. French, the decree has "been made against his person and property. Such being the case, it is not "necessary to hold in this suit any investigation as to whether the *putnee* tenure, "&c., *viz.*, the rights and interests of the "minor aforesaid, have been sold or not."

In para. 5 he says: "My claim was "against the executor of the document, "*viz.*, the defendant (Mr. French), and "as a moiety of the *putnee* tenure of the "said minor, *viz.*, the female defendant, "was mortgaged, I had included her in "the number of defendants, a detail of "which is set forth in the petition of plaint. "Such being the case, it was just and proper to make the decree against the defendant (Mr. French) alone, and the objection "urged by him (the defendant) appears "to be utterly groundless."

In short, the plaintiff contended that the decree was properly given against Mr. French alone, and that Mr. French's contention that the decree ought to have been against the 8-annas share of the estate was utterly groundless.

It has been shown that Mr. French was appealing upon a ground wholly at variance with his written statement, and contrary to the interests of his daughter for whom he appeared as guardian, and that the plaintiff in the suit, the respondent, was contending that the decision was perfectly right, and that there was no ground for making the estate liable. But they afterwards represented to the Court that an agreement had been come to, and that they had compromised the matter. The Sudder Court then remarked as follows in their judgment (S. D. A. Reports, 1857, page 332).

"Mr. French has appealed, and his pleader, "after submitting some pleas and objections "which were found not to be included in "his written grounds of appeal, confined "his appeal to the point that, as the debt "was obviously contracted by Mr. French "for the purpose of a putnee exclusively "intended for the use and benefit of his "minor daughter, and for the security of "which debt the half share of the putnee "was specially pledged, the decree be allowed to declare the liability of the property so pledged in the first instance; and "the decree-holder be permitted to proceed "against Mr. French only for such balance "of the decree as may not be satisfied by "the sale of the property pledged. As the "pleader on the other side signified to the "Court that he should be satisfied if the "Lower Court's decree be to this extent "amended, it is, therefore, ordered that the "amount decreed by the Principal Sudder "Ameen be confirmed." "But," the Court went on, "with reference to the above arrangement, the decree-holder will first proceed to satisfy the decree by sale of the "property pledged, so far as that property "may be liable under the terms of the bond "executed by Mr. French as *woolee* and

"*woosee* for his daughter, and any balance "still remaining will then be levied against "Mr. French unreservedly, till the whole "amount of the decree be realized. Costs "on the appellant."

Having got the decree so far modified, the plaintiff has lately proceeded to execute it, and, upon an appeal from the decision of the Principal Sudder Ameen who was executing it, a Division Bench of this Court (*see* 6 Weekly Reporter, Miscellaneous Rulings, page 18) held that there could be no doubt that the 8-annas putnee talook Zillah Sewal was declared liable for the decree of the Sudder Court to be sold for the realization of the amount due on the bond. They say: "It was not only made liable in so many words, but it was ordered that the decree-holder will first proceed to satisfy the decree by the sale of that property."

I agree with the Division Bench in thinking that that is the substance of the order of the Sudder Court, *viz.*, that the 8-annas share was liable to be sold, and that the plaintiff should proceed against that 8-annas share before he should proceed against Mr. French personally. The Division Bench, sitting merely as a Court of Appeal in execution of the decree of the Sudder Court, were bound to proceed upon the decree as they found it, and they were bound, in executing that decree, to declare that the 8-annas share was liable to be sold in the first instance. They were not sitting to review the decision of the Sudder Court, and they had no power to do so in that stage of the proceedings. But they pointed out certain objections, and said that, whether those objections could be taken on review, they were not called upon to decide; but that, finding that the decree rendered the 8-annas share liable to be sold, the 8-annas share must be held liable in execution.

The case was then brought before this Court upon an application for review upon the objection that the Sudder Court was wrong in holding that this 8-annas share was liable to be sold in execution of the decree, and ordering it to be sold in the first instance.

I think it perfectly clear that, when the decree was obtained against Mr. French upon his answer that he alone was personally liable, and that neither his daughter nor her estate was liable, the Sudder Court ought not, on his appeal as guardian of his daughter, to have held that the 8-annas share was liable to be sold in execution of that decree; nor do I understand that the Sudder Court did so decide as a matter of legal construction. They merely acted upon the arrangement and compromise between Mr. French and the respondent, and this at a time when the daughter's interests were in conflict with those of her guardian. They say: "With "reference to the above arrangement, the de- "cree-holder will first proceed to satisfy the "decree by sale of the property pledged so far "as that property may be liable under the "terms of the bond executed by Mr. French "as *woolee* and *woosee* of his daughter, and "any balance still remaining will then be "levied from Mr. French unreservedly, till "the whole amount of the decree be real- "ized."

Mrs. Stephenson and her husband now contend that it was an error on the part of the Sudder Court to hold that a compromise between Mr. French and the plaintiff could affect the interests of his minor daughter; and that, if the Sudder Court's intention had been called to the matter by a guardian properly looking after her interests, instead of by a guardian who was interested in having her estate made liable in ease of himself, the Sudder Court would never have made such an order, and that it ought to be set aside on review.

The whole of the parties being now before us, except Mr. French who has been duly summoned, but does not appear, we are of opinion that the Sudder Court ought not to have acted upon the compromise between Mr. French and the plaintiff to the prejudice of the minor, and that the decree ought to have stopped at the word "confirmed."

But Mr. Peterson now contends on the part of the plaintiff, respondent, that this property was liable to be sold. This contention is quite at variance with the contention of his client in his answer to the grounds of appeal. The decree being a mere money-decree, the land could not be sold in satisfaction of the decree against Mr. French to the prejudice of Mrs. Stephenson, the owner. That has been decided in a Full Bench case, Gopeenath Singh *versus* Sheo Sahoy Singh, 1 Weekly Reporter, p. 314. It is only in consequence of the express order made by the Sudder Court in appeal that the land could be sold.

Whatever may be the rights between Mr. French and the plaintiff between themselves under the agreement of compromise, we are of opinion that no effect can properly be given to it in an appeal from the decision

of the Principal Sudder Ameen, and that, upon re-hearing that appeal upon review, which we are now doing, we cannot order it to be enforced to the prejudice of Mrs. Stephenson by modifying the decree of the Principal Sudder Ameen, and holding that the estate shall be sold in execution of the decree before it is enforced against Mr. French.

Upon the merits of the appeal, independently of the agreement of compromise, we are of opinion that Mr. French's appeal ought to have been dismissed, and the decision of the Lower Court affirmed upon the ground that the suit was not brought to render the estate liable, but for a decree against Mr. French personally; *second*, that Mr. French's ground of appeal were in direct opposition to his defence in the Lower Court, and that the plaintiff in his answer to Mr. French's grounds of appeal contended that there was no necessity to enter into the question whether the land was liable.

Therefore, we think that, upon this re-hearing, the judgment and decree of the Sudder Court must be modified by cancelling that part of it which orders that the decree-holder will first proceed to satisfy the decree by sale of the property pledged, so far as that property may be liable under the terms of the bond executed by Mr. French as *woolee* and *woosee* of his daughter, and that any balance still remaining will then be levied from Mr. French unreservedly until the whole amount of the decree be realized.

The Sudder Court awarded "costs against the appellant," which shows that they did not consider the order which they made as to the sale of the property as that which Mr. French was legally entitled to in the appeal, and that it was merely made to give effect to the compromise.

It is contended by the plaintiff that Mr. French has alleged in his grounds of appeal that the answer set up for him in the Lower Court was not set up by him, but in fraud of him. Even if that was the case, there is no proof of it, and the plaintiff cannot take advantage of it in the appeal.

Sitting here as a Court of Appeal, we have only to see whether the Lower Court was right or wrong upon the materials before it. We cannot reverse or alter the decree of a Lower Court upon the ground that the answer set up in that Court was set up without the party's knowledge or in fraud of him. Such a fraud might form a ground for a suit to set aside the judgment, if the plaintiff was a party to it; but it clearly could not form a valid ground of appeal.

We must order Mrs. Stephenson to be restored to all things which she has lost by the decree of the Sudder Court, which has been set aside. We, therefore, order that all that has been done to her prejudice in pursuance of that part of the decree of the late Sudder Court which ordered the 8-annas share to be sold be set aside, and that the attachment of that 8-annas share be withdrawn. We think it unnecessary to interfere with the amount of costs awarded by the late Sudder Court.

The 10th June 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Limitation—Foreign Judgments.

Case No. 2993 of 1866.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 17th August 1866, affirming a decision passed by Baboo Koylash Chunder Deb, Principal Sudder Ameen of that District, dated the 30th December 1865.

Heera Monee Dossia (Defendant), *Appellant,*

versus

Promothonath Ghose and others (Plaintiffs), *Respondents.*

Baboo Judoonath Mookerjee for Appellant.

Baboo Boykuntnath Paul for Respondents.

The right to sue on a foreign judgment, as on a new cause of action, accrues on the day when the foreign decree was made, and is barred in all Courts to which Act XIV. of 1859 applies, at the expiration of 6 years from that date.

Phear, J.—THIS was a suit brought upon a judgment which had been obtained by the plaintiff in the French Court at Chandernagore. It was admitted by the plaintiff that the date of the French judgment was more than six years before the filing of his plaint, and the defendant urged that this fact barred the suit. The Lower Appellate Court, while holding that the period of six years was the time of limitation applicable to a suit of this character, still held that this suit was not barred, because it considered that the cause of action did not accrue within the cognizance of the English Court, until the

proceedings in execution which were taken in the French Court proved totally or partially infructuous, and this event seems to have occurred within the six years. Against this decision, the defendant now appeals specially.

We are of opinion that the view taken by the Lower Appellate Court of the point under appeal is erroneous. It seems to be founded on the supposition that the proceedings in the second Court are in the nature of proceedings in execution of the decree of the first Court. If this were so, no doubt it might well be that the plaintiff would have no right to bring his suit in the second Court, at any rate, while he was prosecuting the execution-proceedings in the first. But it appears to us that this view involves a complete misconception of the real cause of suit. To use the words of Mr. Baron Parke (the present Lord Wensleydale) "the prin-"ciple on which the action is founded is that, "where a Court of competent jurisdiction has "adjudicated a certain sum to be due from "one person to another, a legal obligation "arises to pay that sum on which an action "of debt to enforce the judgment may be "maintained. It is in this way that the "judgments of Foreign and Colonial Courts "are supported and enforced, and the same "rule applies to inferior Courts in this "country, and applies equally whether they "be Courts of record or not." Williams *versus* Jones, 13 M. and W. 628. And the High Court, on its original side, has upon this principle frequently entertained suits brought upon judgments of the Calcutta Small Cause Court. The only ingredients necessary to the cause of action are, *first*, that the obligation to pay should be complete; and, *secondly*, that that obligation should not have been discharged. With regard to the first of these, it sometimes happens that, by reason of the nature of the judgment out of which it arises, the obligation is not finally definite, and, if so, it obviously cannot be made the ground of suit in another Court. This has been held to be the case with regard to the judgments of modern County Courts in England (Berkely *versus* Elderkin, 1 E. and B. 805). But if the obligation to pay, which is imposed by the judgment, be final and definite, the fact of non-payment must render the cause of action complete, quite irrespective of any proceedings in execution for the purpose of obtaining payment. In truth, the judgment-creditor is not bound to take any such proceedings at all unless he chooses; his right against the judgment debtor to be paid his judgment-debt stands entirely clear of them. Therefore, his title to come into another Court to enforce that by suit must be clear of them also, and must date from the day upon which judgment was finally given. The only way in which the execution-proceedings in the original Court can properly become matter of consideration in the Court, where the action on the judgment is brought, is by their being introduced on the part of the defendant, to show that the plaintiff has been paid or satisfied (if the fact be so) through their agency. And, obviously, the effect of them, if so used, would be, not to prove that no cause of action had ever arisen, but, on the contrary, to admit that it had, in order at the same time that the obligation might be avoided by showing that it has since ceased. In short, the success of the measures taken to obtain execution in the Court of original judgment may afford a good foundation for a plea of payment in an action on the judgment, but it can in no way affect the origin of the right of action. It is said that, in this view, the plaintiff may in the end obtain two judgment in effects for the recovery of the same original debt, and may thus simultaneously prosecute two sets of execution-proceedings, and possibly obtain accumulated payment. This is in a sense true; but it is by no means specially characteristic of this one class of cases alone. It happens, whenever a mortgagee brings his action on the covenant to pay, as well as institutes a suit to foreclose, and the two causes of suit do not fall within the jurisdiction of the same Court; also, whenever a payee under a bill of exchange sues contemporaneously the drawer and endorser; and again, when a plaintiff institutes in two jurisdictions (say foreign and home) suits on one cause of action, cognizable alike in both jurisdictions, so nearly together that judgment and satisfaction in one cannot be pleaded as a bar to the other. It would not be difficult, moreover, to show that to forbid, by a rule of law, the rising of a right to sue in any of the cases above mentioned and the like as long as litigation on the same matter was pending elsewhere would lead to much mischief and denial of justice. The proper remedy against abuse of the power to institute duplicate or quasi duplicate suits is to be sought in the control which every Court possesses over its own proceedings, especially those directed to obtain execution. By a due use of this means, it is in practice easy to take care that a plaintiff shall neither obtain payment of his debt twice

over, nor even vexatiously harass his adversary.

There seems to have been no question raised in the case before us as to the final and definite character of the French judgment, and none as to its validity or binding effect. Consequently, in our opinion, the plaintiff's right to sue on that judgment, as on a new cause of action, accrued on the day when the French decree was made, and was therefore barred in all Courts to which Act XIV. of 1859 applies at the expiration of six years from that date. And this conclusion agrees with the opinion somewhat incidentally thrown out by a Division Bench of this Court in the case of Boloram Gooy and others *versus* Kaminee Dossee, 4 Weekly Reporter, Civil Rulings, 108.

This appeal is decreed, and the suit is dismissed with all costs.

The 16th June 1867.

Present:

The Hon'ble G. Loch and C. P. Hobhouse, *Judges.*

Limitation—Mortgage.

Case No. 3055 of 1866.

Special Appeal from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 29th August 1866, reversing a decision passed by Moulvie Syud Ali Hyder, Sudder Ameen of that District, dated the 14th December 1865.

Nund Coomar Lal and others (Plaintiffs), *Appellants,*

versus

Shumboo Singh and others (Defendants), *Respondents.*

Baboo Poorno Chunder Shome for Appellants.

Moulvie Syud Murhumut Hossein for Respondents.

Where there was nothing to show whether the family had been a joint or a divided family, and where the suit was not against a mortgagee, but before the plaintiff could get at the mortgagee, he had to remove the obstacle presented by the adverse title (based on a 12 years' usufructuary adverse possession) of the daughter-in-law of the original mortgagor—HELD that the limitation applicable to the case was that prescribed by Clause 12, Section 1, Act XIV. of 1859.

Hobhouse, J.—THE following is admittedly the family-tree of the present two principal disputants :—

Lala Mohun Lal, the founder,

deceased, leaving | three sons, *viz.* :—

Dyal Narain, deceased, leaving an adopted son.	Futteh Chung, deceased, leaving a daughter-in-law, the widow of his son Neput Sing, *viz.*	Sheo Pershad, deceased, leaving a son, the person adopted by Dyal Narain, *viz.*
Ram Lal, Plaintiff.	Chyet Kooer, Defendant No. 5.	Ram Lal, Plaintiff.

Whether this family was a joint or a divided family is not before us, but the facts which are admitted are these, *viz.*, that, on the 7th June 1844, Futteh Chung gave the property in dispute in zur-i-peshgee to 4 certain persons, *viz.*, to defendants, Shumbhoo, Sook Lall, Johur, and Sumrun Singh (Nos. 1 to 4); that, at some time subsequent to this, Sumrun became the sole mortgagee; that the term of the mortgage was for nine years, or until the year 1853; that the material conditions of the mortgage were : *first*, that the mortgagee was to have the whole usufruct; *secondly*, that, out of this, he should pay Rupees 9-12 as Government revenue, and Rupees 2-4 yearly quit-rent to the mortgagor; and, *thirdly*, that, if the mortgagor did not purchase the equity of redemption in 1853, the mortgage should run on; that Futteh Chung died on the 27th Magh 1257 (January 1850); that, up to the time of Futteh Chung's death, the Government revenue of Rupees 9-12 and the quit-rent of Rupees 2-4 were paid to him; that, from and after Futteh Chung's death and up to 1853, the said revenue and quit-rent were paid to his daughter-in-law, the defendant Chyet Kooer; that in 1853 this Chyet Kooer purchased the equity of redemption of the mortgage of 1844; that, on the 3rd March 1853, she executed a fresh mortgage in the joint names of the defendants, Sumrun, and a new man, Gudadhur Singh; that by the material condition of this mortgage, this Chyet Kooer was to receive a sum of Rupees 21 per annum as Government revenue and quit-rent, and that this sum she did receive from the date of mortgage up to date of suit, 1866, the mortgagees holding possession.

Under these circumstances, and without any sustained allegation of *mala fides*, the plaintiff, Ram Lall, special appellant, sued to purchase the equity of redemption of the mortgage of 1844, to set aside the mortgage of 1853, and to obtain possession of the

mortgaged property as heir of Futteh Chung.

The principal defendant Chyet Kooer pleaded 12 years' usufructuary adverse possession of the property in bar of plaintiff's claim, and the Lower Appellate Court held that the plea was good, and dismissed the suit.

The only question before us is, whether the limitation applicable to this case is that set forth in Clause 15, or that in Clause 12, Section 1, Act XIV. of 1859.

If the suit were against the mortgagee Sumrun Singh solely, there could not, in my judgment, be any doubt but that plaintiff could claim the benefit of the 60 years' limitation prescribed by Clause 15.

But here, before the plaintiff can get at the mortgagee, he has to remove the obstacle presented by Chyet Kooer's adverse title.

And this is not the title of a mere trespasser, who fraudulently and secretly has been carrying on illicit transactions with the mortgagee, but it is the title of a member of the family, the daughter-in-law of the original mortgagor, the receiver of the rents of the property, and the payee of the Government revenue due on the property for a period of some 16 years, the purchaser of the equity of redemption in 1853, and the open and published (the mortgage-deed of 1853 was registered) fresh mortgagor in 1853.

And, if plaintiff had any title at all, clearly to my mind that title accrued when Futteh Chung died in 1850, and Chyet Kooer's receipt of the quit-rents from that year up to date of suit, a period of some 16 years, is conclusive evidence of a real possession adverse to the plaintiff for a period of more than 12 years.

In this view of the case, I think that the limitation which applies is that to be found in Clause 12, and I would uphold the judgment of the Lower Appellate Court, and would dismiss this special appeal with costs and interests thereon.

Loch, J.—I concur.

The 12th June 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Carriers by water—Damages—Leakage.

Case No. 391 of 1866.

Regular Appeal from a decision passed by Dr. W. H. Clarke, Recorder of Rangoon, dated the 26th September 1866.

The British India Steam Navigation Company, Limited (Defendants), *Appellants,*

versus

Ibrahim Moosum (Plaintiff), *Respondent.*

Mr. A. T. T. Peterson for Appellants.

Messrs. R. T. Allan and *R. E. Twidale* for Respondent.

Suit laid at Rupees 8,591-1-6.

Plaintiff shipped some bales of cloth from Calcutta to Rangoon under a bill of lading by which the defendants were bound to deliver, "accidents, loss, or damage from * * fire, machinery, boilers, steam, and all the accidents of the sea, rivers, land-carriage, and steam navigation, &c.," excepted. On the voyage, one of the boilers leaked, and, steam and water escaping, some of the bales were damaged.

HELD that the damage was within the exceptions in the bill of lading, and therefore that the defendants were not liable to make good the loss.

Quære.—Whether, notwithstanding the exceptions in the bill of lading, the defendants might not have been made liable in a suit on the implied warranty if it had been proved as a fact that the boiler was not reasonably fit for the voyage.

The bill of lading contained a provision that any claim for short delivery or for damage done to goods should be made at the port of Calcutta, and not elsewhere. HELD that this Clause did not affect the plaintiff's right of suit in the Court at Rangoon, and that, if the defendants meant to object that no claim had been made in Calcutta before the commencement of the suit, they should have done so in proper time, *viz.*, in his written statement. An objection on that ground taken for the first time at the hearing of the appeal was disallowed.

Seton-Karr, J.—THE facts out of which this appeal arises are in the main not denied or contested, and may be set out as follows:—

The plaintiff, who is a native merchant residing at Rangoon, shipped by his agent at Calcutta, in the month of April 1866, certain bales of piece-goods on the steamer called *Rangoon*, belonging to the defendants.

On the voyage from Calcutta to Rangoon, one of the boilers of the said steamer leaked, and, the steam and water escaping, a portion of the valuable bales shipped by the plaintiff became damaged by the wet. The damage was done to eight bales of one lot, and to six bales of another. The former were left by the plaintiff on the wharf of the defendants;

the latter were taken by the plaintiff to his own house and were examined there, and found to be wet and damaged.

The defendants took various pleas in their written statement, the chief of which were that they were protected by the bill of lading, of which bill special mention will be made hereafter, and that they were not liable for the full amount of the damage as valued by the plaintiff.

The Recorder of Rangoon took the evidence of the Captain and the Chief Engineer of the steamer *Rangoon*, as well as that of other persons who examined and valued the damaged goods; and then, in an elaborate judgment, the Lower Court gave a decree for the value of the eight packages left on the defendant's wharf excepting the six bales of what are called T cloths, inasmuch as the plaintiff had removed the same to his own premises, and would not sell them as he had been urged and advised to do.

There is an end, therefore, of this particular part of the claim. But the appeal has been argued by Mr. Peterson for the Steam Company and against the decree which awards anything to the plaintiff, who, on the other hand, has been fully represented by Mr. Allan.

Mr. Peterson, waiving all other points, takes two main objections to the decree: *first*, that the Steam Company are protected by the bill of lading; and, *secondly*, that, even if damages are decreed, they should not be decreed at the full value of the bales when not damaged, but at the difference between their original value and their market-value when deteriorated or damaged.

The exceptions mentioned in the bill of lading are, the act of God and the Queen's enemies, and then "accidents, loss, or dam-"age from vermin, barratry, jettison, "collision, fire, machinery, boilers, steam, "and all the perils and accidents of the sea, "rivers, land-carriage, and steam-navigation "of whatsoever nature and kind soever, and "accidents, loss, or damage from any act, "neglect, or default whatsoever of the pilot-"master or mariners, or other servants of the "Company in navigating the ship or from any "deviation." The plaintiff, we observe, did not insure his goods. He trusted to the ship performing her voyage in safety, and he knew that he ran the risk of his consignment being damaged owing to any of the contingencies contemplated in the exceptions. It seems to us unquestionable that the accident, which did really happen to the boiler, and by which the bales were injured, was really contemplated and covered by such exceptions in the bill of lading as those which specify "accidents, loss, and damage from machinery, *boilers*, and *steam*," and "all the perils, dangers, and accidents of *steam*-navigation of whatsoever nature and kind soever."

But it is said, on the other hand, that the Recorder fairly gets over this difficulty by finding the defendants guilty of *crassa negligentia*, or at least of carelessness in taking no steps to remove the goods from the bilge water to the higher and drier part of the ship; and it is argued that the principles enforced and expounded in the highest Courts of England expressly lay it down that vessels on which valuable cargoes are shipped should be staunch, tight, strong, and seaworthy; and that there is an implied guarantee, in all such cases, that the vessels are fit for the employment for which they are offered to the public.

In a case like the present, we have naturally referred to the approved doctrines laid down on the subject by English Judges and in English Law-books, *see* Maude and Pollock on Merchant Shipping, Ed. of 1861, page 44; and the case of Lyon *versus* Mills, page 428, Volume V. of East's Reports. In this case, Lord Ellenborough clearly laid it down that a carrier by water contracting to carry goods for hire impliedly promises that the vessel shall be tight and fit for the purpose, and that he is answerable for the damage arising from leaking.

Now, to see how the above doctrines apply to the facts disclosed by the evidence, it appears from the testimony of the Captain and Chief Engineer that the boilers of the steamer had been in use for about five years; that on a previous trip, from the state of the same boilers, the vessel had been "in considerable peril between Akyab and Calcutta," but that, in consequence, the ship had lain up for two months, during which time the boilers had been overhauled and repaired, it not being, apparently, deemed necessary to fit her with new boilers, which were then lying ready in Calcutta.

The damage arose, on the trip which forms the origin of the case, by a leak in the port boiler occurring in the river Hooghly, some six hours after the vessel had left Calcutta. The Chief Engineer states, further, that it took him two hours to get at and stop the leak, and that then the vessel went on her course, and arrived safely at Rangoon.

It appears, also, that the vessel was regularly surveyed, and a survey-certificate granted on the 28th of April 1866, or just before the departure of the vessel. In the certificate the condition of the hull and the general equipment are described as "good," and it is stated that the boilers and engines will be good for "six months."

We may be justified in inferring from the leak which sprung in the boilers, only six hours after the engines had been at work, that the repairs cannot have been executed as completely and effectively as they ought to have been, and as they were described in the survey-certificate to have been; but, on the other hand, it is undeniable that the leak was repaired speedily, that the vessel proceeded on her journey, and that she arrived at Rangoon, landed her cargo, and returned to Calcutta without, as far as appears, any further mishap or delay.

This, at least, is what we may fairly infer from the state of things disclosed by the record. The plaintiff, though in his plaint he charges the defendants with carrying the goods so negligently that his goods were damaged, has adduced no evidence to show that the boilers were in such a state as to be dangerous, or that, from their weak and insecure condition, an accident was literally inevitable. He might have shown that the rivets would not stand a few ordinary days' work, or that the plates were worn to a degree of thinness incompatible with safety or efficiency.

All that we are warranted in affirming on the evidence before us is that, in spite of the repairs executed in a period of two months, and in spite of a survey which declared the boilers capable of lasting for six months, a leak was sprung only six hours after departure. On the other hand, there is the fact that the steamer, after a brief delay which did not render it necessary for her to put back to the port of departure, did proceed on her voyage, and did get safely to her port of destination. There is thus nothing to show that the *Rangoon* was not tight and seaworthy, and fit to navigate the Bay of Bengal at the commencement of the south-west monsoon.

On the whole, then, we cannot think that the doctrine laid down by Lord Ellenborough in Lyon *versus* Mills applies to this case. That case referred to a lighter by which goods were carried from a quay at Hull to a ship in dock there, and it differs materially from the case of a steamer navigating the ocean. Even the best found steamer, and the most complete, the newest, and the most finished machinery, may get out of order by the loss of a bolt or a rivet, or by the loosening of a plate; and of this the plaintiff, when he shipped his goods, and received the bill of lading, admittedly took the risk.

In this view the decision of the Recorder, making the defendants liable for the full value of the eight packages left on the defendant's wharf, cannot be sustained. It is necessary to discuss the second point raised by Mr. Peterson as to the defendants not being liable for the full value of the goods.

In our view as to the effect of the bill of lading, and as to the main facts either admitted or disclosed by the evidence as to the leak and the completion of the voyage in safety, the defendants are not liable.

The appeal is decreed, and the decision of the Recorder is reversed, and the suit dismissed with all costs.

Norman, J.—The facts of this case are fully stated in the judgment of my learned brother Seton-Karr.

The points in the case are, *first*, whether the damage done to the goods is within the exceptions in the bill of lading. My learned brother has shown that such is the case, and I need add nothing to what he has said on that subject.

The *second* point is whether, apart from the accident and damage from the boilers and steam, damage has been caused by the negligence of the defendants' Captain in not taking due care of the goods. The Recorder says that the "defendants have been guilty of *crassa negligentia*, or at last of want of due care of the goods." He says: "They do not appear to have taken any care to remove the goods after the explosion had occurred to a drier part of the ship." He adds that "they were left till their arrival at Rangoon in the wash of a bilge which Mr. Grey describes as of the depth of three inches." The Recorder seems to have wholly misunderstood the evidence of Mr. Grey (whom he calls Mr. Craig). Mr. Grey says nothing whatever as to the depth of the bilge water. He does say: "The bilge water, if it get in, must wash among the cargo." He does not, nor does any one, say that he or any one else was aware that the bilge water had got to the cargo. No one suggested, much less was it proved, that it would have been proper or prudent to have shifted the cargo while at sea.

The *third* point is whether the defendants were guilty of negligence in not providing a steamer with fit and proper boilers, sound, tight, staunch, strong, and properly fitted for the voyage. The Recorder alludes to it as an implied warranty; and Mr. Allan, in arguing the case for the respondent, referred us to the case of Lyon *versus* Mills, 5 East 428, and read the judgment of Lord Ellenborough as part of his argument.

No doubt, as a general rule, independent of any contract, it may be true to say that a carrier, who offers to carry goods by sea, undertakes that his vessel is reasonably fit for the purpose for which he offers it. It is unnecessary to consider how far a right of suit for a breach of such implied obligation would be affected by the special stipulations in the bill of lading in the present case. The plaintiff has not brought his suit on that ground. He does not by his plaint say that the defendants undertook or represented that the boilers of the *Rangoon* were reasonably fit for the voyage, but that, in fact, they were not so. (This was the form of the suit in Lyon *versus* Mills.) No issue was raised on that point. The defendants were in no way warned that they would be called on to answer a charge of sending to sea a vessel with unsafe boilers, or they might have called the Government surveyors and workmen who repaired the boiler while in Calcutta.

The survey and certificate are apparently in the usual form, and there seems no foundation for the observations of the Recorder upon them. My learned brother has pointed out that there is not in the evidence, as the case stands, anything which ought to induce us to say that the boilers were not reasonably sufficient for the voyage at the time when the *Rangoon* left Calcutta.

The *fourth* point is this. The bill of lading contains the following note: "Any "claim for short delivery of, or for damage "done to, goods, and all other claims what-"soever to be made at the port of Calcutta "and at no other port; and the goods are "shipped, and this bill of lading granted "subject to this express condition."

It appears to have been contended for the defendants in the Court below that, under this provision, no suit for damage could be brought in the Court at Rangoon.

The Recorder disallowed the objection. It was renewed by Mr. Peterson before us. We intimated our opinion that the Clause was not meant to bar suits in Courts other than those at Calcutta, but simply to provide that claims should not be made against agents of the Company at the outports; and that it was not intended to interfere with the remedies of the claimant to enforce his claim after it should have been made.

Mr. Peterson then observed that it was not shown that any claim had been preferred before the commencement of this suit to the Company in Calcutta. But we thought that, the point not having been taken in the defendant's written statement, it ought not now to be allowed, because, if it had been taken in proper time, the plaintiff would have had an opportunity of withdrawing the present suit, and bringing a fresh one after making a claim against the Company in Calcutta.

The 13th June 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Lost record.

Case No. 333 of 1862.

Regular Appeal from a decision passed by the Deputy Collector of Durbangah, in Zillah Tirhoot, dated the 23rd of April 1862.

Bunwarry Lall (Defendant), *Appellant*,

versus

Mr. James Furlong, General Manager of the Raj of Durbangah (Plaintiff), *Respondent*.

Baboo Dwarkanath Mitter for Appellant.

Baboos Kishen Kishore Ghose and *Juggodanund Mookerjee* for Respondent.

Where the records of a case in appeal were not forthcoming, the High Court ordered the return of whatever papers had been sent up, together with such papers as the parties had respectively filed, with a direction to the Lower Court to summon both parties, and to take such further evidence as either of them might think fit to adduce in support of his case, and to return such evidence with its own opinion for final disposal by the High Court.

Peacock, C. J.—THE plaint and written statement have been sent up lately to this Court from the Collectorate, which shows, either that the record never came to this Court originally, or that it has been sent back to the Collectorate by mistake. It seems useless to delay the case any longer for a further search. Under these circumstances, we think that the proper order will be to return whatever portions of the record

have been sent up to this Court, together with such papers as the parties have respectively filed in this Court, with a direction to the Collector to summon both parties, and to take such further evidence as either of them may think fit to adduce in support of his case, and to return such evidence with his opinion, in order that we may finally deal with the case.

The case will be retained on the file of this Court, so as to prevent the necessity of either party having to appeal again.

The 13th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Mahomedan Law of Inheritance—Descendants of paternal grandfather's brother—Granddaughters.

Miscellaneous Appeals from an order passed by the Judge of Moorshedabad, dated the 13th December 1866.

Case No. 101 of 1867.

Syud Showkut Ali, *Appellant,*

versus

Ahmud Ali and others, *Respondents.*

Baboos Ishur Chunder Chuckerbutty and *Rash Behares Ghose* for Appellant.

Mr. R. T. Allan and *Baboo Obhoy Churn Bose* for Respondents.

Case No. 126 of 1867.

Syud Meher Ali and others, *Appellants,*

versus

Syud Showkut Ali and others, *Respondents.*

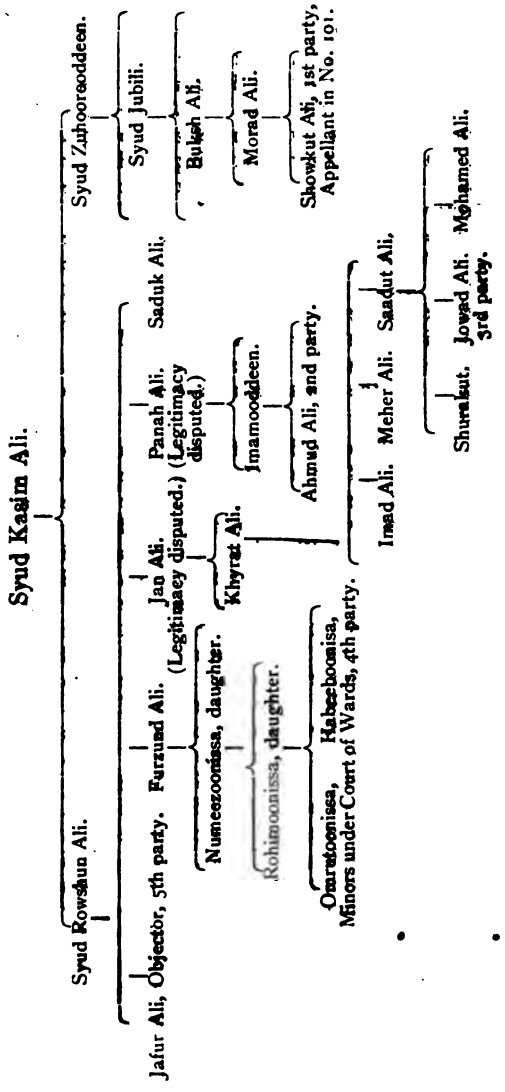
Mr. R. T. Allan and *Baboo Obhoy Churn Bose* for Appellants.

Mr. R. E. Twidale and *Baboos Issur Chunder Chuckerbutty* and *Rash Beharee Ghose* for Respondents.

According to the Mahomedan Law, descendants of a paternal grandfather's brother are entitled to rank among residuaries, and, as such, are preferable heirs to grand-daughters.

Jackson, J.—THIS is an application for a certificate to collect debts due to the estate of a Mahomedan lady named Numeezoonissa. There were four claims to this certificate before the Zillah Judge. One was on the part of Showkut Ali, who is appellant in the case No. 101, and who alleges himself to be the lineal male descendant of Rowshun Ali, one of the sons of Syud Kassim Ali,* the deceased lady having been through her father Furzund Ali the grand-daughter of another son of the same Syud Kassim Ali. The second claim to this certificate was on the part of Ahmed Ali, who alleged himself to be a lineal descendant of the same Rowshun Ali through

* See Genealogical tree at foot.



Panah Ali, an alleged son of his. The third was on the part of several persons alleging themselves to be also descended from Rowshun Ali through their father and grandfather Khyrat Ali, son of Jan Ali, another alleged son. The fourth claim, and that preferred by the Zillah Judge to the others, was on behalf of two minor young ladies who were daughters of the daughter of the deceased lady. The mother of these minors predeceased her own mother.

Looking at the whole proceedings and the evidence in this case, we think we are entitled to take it as having been conceded in the Court below, that Showkut Ali really stood in the relation which he represented himself to be in towards the deceased lady, that is to say, that he was the great-great-grandson of the deceased lady's paternal grandfather's brother. As between him and the minor girls, therefore, the question at issue is whether, according to Mahomedan Law, he or they are entitled to succeed in preference. But between both of these claimants and the two other sets of claimants, a different question, which is a question of fact, arises, namely, whether the two ancestors under whom they claim, named respectively Jan Ali and Panah Ali, were, as they are alleged to have been, legitimate sons of the common ancestor Rowshun Ali.

I may dispose, first, of the question between Showkut Ali and the two minors. The two latter are, it is admitted, in the category of distant relatives; and it is further admitted that, if Showkut Ali proves himself to be within the class who are called in the Mahomedan Law residuaries, he will take in preference to them. From the authorities before us, there would be really no question upon this point if it were not for a passage in Sir William Jones's Translation of the "*El Serajjya*," and also a passage from Sir William Macnaghten's "Principles of Mahomedan Law." Sir William Jones in his translation of the "Serajjya" has undoubtedly a passage which appears to exclude the claim of Showkut Ali. It is the passage in which he speaks of the "offspring "of his father and of his nearest grand-"father, a preference being given, I mean "a preference in the right of inheritance, "according to proximity of degree."

Baboo Issur Chunder Chuckerbutty, the vakeel for Showkut Ali, has shown to my mind very satisfactorily out of the two works of Mr. Baillie upon Mahomedan Law, that is to say, his work upon Inheritance and his later work upon Mahomedan Law, that this is a mistranslation on the part of Sir William Jones, and that the word "nearest" ought not to precede the word "grandfather" in that passage. Sir William Macnaghten has apparently followed Sir William Jones, and I am bound to say that it appears to me, on looking at the works of the different authors, that there can be no question but that descendants of the paternal grandfather's brother are entitled to rank among residuaries. This being so, it necessarily follows that the claim of Showkut Ali is preferable to that of the two young ladies.

Then comes the question between him and the descendants of Jan Ali on the one hand, and Panah Ali on the other. For, if the descent of these persons from Jan Ali and Panah Ali respectively be made out, and these two persons are legitimate sons of Rowshun Ali, they, in their turn, are nearer descendants and nearer relations of Numeezoonissa than Showkut Ali, and would consequently exclude him. We must, therefore, consider whether Jan Ali and Panah Ali are shown to have been legitimate sons of Rowshun Ali or not. Rowshun Ali appears to have died many years ago, probably 80 or 90 years ago. The evidence, therefore, upon this point is necessarily vague. Showkut Ali's opponents place their principal reliance upon an answer put in on behalf of Numeezoonissa in a civil suit in 1852, and a genealogical table also filed in the same suit on the part of that lady and of other defendants in the suit. In that answer and that genealogical table undoubtedly the statement appears that Rowshun Ali had five sons. If it were quite clear that this statement had been voluntarily made by the lady, or with her consent and knowledge, and against her own interest, we should be bound to place the greatest stress upon it. But I think it is clearly shown by the evidence before us in this case that, before the time that defence and that genealogical table were put in, Ahmed Ali (who is one of the claimants in this case, and who claims to be descended from Panah Ali, one of the alleged sons of Rowshun Ali) had come into the family of this lady, and had assumed the principal management of her affairs. She being a young Mahomedan lady, a *purdah-nusheen*, and a person in the position of Ahmed Ali being manager of her affairs, it appears to me that the circumstance of this answer having been filed loses a very great deal of

its weight. It is merely a piece of evidence, and we have to consider whether there is any other evidence of a contradictory kind which deprives it of its weight. That being so, I am bound to say that there seems to me to be a good deal in the Judge's observation that these parties, if, as they allege, they were legitimate descendants of Rowshun Ali, have altogether failed to show satisfactorily how it is that they are not, and have never been, in part enjoyment of the estate which Rowshun Ali left. The alleged gift by Khyrat Ali of part of this property, and the alleged trust in the hands of Numeezoonissa, appear to me to be insufficiently made out. Certainly, the evidence is not of that precise or satisfactory character which would enable me to pronounce a decision different to that from which the Judge came to on this point.

I think, therefore, we can do no better than affirm, excepting upon the point where his order was clearly wrong, the finding of the Zillah Judge. The Zillah Judge appears to have considered that the claim of Showkut Ali would have been preferable to the claim of the other alleged descendants of Rowshun Ali, but that Showkut Ali's own claim was inferior to that of the grand-daughters. But as I have shown that, under the Mahomedan Law, Showkut Ali is the preferable heir to these grand-daughters, I think we are bound to give effect to the remainder of the Judge's decision, and to declare Showkut Ali to be entitled to a certificate. This, of course, will not prevent any of the other claimants from bringing any suit which they may be advised to bring to establish their rights.

I ought to mention that, on behalf of these young ladies, a separate claim, independently of their claim of inheritance, was set up in the Judge's Court, that is to say, a claim by reason of a gift made by the deceased lady before her death. Upon that point, the Zillah Judge decided against the minors.

Baboo Kishen Kishore Ghose, on behalf of the Court of Wards (which had taken their affairs into its hand) preferred an objection to the Zillah Judge's decision upon that point; but, upon hearing the evidence in respect of that grant, I am bound to say that I must fully concur with the Zillah Judge. I think that the grant is not made out, and that probably it was resorted to to bolster up an infirm title by inheritance.

The appeal of Showkut Ali will be determined in his favor, and that of Syud Mohur Ali and others will be dismissed with costs in each case.

Hobhouse, J.—I have had some hesitation in this case; but, on the whole, I concur with my learned colleague; and he has so fully set forth the facts of the case, and my own view upon it, that I have nothing to add to the judgment.

The 14th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Maintenance—Widow—Execution.

Case No. 130 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Rungpore, dated the 18th December 1866, affirming an order passed by the Principal Sudder Ameen of that District, dated the 22nd September 1866.

Hoymobutty Debia Chowdhrain (Decree-holder), *Appellant,*

versus

Koroona Moyee Debia Chowdhrain (Judgment debtor), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Mr. R. T. Allan for Respondent.

Arrears of maintenance are capable of being attached as a debt due to a widow in execution of a decree against her.

Jackson, J.—The decision of the Lower Appellate Court and of the Principal Sudder Ameen are manifestly erroneous.

It has been held in this Court on several occasions (one being in the case to be found in VI. Weekly Reporter, page 64) that arrears due of maintenance are capable of being attached as a debt due to the widow in execution of a decree against her.

The decision appealed against will be reversed with costs.

The 14th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Execution—Mesne-profits.

Case No. 99 of 1867.

Miscellaneous Appeal from an order passed by the Additional Judge of Chittagong, dated the 15th December 1866, affirming an order passed by the Principal Sudder Ameen of that District, dated the 24th April 1866.

Shaikh Mahomed Busheeroollah Chowdhry (Decree-holder), *Appellant,*

versus

Hedaet Ali Chowdhry and another (Judgment-debtors), *Respondents.*

Baboos Romesh Chunder Mitter and *Mohinee Mohun Roy* for Appellant.

Mr. R. T. Allan for Respondents.

In a suit for possession and wassilat, the first Court awarded wassilat, but the Lower Appellate Court, considering that no evidence had been given by the plaintiff of the wassilat which he was entitled to recover, allowed him up to date of suit only the amount which he had paid as Government revenue upon his mehal. HELD that the Court executing the decree was not prevented from ascertaining the amount of wassilat which had accrued between the date of decree and the date of possession.

Jackson, J.—IN this case no one appears for the respondent.

It appears to me, after hearing the vakeel for the appellant, and considering the decision of the Court below, that both the Lower Courts are mistaken.

This was a suit for possession of land with wassilat. Wassilat had been awarded by the Court of first instance; but the Zillah Judge, on appeal, considering that no evidence had been given by the plaintiff of the wassilat which he was entitled to recover, allowed him up to the date of suit only the amount which he had paid as Government revenue upon the mehal. Without considering now whether that was a proper decree to make or no, I may observe that it appears only to apply to the state of things previous to suit. The Judge's objection could not possibly apply to wassilat accruing after the suit, because in respect of that plaintiff could not be expected to, in fact could not, offer evidence. Section 11 of Act XXIII. of 1861 provides that questions regarding the amount of any mesne-profits or interest which may be payable in respect of the subject-matter of suit between the date of institution of suit and execution of decree shall be determined by order of the Court executing the decree. Now, this was a case in which the Court had held that mesne-profits were payable, although, for want of evidence at the trial, it had thought fit to restrict that amount up to the commencement of suit to a certain sum named which had been paid as Government revenue. That would not prevent the Court in executing it from ascertaining what the amount was which had accrued between the date of suit and execution of decree. And, in fact, we see under the terms of the law that the Court was bound to ascertain that amount. I think, therefore, that the Court executing this decree ought to ascertain in the usual way what the actual amount of wassilat has been between the date of decree and the plaintiff receiving possession of the estate.

Generally speaking, the plaintiff, on recovering his decree, ought to execute it, and take possession of his property. On this occasion, it appears that objections were raised by the judgment-debtor, so that the plaintiff was impeded in taking possession of the property, and he, therefore, is apparently not to blame. I think the order must be set aside with costs.

Hobhouse, J.—I concur. I think that, on the remand, the Lower Courts must ascertain the amount of mesne-profits from the date of decree up to the date of possession, and I understand that to be the effect of my brother Jackson's judgment.

The 14th June 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Endowment—Evidence.

Case No. 431 of 1866.

Regular Appeal from a decision passed by Baboo Mohendronath Bose, Officiating Principal Sudder Ameen of Hooghly, dated the 25th September 1866.

Muddun Lal (Plaintiff), *Appellant,*

versus

Sreemutty Komul Bibee and others (Defendants), *Respondents.*

Baboos Onookool Chunder Mookerjee and *Dwarkanath Mitter* for Appellant.

Baboos Unnoda Pershad Banerjee, Hem Chunder Banerjee, and *Kadernath Chatterjee* for Respondent.

Suit laid at Rupees 7,860.

Documentary proof is not absolutely necessary to prove an endowment.

The mere fact of the proceeds of any land being used for the support of an idol may not be proof that those lands formed an endowment for the purpose; but where there is apparently good evidence going back for more than half a century that the land was given for the support of an idol, proof that from that time the proceeds had been so expended would be strong corroboration.

Glover, J.—This was a suit by the plaintiff, as heir of Lalla Dyal Chunder, to succeed to certain endowed property heretofore in the Lalla's possession as "shevait," and after his death held by his widow Bolakee Bibee in a similar capacity on a life-interest, and to reverse a sale of the said property made by Bolakee Bibee to the ancestor of the defendants Nos. 1 to 6.

Bolakee Bibee died in 1267 B. S, from which date the plaintiff's cause of action accrued, and from which he calculated his claim for mesne-profits.

The defence was that the property sought to be recovered was not an endowment for the support of idols, but ordinary ancestral "lakheraj" belonging to the estate of Dyal Chand, and as such sold by his widow in possession as nearest heir on account of urgent necessity, such as the Hindoo Law allows.

The defendant further pleaded limitation, and that the subject-matter of the suit ought to have been included in a former suit brought by the plaintiff as reversioner of his grand-uncle's estate.

The Principal Sudder Ameen overruled the objections in bar, holding that the plaintiff sued as shevait of an endowment, and not as reversionary heir of Dyal Chand, and decided that the land in suit was not endowed land; and that, as the plaintiff sued in his capacity of shevait, his suit brought on that ground ought to be dismissed. To avoid future litigation, however, he went into the question as it would have presented itself, had the plaintiff come into Court merely as a reversioner, and held that there was proof of a sufficient necessity on the part of the widow Bolakee Bibee to sell, and that the representatives of the *bond-fide* purchaser for value were entitled to retain possession.

The *first* point to be decided in appeal is whether the 80 beegahs of land in suit is "endowed" land or not; if it be, no alienation for any purpose on the part of Bolakee Bibee was legal, and the property must revert to the heir as shevait of the endowment.

If not, the question will arise as to whether the plaintiff would, in his present case, be entitled to come in as reversioner, he having already brought a suit in that capacity to recover the family-estates in which it is contended he ought to have included this property.

And then, if necessary, will have to be determined the question of legal necessity to sell.

The Principal Sudder Ameen has held that endowments not proved to be *bond fide* must be presumed to be nominal, and that documentary proof is necessary to prove an endowment. On the evideuce he found that there was no such proof.

The *second* point, which refers, we suppose, to a specific endowment by grant, appears to us to be too broadly taken, and the decision quoted by the Principal Sudder Ameen in support of his position (Sudder Dewanny Adawlut Reports, page 886, 2nd September 1852) does not apply. The marginal note in that case does, no doubt, lay down the law that endowments can only be proved by documentary evidence, but there is no mention of this dictum in the body of the decision, and we are not aware of any ruling of this Court which makes documentary proof a *sine qua non*. In the great majority of cases, it would, of course, be looked for, but its absence would not necessarily put the party suing under an endowment out of Court.

But, although no specific deed of endowment is filed, there is considerable documentary evidence of the endowment itself on the record, and the Lower Court took it into consideration, although, for reasons given, it thought it insufficient to prove the plaintiff's case.

After going carefully through it, we have come to a different conclusion, and that for the following reasons.

The taidad filed by the plaintiff is dated 1209 B. S. It makes special mention of the land now in suit as having been granted to Dyal Chand, and the fact is not disputed. The objection taken to it is that the words used do not show the land to have been an endowment, but only "mahatran," which may mean rent-free land of any description, and have a personal, and not a local application. If there were no other description of the land than the word "mahatran," the

objection would have considerable weight; but in the descriptive column of the taidad, we find a special memorandum to the effect that this land was allotted for the expenses of the worship of an Ishur Thakoor or idol. Now, it can hardly be supposed that Dyal Chand, when filing this taidad in the Collector's office, would have called this land an "endowment" if it were not so, the statement being clearly against his interest, which would have been best served by his having the land registered as his own ancestral lakheraj, over which he could exercise a free and independent control. There is no reason to suppose, and there is certainly no proof, that Dyal Chand was at the time in difficulties, or desirous of secreting the property from its creditors.

We do not say that the mere fact of the proceeds of any land being used for the support of an idol is proof that those lands formed an endowment for the purpose; but where there is apparently good evidence going back for more than half a century that the land was given for the support of an idol, proof that from that time the proceeds had been so expended would be strong corroboration.

To continue. In the resumption-proceedings of 1831, the lands now in suit were released as belonging to the idol. By itself this would be insufficient; but, taken in connection with the taidad, it appears to us sufficient to warrant the conclusion that the 80 beegahs were from very early times given over as an endowment; and, if that be so, no amount of breach of trust by any subsequent holder could alter the nature of the original grant. The land could never be taken away from the idol, or from the person having authority to act as shevait. There is also filed the copy of a char granted by Mr. Young in 1786, in which there is a recital that these lands were endowed (according to the statement of the then owner, attested by three witnesses) for the service of the idol, and had been so ever since the year 1171 B. S.

Taking all these together, we think that the plaintiff has sufficiently proved that the land was originally given as an endowment, and as such was inalienable.

And that, as a necessary consequence, the plaintiff, who is admittedly the next heir of Dyal Chand, is entitled to possession as shevait.

This being so, there is no necessity for our going into the plaintiff's position as reversioner, nor into the question of legal necessity.

Under the circumstances, however, we give the appellant wassilat from the date of suit only.

The judgment of the Lower Court is reversed with costs in proportion.

The 14th June 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Damages.

Case No. 350 of 1867.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 11th December 1866, reversing a decision passed by the Sudder Ameen of Maldah, dated the 20th August 1866.

Parusnath Shaha and others (Plaintiffs), *Appellants,*

versus

Brojo Lal Gossain and others (Defendants), *Respondents.*

Baboo Toolsee Dass Seal for Appellants.

Baboo Mohinee Mohun Roy for Respondents.

Where a cause of action is established, the plaintiff is entitled to *some* damages. His claim ought not to be dismissed altogether by the Lower Appellate Court, because the first Court assessed the damages at too large a sum.

Seton-Karr, J.—In this case the Lower Appellate Court has done wrong in dismissing the plaintiffs' suit altogether. The Lower Appellate Court is of opinion that the plaintiffs have proved their cause of action, and that the only point in which the decision of the Court of first instance was wrong was that it assessed the damages at too large a sum. The cause of action having been established, the plaintiffs are clearly entitled to *some* damages, whether large or small. The Judge must, therefore, now re-consider the case, and assess the damages at such amount as he may think warranted by the evidence.

The case is remanded accordingly.

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The 14th June 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Zemindaree Dak—Putneedar.

Case No. 344 of 1867.

Special Appeal from a decision passed by the Officiating Principal Sudder Ameen of Rungpore, dated the 6th December 1866, affirming a decision passed by the Moonsiff of Budeakhally, dated the 30th May 1866.

Rohinee Kant Roy (Plaintiff), *Appellant,*

versus

Tripoora Soonduree Dassia and others (Defendants), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Baboos Mohinee Mohun Roy and *Mohesh Chunder Chowdhry* for Respondents.

The provision in a pottah that, if any item is laid upon the zemindar over and above the sudder jumma, the putneedar shall bear a rateable proportion of it, held not to include the charges connected with the zemindaree dâk.

Macpherson, J.—In this case we are of opinion that, although the pottah contains a provision that, "if any item is laid upon" the zemindar "over and above the sudder jumma," the putneedar shall bear a rateable proportion of it, this provision does not include the charges connected with the zemindaree dâk: because the zemindaree dâk is a matter unconnected with the sudder jumma which a zemindar has to pay.

We concur in two decisions of two different Division Courts, in the cases of Rakhal Dass Mookerjea *v.* Ranee Shurno Moyee, reported at p. 100, Vol. VI., Weekly Reporter, and Sharoda Soonduree Debia *v.* Wooma Churn Sircar, p. 20, Vol. III., Weekly Reporter, Small Cause Court References.

We, therefore, dismiss this appeal with costs and interest.

The 15th June 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble C. P. Hobhouse, *Judges.*

Suit against unincorporated or unregistered Company.

Reference to the High Court by Mr. C. D. Field, Officiating Judge of the Principal Court of Small Causes of Kishnaghur.

Koylash Chunder Roy, *Plaintiff,*

versus

Mr. Edward Ellis, Manager on behalf of the Bengal Indigo Company of Khalbolia Factory, *Defendant.*

In the case of an unincorporated or unregistered company, the plaintiff, if he does not know of what persons the company is composed, may sue the company by the name under which they are carrying on business, stating in his plaint his inability to describe them better.

Case.—This is an action brought by one Koylash Chunder Roy against Mr. Edward Ellis, "*Manager on behalf of the Bengal Indigo Company of Khalbolia Factory*" in this district, for the recovery of Rupees 96, for work and labour done as a mooktear. The summons was served on Mr. Ellis, who appeared through a vakeel, and pleaded that not *he*, but the *factory*, was liable. It is not pretended by plaintiff that Ellis is personally liable, and the debt is one on all hands admitted to be that of the *Factory* or *Company*.

No certificate of incorporation under Section 18 of the "Indian Companies Act, 1866," is put in evidence, nor is it sought to be proved in any way that the *Bengal Indigo Company* has been registered or incorporated under this Act or any other law. It is, in fact, admitted in a petition put in by plaintiff that no such incorporation or registration has ever taken place. Under these circumstances, I do not see how the Bengal Indigo Company can sue or be sued through a Manager, Secretary, or other principal officer.

It is alleged that Mr. Ellis was appointed *Manager* by a deed which empowered him to sue and be sued on behalf of the partners, who compose the so-called Company. Whether such power could be conferred by a deed, it is not necessary to enquire, as the deed is not in evidence: no notice to produce it has been served: no secondary evidence of its contents is offered: and no ground is shown for admitting such secondary evidence.

It is contended that, Ellis having signed the vakalutnamah as "Manager," this is sufficient evidence to entitle plaintiff to a decree against the so-called Company. This admission would certainly be good evidence against Ellis, if it were sought to render him personally liable on the ground that he had exceeded his power or for any other sufficient reason; but it is no proof as against the partnership of Ellis's authority to sue and be sued on their behalf.

I have said above that it is not sought to make Ellis personally liable; and the case is, therefore, distinguishable from that of an agent professedly contracting for a principal whose name is not disclosed at the time. In such a case (at least under English Law), the agent might be made personally liable (Smith's Mercantile Law, 7th Edition, page 163; Stephen's Lush's Common Law Practice, page 52; Smith's Leading Cases, 5th Edition, Volume 11, page 321; Roscoe's Nisi Prius, 11th Edition, pages 308-9; Davis's Practice of the County Courts, page 330; *see* also Macpherson's Civil Procedure, page 127). The plaintiff being then desirous to obtain a decree against the so-called Bengal Indigo Company, and this Company not having been registered or incorporated, I think the names of the members of the partnership must be given in the plaint. Under Section 26, Act VIII. of 1859, "the name, description, and place of abode of the defendant, so far as they can be ascertained," are some of the particulars which should be contained in the plaint. In the case of *Messrs. Robert Watson and Co.* versus *Roop Chand Sircar* (Sutherland's Small Cause Court Rulings, page 38), the High Court decided that an unregistered trading Company must disclose the names of the members of the partnership when suing, and this decision would seem equally applicable where such a Company are defendants. I may refer to case No. 384 of 1863, *Mr. D. R. Tripp, Manager of the Bengal Indigo Company, Appellant,* versus *Nursingh Chunder Mitter, Respondent, 3rd February* 1864 (Page 7, Miscellaneous Rulings, Sutherland's Reports for February 1864), to show the confusion likely to result from a decree being passed in such a loose manner against an unincorporated Company.

At the first hearing of the case in default of proof that Mr. Ellis had power to sue and be sued on the part of the partnership, I directed the plaint to be amended, and allowed time for doing so. The plaintiff now admits that the Company has not been registered, and is unwilling or unable to insert the names of the members of the partnership against which, under the name of the "Bengal Indigo Company," he desires a decree.

I, therefore, solicit the decision of the High Court on the following point: "Have I correctly ruled under the circumstances that the names of the partners must be inserted in the plaint?"

The judgment of the High Court was delivered as follows by—

Peacock, C. J.—We are of opinion that this suit cannot be brought against Mr. Edward Ellis as Manager on behalf of the Bengal Indigo Company of Khalbolia Factory. The proper course would be to sue the individual members of the Bengal Indigo Company in the same way as the individual members of any other firm, not being incorporated or registered, would have to be sued. But it appears that the plaintiff does not know of what persons the Bengal Indigo Company is composed. If that is so, we are of opinion that he might sue the Company by the name of "the Bengal Indigo Company," the name under which they are carrying on their business, and contracted with him, if at all. But he will have to state in his plaint that he is unable to give any better description of the defendants than that. (*See* Act VIII. of 1859, Section 26, Clause 2.) The suit will then proceed against that Company, and any property belonging to the firm will be liable to be taken in execution if a decree be obtained.

This case is different from that cited, in which it was held that, in a suit by Messrs. Watson and Co., the names of the individual members must be given, inasmuch as in that case Messrs. Watson and Co. were the plaintiffs, and could not be ignorant of the names of the members of their own firm.

The 15th June 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Valuation of suit.

Case No. 332 of 1867.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 18th February 1867, reversing a decision passed by the Moonsiff of that District, dated the 30th July 1866.

Shaikh Muzhur Ali (one of the Defendants), *Appellant*,

versus

Mussamut Basoo (Plaintiff) and others (Defendants), *Respondents*.

Messrs. R. E. Twidale and *C. Gregory* for Appellant.

Baboo Dabendro Narain Bose for Respondents.

If at the hearing of a suit it proves to be undervalued, and if the Court would not have jurisdiction to entertain it if properly valued, the suit ought to be dismissed.

It is only at the time of presentation of the plaint that the plaintiff in a suit, which has been brought in a Court in which, with reference to its proper valuation, it should not have been brought, can claim the benefit of Sections 30, 31, and 32 of the Code of Civil Procedure.

Macpherson, J.—WHEN this suit first came on for hearing in the Moonsiff's Court, the defendants took the objection that the suit was undervalued. The Moonsiff, on investigation, found that this was so, and that, according to the proper value, the claim was not cognizable by him at all. But he gave the plaintiff three days within which to put in an additional stamp of Rupees 84; upon which stamp being put in, the Moonsiff apparently intended to return the plaint in order that it might be again presented in the proper Court. The plaintiff failed to file the additional stamp, and thereupon the Moonsiff dismissed her suit with costs.

The plaintiff appealed from this decree, and contended that the suit was not undervalued. The Principal Sudder Ameen agreed with the Moonsiff in thinking that the suit was undervalued, and that the proper value was such that the suit would not lie at all in the Moonsiff's Court, although he did not quite agree with the Moonsiff as to the details of the calculation by which the real value of the claim was to be ascertained. But the Principal Sudder Ameen considered that the Lower Court ought to have allowed the plaintiff a longer time than it did, wherein to file the additional stamp, and accordingly reversed the decree which had been passed, and remanded the case to the Moonsiff that he might allow the plaintiff a week's time to enable her to file the necessary stamp, and might then make such orders as he deemed proper, each party paying their own costs of the appeal.

The defendants are the appellants before us. They seek to set aside the order of the Lower Appellate Court, and to revive that passed by the Moonsiff, on the ground that the order of the Principal Sudder Ameen is not warranted by the Code of Civil Procedure, and therefore is one which he had no power to make.

We think that the order of the Lower Appellate Court is wrong, and that the decree of the Moonsiff was right.

The question as to the valuation did not arise upon the face of the plaint. It, therefore, was not raised at the time of filing the plaint, nor until the first hearing which came on in due course upon the return of the summons. Consequently, the provisions of Sections 30, 31, and 32 of Act VIII. of 1859, all of which are Sections relating to the first presenting and filing of the plaint, do not apply to the present case at all. And the Moonsiff, finding at the hearing that he had no jurisdiction, on account of the real value of the claim, ought, in strictness, as it seems to us, to have at once dismissed the suit, on the ground that he had no jurisdiction to entertain it. But the Moonsiff, not in the first instance adopting this course, followed the directions, or rather the spirit of Section 31 of Act VIII. of 1859, and gave the plaintiff an opportunity of correcting her error. Of this opportunity the plaintiff did not avail herself, and the Moonsiff then dismissed the suit. Under the circumstances, we are at a loss to conceive what other decree the Moonsiff could have made. The Lower Appellate Court has reversed the decree on the ground chiefly that the Moonsiff should have given the plaintiff a longer time wherein to file the additional stamp. But the proper decree for the Moonsiff to have made in the first instance was a simple decree dismissing the suit without any further provision or order as to filing an additional stamp. And the first order of the Moonsiff giving the plaintiff time to file an additional stamp, and the order of the Principal Sudder Ameen, are alike not warranted by the Code of Civil Procedure, and are illegal.

The rules as to the valuation of suits are in themselves sufficiently simple, and, if

parties chose to neglect those rules, they do so at their own risk. If there is any doubt as to what is the proper value to be put upon a claim, the opinion of the Court can always be taken, and ought always to be taken, upon the point at the time that the plaint is presented. And it is at the time of presentation of the plaint—and not afterwards when the case comes on for hearing upon the return of the summons and after the appearance of the defendant—that the plaintiff in a suit, which has been brought in a Court in which, with reference to its proper valuation, it should not have been brought, can claim the benefit of those Sections of the Civil Procedure Code which bear upon the question of valuation. In the present instance, the plaintiff not only did not avail herself of the opportunity of putting in a sufficient stamp which the Moonsiff gave her, but in appeal contested the declaration that she had undervalued her suit. She, in fact, elected to stand or fall by the decision as to whether her valuation was right or not. The decision of both Courts is against her; and we fail to see that the case is one in which the application of the strict law can be said to work any appearance even of hardship.

The decision of the Lower Appellate Court is reversed; the order of the Moonsiff's Court, dismissing the plaintiff's suit, is affirmed; and the plaintiff (respondent) will pay the whole costs of the suit both in this and the Lower Courts.

The 15th June 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Appeal to Privy Council—Forma Pauperis—Stamp-duty—Security—Costs.

Jowad Ali and another, *Appellants to England.*

An application to appeal to the Privy Council *in formâ pauperis* may be made to the High Court on unstamped paper, and accompanied by a certificate of Counsel that there is a reasonable ground of appeal; the usual security for costs being given, and the costs of translation deposited.

Deputy Registrar.—ACCORDING to the resolution of the late Sudder Court of the 15th of April 1831, "No pauper appeal to "Her Majesty in Council can be admitted "unless the appellant give security to the sa- "tisfaction of the Court, for the payment of all "such costs as the Court may think liable "to be incurred by the appeal, as well as "for the performance of such orders or judg- "ment as Her Majesty, her heirs, or success- "ors may think fit to make thereupon."

No security for costs, &c., having been filed with this application to be allowed to appeal to Her Majesty in Council *in formâ pauperis*, this application might have been returned to the applicant, were there not some reason to doubt whether the practice based upon the above rule is not out of date, Regulation XXVIII. of 1814, which probably gave sanction to it, having been repealed by Act X. of 1861, and there being, besides, rulings of Her Majesty's Privy Council of dates subsequent to the rule, and which are adverse to it.

In the case reported at page 114 of Volume IV. of Moore's Indian Appeals, it appears to have been held (*see* marginal note) that, "although the Courts in India admit "a party to appeal to England *in formâ* "*pauperis*, yet the appellant ought to make "special application to the Queen in Council "to prosecute such appeal *in formâ pau-* "*peris.*"

And from a more recent ruling in Moore's Indian Appeals, Volume X., page 533, quoted by Mr. Macpherson in his "Practice in the Judicial Committee of the Privy Council," page 220, it would appear that Her Majesty's Privy Council has allowed an appeal *in formâ pauperis* on the application of the appellant, setting forth the facts of his case, and praying for leave so to appeal, and has dispensed with the usual securities for prosecuting the appeal.

I beg, therefore, the orders of the Judge presiding in the Miscellaneous Department upon the points:—

1st.—Whether an application like this should be made to this Court or to Her Majesty's Privy Council.

2nd.—If the application may be made to this Court, is it to be received without the security for costs of the appeal, and without the deposit for the costs of translation, &c.?

Jackson, J.—I think the application might properly be made to this Court, and stamp-duty might be dispensed with; but the usual security for costs must be given, and the costs of translation must also be deposited. Moreover, the application would have to be accompanied by a certificate of Counsel, that there was a reasonable ground of appeal.

The 17th June 1867.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Execution—Attachment.

Case No. 247 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 24th September 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 30th December 1865.

Khadem Hossein Khan and others (Plaintiffs), *Appellants,*

versus

Kalee Pershad Singh and others (Defendants), *Respondents.*

Baboos Debendro Narain Bose and *Romanath Bose* for Appellants.

Mr. C. Gregory for Respondents.

Where a decree-holder has applied for execution, and has proceeded up to a certain point in the execution, and then the execution-proceedings are set aside *in toto*, the property cannot still be considered as under attachment for the benefit of the decree-holder.

Markby, J.—In this case the plaintiffs sued for confirmation of their possession and for registration of their names as owners of a 14-gundahs 2-krants 3-dants share in a talook which they alleged that they had purchased at a sale in execution of a decree on the 5th May 1862, confirmed on the 17th June 1862.

It appears that one Motee Singh was the joint-proprietor with Jothoo Singh of a 1-anna 1-gundah and 1-krant share of Talook Tirhoot Kewut Gowur consisting of several Mouzahs, one of which bore the same name as the talook.

In the year 1854 Motee Singh executed a mortgage-bond in favor of one Ram Dyal Misser in respect of his share in the *single mouzah* Tirhoot Kewut Gowur and its appurtenances only. Ram Dyal instituted a suit on this bond on 16th January 1860, but asked for and obtained a common money-decree only. In execution of this decree, he attached the whole talook on the 25th April 1861. Subsequently, under circumstances which have not been stated, these execution-proceedings were "struck off the file," by which I understand that they were either voluntarily abandoned by the decree-holder, or put an end to at the request of the judgment-debtor, and wholly removed from the file from their commencement: the judgment, however, remained unsatisfied.

In the year 1860 Motee Singh executed a mortgage-bond in respect of his share in the *entire talook* in favor of the defendant Kalee Pershad; and again in 1861 executed a similar mortgage-bond in favor of the same person to secure a further advance. Under these two mortgage-bonds, Kalee Pershad obtained a decree for the sale of Motee Singh's interest in the entire talook on the 18th August 1863, and sold it to persons who are defendants in this suit.

Prior to this sale in execution, but subsequently to the two mortgages in favor of Kalee Pershad, fresh proceedings had been taken by Ram Dyal on the decree which he held in the suit of January 1860, and he obtained a fresh order for the sale of the entire talook. The property was put up for sale on the 5th May 1862, and the plaintiffs became the purchasers. The sale was confirmed on the 17th June 1862, and the plaintiffs got possession.

These facts have all been found by the Lower Appellate Court. The plaintiffs have tried to contend that, on the proper construction of the bond of 1854, they are mortgagees, not of the *mouzah* only, but of the entire talook; that, according to a common practice, the name of the principal mouzah only is mentioned; and that, under the words "Mouzah Tirhoot Kewut Gowur, aslee and dakhelee," all the other 19 mouzahs are included. But there is nothing on the face of the bond to show that the parties intended by these words to describe the entire talook; nor is there anything in the facts found or in the evidence to lead to the supposition that all these mouzahs are subordinate to, and included within, the single Mouzah Tirhoot Kewut Gowur, so as to come within the ordinary meaning of the word "dakhelee." On the contrary, the Lower Appellate Court has found that the single mouzah only, and not the entire talook, is comprised in the bond of 1854. This contention, therefore, fails.

The plaintiffs have also contended that, notwithstanding that the execution-proceedings were struck off the file, the entire talook still remained under attachment in satisfaction of Ram Dyal's decree in the suit of January 1860, and consequently that the subsequent mortgages to Kalee Pershad were void as against them under the provisions of Section 240 of Act VIII. of 1859. This notion, that an attachment

remains in force after the execution-proceedings in which the attachment was ordered have been struck off the file, appears to be a modern one, and to have originated in certain expressions used by the Privy Council in the case of Rajah Mohesh Narain Singh *versus* Krishnanund Misser at page 337 of the report in the 9th Volume of Moore's Indian Appeals. In that case, an order for sale of certain property in satisfaction of his decree was obtained by the decree-holder in 1843. In compliance with the Regulation XX. of 1795 then in force, a copy of the decree was transmitted to the Board of Revenue, and the Collector was duly authorized to proceed with the sale. Four sales took place under this order which were never completed by the purchasers, and, subsequently, the execution-proceedings were taken off the file. In the year 1845, a fresh order for sale was obtained from the Civil Court, and on this occasion the decree was not again transmitted to the Board of Revenue. The property was sold under this second order, and many years afterwards an attempt was made to upset this sale on the ground of irregularities, one objection being that the decree had not been transmitted to the Board of Revenue in compliance with the Regulation. It appears to have been contended that a second transmission of the decree was necessary, because the order under which the sale took place must be considered as having been made *in a different suit* from that in which the first order was made. It is with reference to this objection that their Lordships observe that "it would be contrary to "general principles and a senseless addition "to all the vexations of delay in the course "of procedure to hold that when, for any "reason, satisfactory or not, the execution "of a final decree in a suit fails, or is set "aside, and the proceedings as regards that "execution are taken off the file, *the whole* "*suit is discontinued* thereby, and the "further proceedings for the same purpose "are to be considered *as taken in a new* "*suit.*" The facts of the case and the arguments of Counsel are not fully reported, and the nature of the objection, therefore, can only be gathered from the expressions used in the judgment. But I am convinced by the use of the word "discontinued," a well-known technical expression of English Law (*see* Archbold's Practice of the Court of Queen's Bench by Chitty, Part 5, Chapter XVIII.) that the contention went to this full length; that, by taking the execution-proceedings off the file, the whole proceedings were wiped out from the very commencement, and the parties stood just as if no suit had ever been brought. It is, indeed, obvious that so large a contention was unnecessary for the appellants, but the words used in the judgment appear to me to show unmistakably that their Lordships considered that the objection *was* taken in this form; and, being a purely technical objection to the title of a person who had been 9 years in possession, they may very reasonably have held the appellants strictly to it.

This, I think, disposes of the case in the Privy Council. All that was there decided was that, if, in consequence of a decree-holder failing in an attempt to execute his decree, the execution-proceedings are taken off the file, the proceedings in the whole suit are not thereby nullified so as to compel the plaintiff, if he still wishes to enforce his claim, to commence his suit *de novo*.

It remains to consider whether, independently of the decision in the Privy Council, there is any ground for saying that, where a decree-holder has applied for execution, and has proceeded up to a certain point in the execution, and then those proceedings are wholly removed from the file (by which I understood it to be meant that they are wholly set aside), the property is still to be considered as under attachment for the benefit of the decree-holder.

Turning to the Code, it appears that the attachment consists in an order of the Court prohibiting the defendant from alienating the property, and all other persons from receiving the same. And when the execution-proceedings are, as here, set aside *in toto*, this order is set aside with them. And it seems to me impossible to contend that, after the order of attachment is set aside, the attachment remains.

It is, of course, not necessary that every failure of a decree-holder to carry out his execution to a successful issue should lead to the execution-proceedings being set aside *in toto*. The execution-proceedings may, as far as I am aware, be set aside from any point. But I have to deal now with a case in which the execution-proceedings have been set aside *in toto*.

Reverting to the facts of this case as above stated, and cleared of these objections on behalf of the plaintiffs, it is plain that, with the exception of the single mouzah which has been mortgaged to Ram Dyal, the plaint-

iffs only bought subject to Kalee Pershad's lien. Kalee Pershad had, therefore, with this exception, a right as against the plaintiffs to carry out his decree of 18th August 1863 for the sale of the entire talook in satisfaction of his claims under the two mortgage-bonds executed in his favor, and the defendants, who purchased under that decree, have, to the same extent, a right to possession as against the plaintiffs. It was to contest these rights of the defendants that the present suit was brought, and the suit was, therefore, so far rightly dismissed by the Lower Appellate Court.

Some question might arise as to the plaintiff's right with respect to the single mouzah mortgaged to Ram Dyal in 1854. Ram Dyal has never yet put in force his mortgage-security upon this mouzah; he has only obtained a common money-decree, under which he has ineffectually attached and sold the entire talook. But, though the plaintiffs' title may be incomplete, yet it is capable of being completed, and probably Ram Dyal would be bound to complete it for them by enforcing his mortgage of 1854, which, to the extent of this mouzah, is prior, and, therefore, superior to the mortgages of Kalee Pershad, under which the defendants claim.

It would be a question of some nicety requiring a good deal of further enquiry, whether or no the plaintiffs could maintain their possession against the defendants in respect of this mouzah; but Mr. Gregory, on behalf of the defendants, has very properly and very prudently consented that the decree of the Court below shall be modified, and the plaintiff's possession confirmed to the extent of this mouzah.

The decree, therefore, will be that plaintiff's possession of 14*gds.* 2*k.* 2*d.* out of the entire 16 annas of the *Mouzah* Tirhoot Kewut Gowur, aslee and dakhelee, be confirmed, and that they retain possession of the same without interruption by the defendants, and that the plaintiffs be registered in the records of the Collector as proprietors of the said share.

The rest of the plaintiff's claim will be dismissed with all the costs of both the Courts below, and the plaintiffs will pay to the defendants the costs of this appeal.

Bayley, J.—I concur in this judgment. The view of my learned brother Markby of the intention of Her Majesty's Privy Council in the case of Mohesh Narain Singh *versus* Kishnanund Misser (9 Moore's Indian Appeals, page 337) is one on which I have in previous cases acted. I quite agree, too, that the plaintiffs' rights in law are confined to the 14*gds.* 2*k.* and 2*d.* share of the single village, aslee and dakhelee, and not of all the villages (28), aslee and dakhelee, which form the *entire talook.*

In this view, I think, the decretal order proposed is correct.

The 11th March 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Mahomedan Law—Widow—Dower (Lien for)—Limitation.

Case No. 94 of 1866.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Patna, dated the 28th of December 1865.

Mussamut Janee Khanum (Plaintiff), *Appellant,*

versus

Mussamut Amatool Fatima Khanum (Defendant), *Respondent.*

Baboos Kishen Kishore Ghose and *Dwarkanath Mitter* for Appellant.

Baboo Unnoda Pershad Banerjee and *Moonshee Ameer Ali* for Respondent.

The widow of a Mahomedan in possession of her husband's estate under a claim of dower has a lien upon it as against those entitled as heirs, and is entitled to possession as against them till her claim of dower is satisfied.

Where a Mahomedan widow was improperly deprived of a portion of such estate under a decree in a suit by an heir of her husband, the question as to her right of dower having been before the Court, but not disposed of by the Judge in that suit—HELD that the heir must be treated as having taken the property subject to a right of lien which was not divested by the decree in the former suit.

A suit by such widow against the heir who has ousted her to establish her lien is one, the limitation of which is either governed by Clause 16, Section 1, Act XIV. of 1859; or, if she sues to enforce her lien on landed property as subject to the lien, Clause 12 may apply.

Norman, J.—THIS is a suit by Amatool Fatima Begum, widow of Tusuddook Hossein, to recover from Mussamut Janee Khanum, the mother of Tusuddook Hossein, Rupees 15,000, alleged to be due from the defendant on account of the *mohr moujjul,* or dower, which had been payable to the plaintiff on the death of her husband, under the following circumstances.

Tusuddook Hossein died in 1845. On his death, the whole of his property came to

the possession of the plaintiff, who held the same as in lieu of dower, alleging that it had been given up to her by an ikrarnamah executed by Tusuddook Hossein in 1835, and that the surrender had been confirmed by an ibranamah, or deed of relinquishment, executed by the now defendant.

The now defendant, having brought a suit for her share of the property, as the mother and heiress of Tusuddook, declaring the alleged ibranamah and ikrarnamah to be fictitious, obtained a decree in the Court of the Principal Sudder Ameen of Tirhoot on the 30th of September 1859. This decree was affirmed by the Judge on appeal in March 1860, and the Judge's decision was upheld by the late Sudder Court on special appeal on the 5th of June 1862, the Court finding that the two deeds were not proved. In execution of this decree, the defendant obtained possession. The plaintiff now sues for dower, treating her cause of action as having arisen on the 8th of September 1862, when the plaintiff obtained possession under the decree of 1859.

The defendant objected that the suit was barred by limitation.

The Principal Sudder Ameen overruled this plea, holding that the cause of action must be deemed to have arisen from the final decision whereby the plaintiff was thrown out of possession.

For the defendant in appeal before this Court, Baboo Kishen Kishore Ghose argued that the cause of action in a suit for dower is the breach of contract to pay the dower; that this cause of action accrues when the dower becomes payable, *viz.*, in this case on the death of the plaintiff's husband in 1845; that, the defendant having dispossessed the plaintiff under a decree of Court in a suit in which the defendant, if she had any right in respect of her dower, might have successfully asserted it, this ouster cannot be treated as a wrong giving the plaintiff a fresh right of suit.

There is a conflict of decisions in the cases in the late Sudder Court on the subject of the right of a dowress to take and hold possession of her husband's property under a claim of dower, and as to the period of limitation in suits for dower.

It is convenient that we should examine first the principles of Mahomedan Law as laid down in the books of authority, and then consider the cases so decided.

In the Sirajjyah it is said there belong to the property of a person deceased four successive duties to be performed by the Magistrate: *first*, his *funeral ceremony* and burial, &c.; next, the discharge of his just *debts* from the whole of his remaining effects; then, the payment of his *legacies* out of the third of what remains after the debts are paid; and, lastly, the *distribution of the residue amongst his successor, &c.*

We may observe that the dower due from the estate of a deceased Mussulman is a debt, which, with reference to questions of priority, stands exactly on the same footing as any other debt of the deceased. *See* Macnaghten's Precedents of Marriage, &c., Case XXIII., p. 274.

In Macnaghten's Principles of Mahomedan Law it is said, Chapter I., Section 1, para. 5: "Debts are claimable before legacies, and legacies (which cannot, however, exceed one-third of the testator's estate) must be paid before the inheritance is distributed." *See* also Case XXIII., Macnaghten's Precedents of Marriage, &c., p. 274.

In Macnaghten's Precedents of Inheritance, Case XVI., p. 94, it is said: "If the amount specified as dower exceed the value of the estate, the heirs will not be entitled to succeed to any part of it; but the whole will appertain to the wife in virtue of her claim of dower. If the amount specified fall short of the value of the estate, the proceeds must, in the first instance, be applied to satisfy the claim of dower." Several authorities are cited.

These quotations are sufficient to show that liquidation of debts precedes the distribution of the estate to the heirs.

In Macnaghten's Precedents of Debts and Securities, Case X., the question was put: "A man dies being indebted to his wife for her dower. Has she a lien on the personal property left by her husband, in satisfaction of such dower, in preference to the other heirs?"

Answer.—"If the other heirs pay the widow the amount of her dower, she has no claim on the property left by her husband except for her legal share of the inheritance; and, if they do not pay her the amount of her dower, she has, in the first instance, *a prior claim on account of her dower*, on the property left by her husband, whether real or personal. The residue, after her claim is satisfied, will be divided between her and the other heirs according to their respective shares of inheritance."

In Macnaghten's Precedents of Marriage, &c., Case XXIV., p. 275, it is said: "There is a distinction between money and other property in cases of dower, *viz.*, that the widow is at liberty to take the former description of property over which she has absolute power; but, as to the other property, she is *entitled to a lien on it as security for the debt*, and it does not become her property absolutely without the consent of the heirs or a judicial decree. Where the debt is large and the property small, the former necessarily absorbs the latter in spite of any objection urged by the heirs, who, until they pay the debt, have no legal claim against the creditor in possession to deliver up the estate.

The lien of the widow for her dower, whether prompt or deferred, is declared to exist in Case XXXII., Macnaghten's Principles of Marriage, &c., p. 285.

These texts and cases seem to us to establish the position that the widow of a Mussulman in possession of her husband's estate under a claim of dower has a lien upon it as against those entitled as heirs, and is entitled to possession of it as against them till her claim of dower is satisfied.

The cases of Gholam Hossein Ali *versus* Zeenab Bebee, 1 Select Reports, p. 48; Wajeeb-oon-nissa Khanum *versus* Mirza Hossein Ali, 1 Select Reports, p. 266 (*see* the Futwa of the Law Officer in note, page 268); Mahomed Noor Buksh *versus* Budun Chand Bebee, Sudder Dewanny Adawlut Reports, 1852, p. 885; Special Appeal No. 1523 of 1862, before Sir Barnes Peacock, Chief Justice, and Mr. Justice Kemp, Syed Atahur Ali *versus* Altaf Fatima and others, decided February 6, 1863 (not printed); and the case in the Privy Council in Ameerunnissa *versus* Mooradoonissa, 6 Moore's Indian Appeals, page 222, appear to have been decided in accordance with the above principle.

It was argued in the last-named case that the plaintiff was the heir-at-law, and, as the deed of dower was disputed, he was entitled, by the Mahomedan Law, to be put in possession of the deceased's real estate, the widow's remedy being to establish the deed of dower by a suit at law. But their Lordships did not accede to that argument. The case is not quite conclusive of the question now before the Court, because there the contest was between Sheas; and the rights of creditors as against heirs of the Shea sect appear to be somewhat larger than in the case of Soonnees—*see* the Futwa, 6 Moore's Indian Appeals, pp. 219 and 220; and compare Macnaghten's Precedents of Marriage, &c., Case XXIV., p. 275, and Case XXXVII., p. 290.

According to the Shea doctrine, the creditor has power to sell landed property to an amount sufficient to satisfy the dower without recourse to the public authorities. According to the Soonnee doctrine, the creditor has simply a lien on any land of the debtor, and cannot take it over so as to acquire absolute title in satisfaction of the dower without consent of the heirs or a decree of Court.

In the cases of Mussamut Wuzeerun *vs.* Mahomed Hossein Khan, 7 Select Reports, page 34; and Ranee Buksh Bebee *vs.* Nadir Bebee, 3 Select Reports, page 59, cited in the case before the Privy Council; Bebee Salamut *vs.* Sheikh Moula Buksh, 5 Weekly Reporter, page 194, where the Court gave possession to the heirs, leaving the widow to establish her right to dower by suit, the Court appear to have overlooked the fact that, in depriving the widows of possession, they were destroying a lien given them by Mahomedan Law. No authority from any book of Mahomedan Law was cited in support of the course taken by the Court in these cases, and apparently no Futwa of the Law Officer was called for on this point. The same observation applies to the case of Sheikh Bebee *vs.* Ranee Buksh Bebee, 5 Select Reports, page 105.

In Althofoonissa *vs.* Soorma Khatoon, S. D. A. Reports, 15th June 1860, page 634, the Court refer to passages in pages 275 and 290 of Macnaghten's Precedents. But they wholly failed to observe that, although, according to the passages cited, the widow could not be deemed to hold under an absolute and proprietary title, she might still be entitled to retain possession by virtue of her lien.

We are strongly disposed to think that these five cases are in conflict with the principles of Mahomedan Law if, indeed, the earlier cases were not in effect virtually overruled by the case in the 6th Moore's Indian Appeals already referred to. However that may be, we think we may hold that, when a Mahomedan widow, who has actually obtained possession of the estate of the deceased husband, has been deprived of possession by a decree in favor of heirs who take with notice of the existence of her claim to dower, and more particularly where her right to sue to establish her claim to dower

has been expressly reserved, we may treat the heirs as taking the property subject to a lien which is not divested by the decree. The maxim applies "actus curiæ neminem gravabit.". In the case of Mahomed Noor Buksh *versus* Buddun Chund Bebee, S. D. A. Reports, 1852, pp. 885-890, the lien was enforced as against a purchaser from the heir.

If this is so, the cause of action in the present suit, which, when closely examined, may be properly termed a suit to give effect to the lien of the plaintiff on the share of the defendant, may very well be treated as having arisen either from the date of the final decree by which possession was adjudged to the defendant in accordance with the view taken by the Principal Sudder Ameen, a Mahomedan Law Officer of very considerable experience, and in accordance with the case of Mussamut Wuzeerun Bebee *versus* Mahomed Hossein Khan, S. D. A. Reports, 1856, p. 841, or rather from the date on which the defendant took actual possession of the estate under the decree, as suggested by the plaint.

The right of lien, and the right to come to Court to pray to have the lien established, are causes of action which may be quite distinct from the right to sue for the original debt in respect of which the lien was created. It is no new doctrine that a lien may remain in full force, though any right of action in respect of the claim for which it was created has long been barred by limitation. *See* English cases, Higgins *versus* Scott, 2 Barnwall and Adolphus 413; *Ex parte* Broomhead, 16 Law Journal, Queen's Bench, 355; Barton *versus* Tattersall, 1 Russell and Mylne 257.

The suit to establish the lien would apparently come under the 16th Clause of Section 1 of Act XIV. of 1859 in this particular instance. If the suit had been to declare that landed property was subject to the lien, it would come under Clause 12. In either case, the suit is in time. The defendant obtained possession in September 1862. We think that the plaintiff has a cause of action against the defendant in respect of her dower which is not barred by limitation, and, therefore, would dismiss the appeal so far as regards this point. We will hear the parties on the other points, if necessary.

The 18th June 1867.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Ejectment—Prior rent.

Case No. 256 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 19th February 1867, affirming a decision passed by the Deputy Collector of that District, dated the 26th November 1866.

Madhub Chunder Muzoomdar (Defendant), *Appellant,*

versus

Sidhee Nuzeer Ali Khan (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboos Sreenath Doss* and *Hem Chunder Banerjee* for Appellant.

Mr. C. Gregory and *Baboo Ashootosh Dhur* for Respondent.

No subsequent interruption by *A* in *B's* occupation and enjoyment of land would be an answer to *A's* claim for rent which had previously accrued. *B's* eviction by *A* will not relieve him from liability for rent which accrued due prior to the eviction.

Markby, J.—This was a suit brought by the plaintiff in the Collector's Court to recover the balance due from the defendant for arrears of rent of the years 1272 and 1273, in respect of certain lands known as Hooda Pykan, &c.

It appears that the defendants took possession of the lands after having signed a blank paper upon the understanding, as they allege, that the terms of the lease should be properly recorded. Subsequently, a paper called a dowl was drawn up in which the rent is stated at Rupees 2,445, and it was at this rate the plaintiff sought to recover.

The Lower Appellate Court finds it to be admitted that the defendant was ijaradar, and that the rent fixed was Rupees 2,445. The amount of arrears is also admitted, supposing the defendants to be liable at all.

The defendants, who are appellants before us, contend that, as the plaintiff did not produce a kubooleut duly registered, he could not recover; that the dowl did not constitute any contract between the parties, and was not admissible in evidence.

It does not appear, however, that the kubooleut has ever been completed, and there is nothing to show that, until its completion, the plaintiff was to be deprived of his remedy

for the rent as it accrued due. The rest of the contention is disposed of by the finding of the Lower Appellate Court that the occupation of the lands by the defendants and the amount of rent were admitted.

The defendants have also objected that they have been prevented by the plaintiff himself from collecting the rents from the ryots. It is not at all clearly stated what the acts of the plaintiff were which the defendants complain of; but I understand the Lower Appellate Court to find that, whatever the plaintiff did was done after the rent now sued for became due; and I think the Judge is right in holding that no subsequent interruption by the plaintiff in the defendant's occupation and enjoyment of the lands would be an answer to the claim for rent which had previously accrued. Even supposing the defendants to have been actually evicted by the plaintiff, they would be liable for rent which accrued due prior to the eviction.

I, therefore, think that the decree of the Lower Courts is right, and that the appeal should be dismissed with costs.

Bayley, J.—I am of the same opinion.

The 18th June 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Pleader's Fees—Suits partly decreed and partly dismissed.

Case No. 35 of 1867.

*Application for review of judgment passed by the Hon'ble Justice L. S. Jackson, on the 4th February 1867, in Miscellaneous Appeal No. 622 of 1865.**

Bama Soonduree Debia (Appellant), *Petitioner,*

versus

Mr. George Rodgers (Respondent), *Opposite Party.*

Baboo Bhowanee Churn Dutt for Petitioner.

Baboo Sham Lal Mitter for Opposite Party.

Section 4 of the Rules regarding pleaders' fees does not lay down that, in cases partly decreed and partly dismissed, the portion of the claim as to which judgment is given for the defendant is to be treated as if the defendant had claimed that sum from the plaintiff, and got a decree for it.

I SEE no reason to grant this application. The petitioner's pleader contends that the view which I have taken is opposed to the practice of the Court; but he cannot point to any case in which, after argument, the Court have held the other way.

He next urges that my ruling is at variance with the principle adopted by the whole Court in the 4th Rule of the Rules now in force respecting fees (? costs) payable by the unsuccessful party in respect of the fees of his adversary's pleader.

But I do not understand the rule in question as laying it down that the portion of the claim as to which judgment is given for the defendant is to be treated as if the defendant had claimed that sum from the plaintiff, and got a decree for it.

I understand the words "calculated according to the scale in Rule 1st" to mean according to such parts of that scale as may be applicable.

The application is, therefore, refused with costs.

The 19th June 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

Limitation—Tenancy.

Case No. 189 of 1866.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 16th March 1866.

Mr. C. T. Davis (one of the Defendants), *Appellant,*

versus

Kazee Abdool Hamed (Plaintiff), *Respondent.*

Mr. J. Cochrane and *Baboo Poorno Chunder Mookerjee* for Appellant.

Baboos Dwarkanath Mitter and *Unnoda Pershad Banerjee* for Respondent.

A landlord's cause of action to recover possession from a tenant or any one claiming under the tenant only accrues from the time when he determines the tenancy; and there can be no limitation or adverse possession as against the landlord so long as the tenancy continues.

Act XIV. of 1859 contains no such provision as the old Law of Limitation did, by which a party was not precluded from proceeding with his suit, if he showed good and sufficient reason for not bringing it within the period of limitation.

* *See* Vol. 7, p. 127.

Peacock, C. J.—This was a suit brought by Kazee Abdool Hamed to recover beegahs 7-3 more or less of land situate at Howrah, and being property situate within certain boundaries described in the plaint, exclusive of a Durga-house and other property also therein described. The question is, first, whether the plaintiff has made out a title to this property; and, in the next place, whether he is barred by limitation, assuming him to be entitled to it.

The suit was brought against the heirs of Mr. George Galloway, who purchased from Hashem Tandel and Khodeja Bebee. Mr. Davis subsequently intervened, claiming that he had acquired the property from Mr. Galloway by a mortgage from Galloway to him dated in 1860. The present suit was commenced on the 17th June 1865.

The plaintiff claims as purchaser of a mourosee pottah granted to Kinoo Tandel of beegahs 7-3 more or less by Mohendro Narain Deb, whose title is admitted by the appellant, at an annual rent of sicca Rupees 53.

It is proved that the plaintiff purchased under an execution of decree for arrears of rent against the heirs of Kinoo Tandel. Indeed, the fact is admitted by Hashem Tandel, under whom the appellant claims, in the recitals to the pottah which he took from the plaintiff. The sale was dated 21st March 1842.

The zimmanamah, or acknowledgment of having received in charge the property attached under the execution, shows the boundaries; and, although the certificate of sale under the decree to Abdool Hamed, the plaintiff, does not give the boundaries, it refers to the attachment. It further appears that, after Abdool Hamed, the plaintiff, had purchased the mourosee pottah, he paid rent under it to the farmer of the zemindar whose title is admitted in the appellant's written statement, and a decree was also obtained against him by the farmer for an arrear of rent due under the pottah. It further appears that the plaintiff granted a lease of the property to Mr. Edwin Budd for seven years at a rent payable by certain instalments; that Mr. Budd fell into arrear on account of rent; and that he brought a suit against Budd for the arrears of rent, and recovered a decree against him. The lease to Budd was for seven years from the 13th Cheyt 1248, corresponding with 25th March 1842. Budd having before the expiration of his lease, *viz.*, during the 7th year, failed to pay his rent, the plaintiff granted a lease to Hashem Tandel. The kubooleut signed by Hashem Tandel is dated 9th January 1849, and the recitals contained in it are important. That kubooleut was registered. It was for only one year. But Hashem Tandel held over and continued in possession of the land after the expiration of the year mentioned in the kubooleut, and never restored possession to the plaintiff. The plaintiff sued him for the rent for subsequent years, and recovered decrees against him, and, in execution of a decree obtained in one of those suits, Hashem was arrested, and the money was brought into Court in order to obtain Hashem's release, and was taken out by Abdool Hamed.

It appears to me that there is sufficient evidence of the plaintiff's title as against the appellant who claims under Hashem Tandel to show that Hashem Tandel continued to hold over after expiration of the term mentioned in the kubooleut which he had signed, and that the plaintiff also continued to receive rent from him for the land.

In one of the suits brought, *viz.*, one which was commenced by the plaintiff in September 1861, for rent and ejectment under Act X. of 1859, and in which Mr. Galloway intervened, the Deputy Collector decreed against Hashem Tandel; the decree was reversed by the Judge; and the Judge's decree was afterwards reversed by the High Court without prejudice to Mr. Galloway's rights. Mr. Galloway was ejected under the decree; but upon petition to the High Court he was restored to possession on the 18th July 1864. The decree shows that Hashem Tandel held as tenant to plaintiff, although the Court did not then determine as to Mr. Galloway's title. But it is now proved that Mr. Galloway derived his title from Hashem Tandel and Khodeja Bebee under a mourosee granted by them subsequently to the date of the kubooleut executed by Hashem Tandel and whilst he was holding over; and therefore the kubooleut signed by Hashem Tandel and the decrees for rent of the land before the date of that mourosee pottah were good evidence of the plaintiff's title against Hashem Tandel, and against Mr. Galloway who claimed under Hashem Tandel.

It appears that Mr. Galloway entered into a contract with Hashem Tandel and Khodeja Bebee for a mourosee pottah to be granted by them to him; that Hashem Tandel executed it, but Khodeja Bebee refused to execute; that Mr. Galloway instituted a

suit to compel Khodeja Bebee to execute it; and that, before Mr. Galloway had paid down the money which he was to pay to Khodeja Bebee, the plaintiff intervened in the suit.

It appeared to me, at first, that there might be some grounds for suspecting that the plaintiff originally purchased the property benamee for Hashem Tandel and Khodeja Bebee. But, after considering the whole of the evidence, it appears to me that there is nothing to warrant the conclusion that he did purchase it benamee. The evidence, I think, shows that he purchased it on his own account. That the plaintiff purchased it for Hashem Tandel is inconsistent with all the documents, with the decrees produced and proved in evidence, with the arrest of Hashem Tandel, and the payment of the amount decreed into Court in order to obtain Hashem Tandel's discharge after he had been arrested. All this took place, it should be remarked, before Hashem Tandel ever attempted to sell the property to Mr. Galloway. If there had been any collusion between the plaintiff and Hashem Tandel, the plaintiff would, in all probability, have allowed Mr. Galloway to pay the whole of the purchase-money before he gave notice of his title. But, pending the sale to Mr. Galloway, Hashem Tandel intervened in the suit against Khodeja Bebee, and Mr. Galloway then had notice that the plaintiff claimed this property under a purchase in execution of a decree for rent, and Mr. Galloway paid his money, or at least one-half of it, with full notice that the plaintiff claimed the property under that purchase.

Mr. Davis, who claims through Mr. Galloway under a mortgage from him, is bound in the same manner as Mr. Galloway. Whether Mr. Galloway informed Mr. Davis of the plaintiff's claim or not, is immaterial.

It appears to me, looking at the whole of the evidence in the case, that the plaintiff has made out his title to the property within the boundaries specified with the exception of the property excluded from his claim, and at any rate that he has made out a title as against Hashem Tandel and against Mr. Galloway who derived his title from Hashem Tandel, and also against the heirs of Mr. Galloway and against Mr. Davis who claims under Mr. Galloway.

It is clear that Hashem Tandel, under whom Mr. Galloway claimed, took a lease of the property for one year, and held over and continued to pay rent for that very property for several years afterwards. It is not proved that, when Hashem Tandel and Khodeja Bebee agreed to grant a mourosee pottah to Mr. Galloway, they, or either of them, had any right or title to the property except what Hashem Tandel had under the lease granted by the plaintiff and the tenancy which was created by Hashem Tandel's holding over and the plaintiff's subsequent suits and receipt of rent. That tenancy was determined by the decree in the suit commenced by plaintiff against Hashem Tandel in September 1861.

Mr. Davis not only disclaims the plaintiff's title, but contends that the plaintiff's is barred by limitation.

The next question is, Has the plaintiff brought his action in sufficient time, *i. e.*, within the ordinary period of 12 years allowed by law under Clause 12, Section 1, Act XIV. of 1859?

That Clause is as follows:—

"To suits for the recovery of immoveable property or of any interest in immoveable property to which no other provision of this Act applies, the period of twelve years from the time the cause of action arose."

Clause 7, Section 1, Act XIV. of 1859, mentioned in Mr. Davis's petition of intervention does not apply. There was no sale in this case for arrears of revenue.

It is contended on behalf of the appellant, that Section 5 of the Act applies. That Section is as follows:—

"In suits for the recovery from the purchaser or any person claiming under him of any property purchased *bonâ fide* and for valuable consideration from a trustee, depositary, pawnee, or mortgagee, the cause of action shall be deemed to have arisen at the date of the purchase. Provided that, in the case of a purchase from a depositary, pawnee, or mortgagee, no such suit shall be maintained unless brought within the time limited by Clause 15, Section 1."

Now, Mr. Davis did not purchase from a trustee, depositary, pawnee, or mortgagee. Mr. Galloway, through whom Mr. Davis claims, if he had any title at all, held on his own account. He was not holding as a trustee for any other person, nor as a depositary, pawnee, or mortgagee; nor did Mr. Davis purchase the property for a valuable consideration. Then, did Mr. Galloway purchase from a trustee, depositary,

pawnee, or mortgagee? He purchased from Hashem Tandel and Khodeja Bebee. It was not proved that Hashem Tandel was holding as a trustee for Abdool Hamed, or that Abdool Hamed pawned the property to him. The case, therefore, does not fall within Section 5.

The question, then, is whether the suit is barred by Clause 12, Section 1. Assuming it to be established that the plaintiff had a title, and that he let this property to Hashem Tandel for one year, and that Hashem Tandel continued to hold over after the expiration of his tenancy for an indefinite period, he probably became, what we should call in England, a tenant from year to year liable to be ejected after six months' notice to quit, and not before. Whether Hashem Tandel held as a strict tenant from year to year or not, according to the English Law (the property being in the Mofussil), it is clear that he was a tenant of some kind, and that he continued to be a tenant of some kind, and continued to pay rent.

It is said that the plaintiff was bound to bring his suit within 12 years from the time when Mr. Galloway took possession. But that, I think, is not so. Whatever interest Hashem Tandel had passed to Mr. Galloway, Hashem could not pass a greater interest than he had. The plaintiff's cause of action did not accrue until the tenancy of Hashem Tandel was at an end. The plaintiff could not have turned either Hashem Tandel or Mr. Galloway or any one else out of possession so long as the tenancy of Hashem Tandel continued. If Hashem Tandel had underlet to Mr. Galloway, the plaintiff could not have ejected him so long as Hashem Tandel's tenancy continued. That tenancy was not determined until the decree of the High Court on the 8th February 1864 in the suit commenced in 1861, and the plaintiff's title did not accrue prior to that time. Galloway did not agree to purchase until 1852, and the plaintiff was not barred when he commenced his suit in 1861.

It was urged on behalf of the appellant that, according to the report of the nazir, Mr. Galloway was in possession and the plaintiff was not in possession. But the ryots were the persons in actual possession of the land. Mr. Galloway was entitled to receive the rents from the ryots so long as Hashem Tandel's tenancy continued, and he was in possession of the rents, and he ought to have paid to Hashem Tandel the rent reserved under the mourosee pottah granted to him by Hashem Tandel, and Hashem Tandel ought to have paid his rent to the plaintiff. But Hashem did not pay his rent to the plaintiff as he ought to have done, and the plaintiff was obliged to sue him, and eventually obtained a decree for rent and ejectment against him in a suit in which Mr. Galloway intervened. Hashem Tandel's tenancy was existing in September 1861 when the plaintiff brought a suit against him under Act X. of 1859 for arrears of rent and to cancel his lease, and eject him for non-payment of those arrears. This he was entitled to do under Section 78 of the said Act. He succeeded in the suit, and obtained a decree, which decree was reversed by the Judge; but subsequently the decree was upheld by the High Court, who reversed the decree of the Judge. The plaintiff, when he obtained that decree in February 1864, had a right to turn out Hashem Tandel; but, although Mr. Galloway intervened in the suit, the decree did not authorize the eviction of Mr. Galloway or his ryots. The Court did not enter into any question as to Mr. Galloway's title. All that the Court had to try in that suit was whether Hashem Tandel was the plaintiff's tenant, and whether such arrears of rent were due as authorized the cancelment of his lease. The decree of the High Court of the 8th February 1864 did not authorize the eviction of Mr. Galloway or Mr. Davis. The decree was expressly without prejudice to the title of Mr. Galloway, if any. This suit, therefore, under Section 83, Act X. of 1859, became necessary, and was commenced long within the period of twelve years from the time when the plaintiff's cause of action to eject either Hashem Tandel or Mr. Galloway or Mr. Davis accrued. That right could not have accrued until the tenancy of Hashem Tandel was at an end.

Take the case of a lease for twenty years subject to forfeiture. When the forfeiture is committed, and the landlord elects to put an end to the lease on the ground of forfeiture, the landlord's title to recover possession accrues. He could not, pending the lease, recover possession from the tenant or any one claiming under the tenant, nor even from a trespasser.

So, in the case of a tenancy from year to year, the landlord cannot maintain an action for ejectment either against the tenant or any one claiming under him or against a trespasser, before the tenancy is determin-

ed. He must determine the tenancy before he has a right to possession. If a tenant from year to year of a farm should sell the farm out-and-out to a stranger, the landlord would not be bound to sue, and could not sue, the stranger so long as the tenancy continued.

The plaintiff in this case intervened as soon as he knew that Mr. Galloway was seeking to enforce his claim against Khodeja Bebee. Subsequently, the plaintiff, in consequence of arrears of rent which were due to him from Hashem Tandel, commenced a suit under Act X. of 1859 in a manner which enabled the Court in consequence of those arrears to declare the tenancy at an end. When the plaintiff obtained a decree in that suit, and not before, he became entitled to recover possession. The Court would not turn out a stranger whom they found in possession, nor try the question of his title in that suit. But they simply gave a decree for arrears and for the cancelment of the tenancy. Having, then, got a right against Hashem Tandel, and his tenancy not standing in the way of the plaintiff's right of possession, he sued Mr. Galloway's heirs, and Mr. Davis intervened in the suit. In that suit, to try the plaintiff's right as against Mr. Galloway and Mr. Davis, the plaintiff has now proved that they derive title under Hashem Tandel and Khodeja Bebee, and therefore he has proved that he has as good a right against them as he had against Hashem Tandel and Khodeja Bebee. Whatever was said or done by Hashem Tandel before he sold to Mr. Galloway was evidence against Mr. Galloway and Mr. Davis. In this view, I think, the plaintiff has made out a sufficient title to recover against them, in the absence of their proving a better title. The plaintiff proved a sufficient *primâ-facie* title against Khodeja Bebee by proving that Hashem Tandel held possession as his tenant, and the defendants did not prove that Khodeja Bebee had any title.

For the reasons above given, I am also of opinion that the plaintiff's right to possession did not accrue until February 1864, long within 12 years next before the commencement of this suit in 1865.

Some difficulty occurred to me with regard to the difference between the quantity, 7 beegahs 3 cottahs more or less, sought to be recovered, and the quantity, 9⅓ beegahs, said to be in Mr. Davis's possession. The plaintiff does not say that the whole of the land within the boundaries is that which he seeks to recover, but that he seeks to recover all the land within those boundaries exclusive of certain lands and buildings to which he makes no claim, and that the land claimed is 7 beegahs 3 cottahs more or less.

I think that it is sufficiently proved that the land within the boundaries specified in the plaint, exclusive of the excepted land, belongs to the plaintiff, and that he is entitled to recover possession of it. His claim is 7 beegahs 3 cottahs more or less, and, even if the land claimed should amount to 9⅓ beegahs, that will not deprive the plaintiff of his right to recover it.

It is admitted by Mr. Davis in his petition of intervention that he is in possession of the land sought to be recovered, and it is not shown that he has any land within the boundaries specified in the plaint save that which he obtained from Mr. Galloway, nor that Mr. Galloway had any save what he obtained from Hashem Tandel and Khodeja Bebee.

It is proved by witness No. 4, Sheikh Tazoollah, that the land which Mr. Davis holds is that which was formerly held by Busheer Tandel, afterward by Kinoo, and, subsequently, by Hashem Tandel.

In most of the cases cited by Mr. Cochrane with reference to limitation, the question of tenancy did not arise; and, as to the two cases cited from Moore's Privy Council Reports, they were cases decided under the old Law of Limitation, by which a party was not precluded from proceeding with his suit if he showed good and sufficient reasons for not bringing it within the period of limitation. The present Law of Limitation contains no such provision.

I see no reason to think that the Principal Sudder Ameen has given an erroneous decree, and I am, therefore, of opinion that the decree must be affirmed with the costs of this appeal to be paid by the appellant to the respondent.

Jackson, J.—I agree with my Lord on both points. It appears to me quite clear from the documents that the plaintiff Abdool Hamed did acquire by the sale in the Collectorate the quantity of land within the boundaries specified known as 7⅓ beegahs more or less, and that this land is identical with the land which is occupied by the defendant, and which is in dispute in this suit.

Whether any question may arise between the plaintiff and the zemindar in respect of

the land being in excess of the quantity, 7½ beegahs, is another matter. But apparently no such question can arise. The land seems to have been taken with the definition of "7½ beegahs more or less;" and it was stipulated in the lease to Kinoo that neither party was to raise any objection to the quantity being more or less.

I think also, as pointed out by the Chief Justice, that there can be no bar from limitation in this case, as there was no adverse holding by Mr. Galloway so long as his lessor paid rent to the plaintiff, and that the plaintiff's cause of action accrued when he determined the tenancy of Hashem, and thus acquired the right to re-enter on the land.

There is only one point, perhaps, which remains to be noticed, and that is the claim set up by the plaintiff when he intervened in the Act IV. proceedings. It appears to me that that has really no bearing on the present case. Those proceedings related to the whole land (more than 200 beegahs) known as Tindel Bagan; and, if the plaintiff's agent in that case, with or without authority, set up on his behalf a claim to land to which he was not entitled, he deserved to be defeated and to be compelled to pay costs in those proceedings; but that would be no reason why he should be debarred from suing now in respect of land to which he is entitled.

I, therefore, quite concur in affirming the decision of the Lower Court with costs.

The 19th June 1867.

Present:

The Hon'ble G. Loch and H. V. Bayley, *Judges.*

Death of occupant ryot—Right of Zemindar.

Case No. 3147 of 1866.

Special Appeal from a decision passed by the Deputy Commissioner of Durung, dated the 15th September 1866, affirming a decision passed by the Moonsiff of that District, dated the 25th June 1866.

Jatee Ram Surmah and others (Plaintiffs), *Appellants,*

versus

Mungloo Surmah and others (Defendants), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellants.

Baboo Kalee Mohun Doss for Respondents.

A zemindar, on the death of an occupant ryot, is entitled to let his land to whomever he pleases. A distant relation of the deceased ryot is not entitled to succeed by inheritance and to set aside the arrangement made by the zemindar letting the lands to another tenant.

Loch, J.—It is admitted by the respondent's vakeel that the ruling of the first Court on the point of Hindoo Law is erroneous; but it is contended that the point does not arise in this case, and that the Lower Appellate Court's decision does not rest upon any question of Hindoo Law, but on the fact that the land in question, being part of a debuttur property held by Kenaram as a tenant, has, on the death of his widow, been let by the zemindar to another tenant, and that the petitioner, as next legal heir of Kenaram, is not entitled to succeed to possession.

We agree with the Lower Appellate Court that the zemindar, on the death of the occupant ryot, was entitled to let his lands to whom he pleased, and that the petitioner, a distant relation of the deceased Kenaram, is not entitled to succeed by inheritance and to set aside the arrangements made by the zemindar, who has given a pottah to Mungloo, the husband of Kenaram's daughter's daughter.

We dismiss the appeal with costs.

The 19th June 1867.

Present:

The Hon'ble G. Loch and H. V. Bayley, *Judges.*

Sale of tenure for arrears of rent (Effect of)—Co-sharers (Liability of).

Case No. 3108 of 1866.

Special Appeal from a decision passed by Moulvie Anwar Ali Khan, Principal Sudder Ameen of Tipperah, dated the 15th September 1866, affirming a decision passed by Baboo Woomachurn Roy, Moonsiff of that District, dated the 30th December 1865.

Alimooddeen (Plaintiff), *Appellant,*

versus

Sabir Khan and others (Defendants), *Respondents.*

Baboo Sreenath Banerjee for Appellant.

Baboos Greesh Chunder Ghose and *Romesh Chunder Mitter* for Respondents.

Where a decree was for arrears of rent due upon a tenure, it was held that, though the sale-proceedings specified that the rights and interests of certain parties were sold, yet the tenure itself was sold, and all the co-sharers were jointly liable.

Loch, J.—The special appellant's allegations in this case are that he purchased certain lands from Dhuneeram, one of the proprietors of the talook No. 19; that he made an arrangement with Sabir Khan, the principal defendant, by which it was agreed that the latter should receive 5 kanees 8¾ gundahs of this land from which he was to pay the zemindar's rent, and that plaintiff was to retain the remaining 4 kanees 5 gundahs, and be free from all responsibility for the rent; that the defendant, in violation of his engagement, brought a suit for rent against the plaintiff, and obtained a decree, and, such decree being injurious to the plaintiff's right, he has brought the present suit to determine his right.

The defence set up was a denial of plaintiff's right altogether, and it was stated that the talook in question had been sold in execution of a decree for arrears of rent; that the plaintiff's vendor, one of the co-sharers, had, at that time, lost any right and interest he might have had in the property, for the tenure was sold for the arrears due upon it, and therefore the plaintiff's purchase from Dhuneeram some years after that sale was of no effect as Dhuneeram had no rights to convey.

The case went to trial, not on the allegations made in the plaint, but on issues arising out of the defendant's pleadings which were *not* objected to by the plaintiff. This issue related to the sale of the tenure for arrears of rent, and the effect of that sale. It was contended for the plaintiff that only the rights and interests of the defaulting tenants named in the decree were sold; that Dhuneeram's right as a co-sharer is not denied, and that his rights and interests were not sold, and therefore he was in a position at a subsequent date to transfer that right to the plaintiff.

The Lower Courts dismissed the suit, holding that the tenure had been sold for the arrears which had accrued upon it, and that by that sale the rights of Dhuneeram were extinguished.

In special appeal, the same argument is raised by the pleader for the appellant, and he urges that the precedent of 12th May 1857, quoted by the Principal Sudder Ameen, is not applicable, inasmuch as the zemindar was cognizant of the fact that Dhuneeram was a co-sharer in the tenure, as is evident from the jummabundee of 1837 and a proceeding of the Collector of 29th July 1843 in which the zemindar sued and obtained a decree for rent from Dhuneeram, from which it may be inferred that Dhuneeram had paid his quota of the rent, and that the zemindar in consequence had excluded him from the number of the defendants whom he sued for rent, and sold the right of the defaulting tenants. Further, it is urged that the sale-proceedings show that only the rights and interests of the defaulting tenants were sold, and that nothing more could be sold, and in support of this averment the decision of the Full Bench of 13th March 1867 in 7 Weekly Reporter, page 260, Civil Rulings, is quoted.

We find, as pointed out by the pleader for the respondent, that the plaintiff, special appellant, abandoned his own case in the first Court; and neither in his appeal below, nor in special appeal, did he complain that his case had not been gone into. It is therefore too late to take it up at this time. The suit has been disposed of on one point, *viz.*, the effect of the sale for arrears of rent under a decree held by the zemindar, and the Lower Courts have held, and properly so, we think, that the tenure was sold for the arrears due upon it. It is true that the zemindar did recognize Dhuneeram as a co-sharer, and, as such, obtained a decree against him in 1843, and that the decree, under which the tenure was sold, runs, not against Dhuneeram, but against the registered tenants in the zemindar's sherishta; but the suit appears to have been brought in the usual form for arrears on the tenure for which all the co-sharers were jointly liable, and of the existence of which arrears all must have been cognizant. It is impossible, without some proof, to admit the plea urged by the special appellant's pleader that the zemindar purposely excluded Dhuneeram and others from his claim. Had he done so, he would, we think, have limited his claim to individuals, and not brought his action in the usual form against the tenants registered in his sherishta. Nor do we see that Dhuneeram was in any way prejudiced by this mode of action. He was not precluded from defending the suit, and it is not pretended that he was ignorant of its institution. The decree was for arrears due upon the tenure for which all the co-sharers were jointly liable; and,

though the sale-proceedings do specify that the rights and interests of certain parties are sold, their names are evidently made use of, because they were the parties registered in the zemindar's books. The decision of the Full Bench quoted by the special appellant has nothing to do with this case. We agree with the Lower Court that, notwithstanding the announcement made in the sale-proceedings of rights and interests, the tenure itself was sold, and therefore the rights and interests of the plaintiff's vendor, whatever they were, ceased with that sale. Under this view of the case, we dismiss the special appeal with costs.

The 19th June 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Sale Law—Rights of auction-purchasers.

Case No. 346 of 1867.

Special Appeal from the decision passed by the Principal Sudder Ameen of Fureedpore, in Dacca, dated the 18th December 1866, affirming a decision passed by the Moonsiff of that District, dated the 28th December 1865.

Goluck Monee Dossee (Defendant), *Appellant,*

versus

Huro Chunder Ghose (Plaintiff), *Respondent.*

Baboo Hem Chunder Banerjee for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

The principle under which purchasers of estates at revenue-sales acquire such estates in the condition they were in at the Permanent Settlement is equally recognized by the last Sale Law (Act XI. of 1859) as by the laws previous to it, and applies as much to actual encroachments on the talook or estate by neighbours as to incumbrances or under-tenures created on it by the old proprietor or by his laches.

Seton-Karr, J.—In this case the plaintiff, who was auction-purchaser at a revenue-sale for a talook known as No. 4449, sued to obtain possession of his talook, and to cancel the effect of a decision under Act X. of 1859 in a case in which he had intervened unsuccessfully.

The Moonsiff decreed the case, and only one defendant out of several appealed to the Principal Sudder Ameen in regard to a portion of the land claimed for the purchaser of the talook, but pleaded by the appellant to be a part of Chupkandee, or of her shikmee talook called Ram Huree Muzoomdar, and as having been held by her under that title for a number of years.

The Principal Sudder Ameen at first decreed the appeal; but, on the plaintiff's producing additional evidence in the shape of papers from the Collectorate, the Court reversed its own judgment, and dismissed the appeal, holding that the plaintiff, as an auction-purchaser at a revenue-sale, was entitled to recover the estate free of all incumbrances, and that the additional papers proved the land claimed to have formed a part of talook No. 4449 at the perpetual settlement.

The appellant takes several grounds of appeal in her written memorandum; but they may all be compressed into this, *viz.*, that there is no legal evidence to show that the lands claimed in Chupkandee belonged to talook No. 4449, and no proof that they were ever held as part of that talook.

The cases respecting the rights of auction-purchasers have been referred to by the respondent in support of the decree of the Lower Court, in order to show how the highest Courts of this country have always treated auction-purchasers and their rights.

They are as follows: Sudder Dewanny Adawlut for 1851, pages 116, 625, 731, and for 1852, page 824; and High Court No. 989 of 1862, from Dacca, Punchanun Gooho *versus* Radha Kant Surmah, decided by Justices Kemp and Levinge on the 10th of March 1863, but not printed.

Several of the cases relate to the avoidance of incumbrances created on an estate, and to the sale-laws previous to Act XI. of 1859. But still there is no doubt that the principle under which purchasers of estates at revenue-sales acquire such estates in the condition they were in at the perpetual settlement is equally recognized by the last sale-law, and that it applies as much to actual encroachments on the talook or estate by neighbours as to incumbrances or under-tenures created on it by the old proprietor, or by his laches.

Applying this rule, which has been regularly recognized by the Courts, to the case before us, we find that the evidence on which the Principal Sudder Ameen has given the lands claimed by the plaintiff to him is that of quinquennial register-papers of the year 1202, the Court holding that these papers clearly show that the lands now claimed by

the defendant as part of a shikmee talook in Chupkandee were really part of the plaintiff's separate talook at the perpetual settlement.

We cannot say that this evidence is not legal evidence, or that there is anything illegal in the deduction which the Principal Sudder Ameen makes from it. The question of long possession by the defendant against an auction-purchaser, not bound by the laches of his predecessor, is wholly immaterial.

The appeal must be dismissed with costs.

Macpherson, J.—I concur generally in this judgment, and think the appeal should be dismissed with costs.

The 19th June 1867.

Present:

The Hon'ble G. Loch and A. G. Macpherson, *Judges.*

Limitation — Execution — Admission — Will — Executors.

Cases Nos. 52 and 53 of 1867.

Miscellaneous Appeals from an order passed by the Judge of Backergunge, dated the 17th December 1866, reversing an order passed by the Principal Sudder Ameen of that District, dated the 6th August 1866.

Chunder Kant Mitter (Objector), *Appellant,*

versus

Ramnarain Dey Sircar (Decree-holder) and others (Judgment-debtors), *Respondents.*

Baboo Hem Chunder Banerjee for Appellant.

Baboos Romesh Chunder Mitter and *Otool Chunder Mookerjee* for Respondents.

Where judgment-debtors appear and admit the debt and promise to pay within a given time, execution may proceed, though the period of 3 years from the passing of Act XIV. of 1859 has expired.

Where property is devised by will to executors, any admission by parties other than the executors to the will would not bind the estate of the deceased, and the admission of one executor would not bind another, particularly if not made in the character of executor.

Loch, J.—In this case the judgment-debtor was one Nubo Kishore. He died leaving a son Ishur Chunder by his first wife, and a widow Ram Sona, the mother of two minor sons Chunder Kant and Shurut Chunder. The decree held by the special appellant was passed on 20th May 1857. Execution was taken out in 1859 when property belonging to the judgment-debtor was attached, and on 6th June 1859 the case was struck off. No further steps in execution appear to have been taken till May 1863 when application to substitute the heirs of the judgment-debtor, and to serve notice on them, was made. Notice was served, and Ishur Chunder and Ram Sona, as mother and guardian of the minor sons of the debtor, appeared and filed a petition admitting the debt, and promising to pay the amount within a certain time, and on this the case was struck off. Fresh application is now made for execution, but the Lower Courts have held that it is barred by limitation.

It has frequently been held (*see* the cases collected in Mr. Thomson's Law of Limitation, pp. 149, 150) that, where the judgment-debtors appear and admit the debt, and promise to pay within a given time, execution may proceed, though the period of three years from the passing of Act XIV. of 1859 has expired. In the present case, the respondents raise two objections: *first*, that Ram Sona was no party to the petition admitting the debt, and that her eldest son Chunder Kant had then attained majority; and, *secondly*, that her husband Nubo Kishen had disposed of his property by will, and therefore the property could not be sold for the debt.

With regard to the *first* objection, we think that no question as to the fact of Ram Sona's having petitioned can now be raised. It was never disputed below. Both Courts state it as a fact that she did petition, and no objection to this finding can be raised in special appeal. On the *second* objection taken before us, we think that, if the decree-holder were in time, the fact that a will had been executed would not protect the property from sale; but, in this case, the decree-holder is not in time, and he rests entirely upon the effect of the admission made by Ishur Chunder and Ram Sona. As, however, the property has been devised by will to executors, any admission by parties other than the executors to the will would not bind the estate of the deceased, and the admission of one executor would not, we think, bind another, at any rate, if the admission was not made in the character of executor, which Ram Sona's admission was not. Under this view of the case, we reverse the order of the Judge, and restore that of the Principal Sudder Ameen, and decree this appeal with costs.

The 19th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Execution—Section 170, Act VIII. of 1859—Attendance of party as witness.

Case No. 127 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 12th December 1866, affirming an order passed by the Sudder Ameen of that District, dated the 30th June 1866.

Syud Deshan Hossein (Decree-holder), *Appellant,*

versus

Mussamut Khodeja and others (Judgment-debtors), *Respondents.*

Baboo Roopnath Banerjee for Appellant.

Mr. R. E. Twidale for Respondents.

A Court may avail itself in an execution-case of the power given by Section 170, Act VIII. of 1859, to summon a party to give evidence, and, on his failing to comply with that order, to pass judgment against him.

Jackson, J.—It appears to me that, in this case, there is no ground of special appeal whatever. Section 170 of the Civil Procedure Code is one primarily applicable to regular suits, and in such suits, when the person, who is a party, is summoned to give evidence without lawful excuse, fails to comply with that order, it is competent to pass judgment against him. Then, by Section 38 of Act XXIII. of 1861, the procedure prescribed by Act VIII. of 1859 (Section 170 being part of it) is to be followed, as far as it can be, in all Miscellaneous cases and proceedings. Therefore, the power given by Section 170 was one which the Court might avail itself of in an execution-case. The matter itself under investigation was, in reality, part of the matter in contest in the suit which the Court had found it more convenient to reserve for investigation after decree. It was, therefore, quite reasonable and lawful to summon the plaintiff, and to require him to give evidence. That being so, the Court would have been at liberty, without reference to the other circumstances in the case, to have disallowed this part of the claim upon plaintiff refusing to appear. The Court has not done merely that; it has gone into the evidence upon the whole of the case, and has disallowed the claim. The Judge in like manner has looked into the merits of the case; and, being of opinion that it was a case in which the evidence of plaintiff was highly necessary, thought that, in the absence of his giving that evidence, the presumption was against him, and therefore that his claim to wassilat should be disallowed. This is wholly a question of fact, and one with which we are not competent to deal in special appeal. I think, therefore, the appeal must be dismissed with costs.

Hobhouse, J.—I concur.

The 20th June 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, *Judge.*

Declaratory decrees — Judgments in rem — Adoption — Thakbust Maps — Misjoinder.

Case No. 424 of 1866.

Regular Appeal from a decision passed by Moulvie Imdad Ali Khan, Principal Sudder Ameen of Tirhoot, dated the 15th September 1866.

Baboo Motee Lal and others (Plaintiffs), *Appellants,*

versus

Ranee, the wife of Maharaja Bhoop Singh Bahadoor, and others (Defendants), *Respondents.*

Baboos Dwarkanath Mitter and *Mohesh Chunder Chowdhry* for Appellants.

Baboos Onookool Chunder Mookerjee and *Bama Churn Banerjee* and *Moonshee Ameer Ali* for Respondents.

Suit laid at Rupees 9,508-4.

It is discretionary with the Courts to give a declaratory decree or not.

The Full Bench decision (7 W. R. 383) merely laid down that a decision in a suit *inter alios* relating to a question of adoption was not a judgment *in rem*, and was not conclusive; and that a judgment or order in a suit *inter partes* in which it had been found that the plaintiff had been adopted could not be used at all as evidence of the fact of adoption in a suit *inter alios*. It only spoke of decrees or judgments *inter alios*, and never intended to speak of the admissibility or inadmissibility of thakbust maps or other similar surveys, as to whether they would or would not be evidence against persons who were not parties to them.

Courts should reject plaints against several defendants for causes of action which have accrued against each of them separately, and in respect of which they are not jointly concerned.

Peacock, C. J.—THE suit was brought for confirmation of possession by a declaration of right and determination of boundaries in respect of certain land situate in Mouzah Rampore Shamchand Shaestabad, by setting aside a new thakbust map prepared by the Deputy Collector of Patna and Tirhoot, a proceeding of the said officer dated 16th January 1865, an order of the Collector dated 17th June 1865, confirming the said proceeding, and an order of the Revenue Commissioner, dated 29th June 1865, rejecting the appeal.

In fact, this is a suit not to obtain relief, because the plaintiff is in possession of the lands in respect of which the suit is brought, but it is in substance brought under Section 15, Act VIII. of 1859, for a decree declaring that the thakbust map is wrong, and that the subsequent proceedings are erroneous.

As to the thakbust map, it appears that the plaintiff has never appeared before the Deputy Collector, or pointed out to him that the boundary-line in the thakbust map is erroneous so far as the plaintiff's estate is concerned. But it appears that the proprietor of another estate Sydabad did prefer a claim before the Deputy Collector with regard to the boundary-line so far as it affected that estate, and that the Deputy Collector upheld the thakbust map so far as it related to that part of the boundary-line.

The plaintiff, then, apparently appealed against that decision of the Collector. The plaintiff had no right to appeal against that decision, because it was made in a proceeding to which he was not a party; and the question which arose in that case might have been a very different one from that which would have arisen had the plaintiff made his representation to the Deputy Collector. But the Collector said that he, the plaintiff, was too late. It appears to us that the Collector was quite right in rejecting his application if made too late, and would also have been right in rejecting it, even if the plaintiff had been in time, because it was an application which he had no right to make, he being no party to the proceeding.

As to the order of the Revenue Commissioner rejecting the appeal, the plaintiff had no right to set aside the order of the Deputy Collector, and consequently no right to appeal against the order of the Collector.

He had no right, therefore, in this suit to set aside the order of the Deputy Collector of the 16th January 1865, or the order of the Collector in reference thereto, or the order of the Revenue Commissioner rejecting the appeal.

The question, then, stands simply with reference to the thakbust map—is plaintiff entitled to come here and ask for a declaratory decree that the map and the boundary-line therein set forth are wrong?

Section 15, Act VIII. of 1859, says: "No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief."

It has been held in England under similar words used in the 15 and 16 Vic., c. 86, that it is discretionary in the Courts whether they will give a declaratory decree or not. It was, as so, decided in the case of Fletcher *versus* Rogers, 10 Hare's Reports, Appendix; also in Garlick *versus* Lawson, ib. 14.

This Court also has decided that it is discretionary with them to make declaratory decrees or not, and refused to do so in a case in which a reversionary heir asked for a decree during the life of the widow. The Court held that the party making the application might never be heir at all, inasmuch as he might die during the life of the widow.

These cases show that it is discretionary with the Court whether they will make a discretionary decree or not; and the only remaining question in this case is whether the Court ought to make a declaratory decree that the line laid down in the thakbust map is wrong.

It appears to the Court that this is not a case in which justice requires that such a decree should be made. If the plaintiff thought that the boundary-line had been wrongly described in the thakbust map, he should have gone before the Deputy Collector, and pointed to him the grounds upon which he contended that that line had been erroneously laid down. It does not appear that the parties interested in the lands on the other side of the boundary-line disputed that the line is erroneously laid down. Whether they do so or not, we do not think that the plaintiff ought to have a declaratory

decree when he neglected to appear before the proper authorities, and make his complaint in proper time.

It is said by the plaintiff that this thakbust map may be used some day or other against him as evidence that the estate on the southern side of it comes up to that line. We have reason to know that it has been considered that this Court, in the Full Bench decision* which they lately gave respecting a judgment *in rem*, substantially declared that thakbust maps could not be used for any purpose. Speaking for myself and my learned colleague beside me, I have no hesitation in saying that it was not the intention of that decision to lay down any rule of the kind. All that we did was to lay down that a decision in a suit *inter alios* relating to a question of adoption was not a judgment *in rem*, and that it was not conclusive; and we also answered another question put to us by the Court which referred the case, and said that a judgment or order in a suit *inter partes*, in which it had been found that the plaintiff had been adopted, could not be used at all as evidence of the fact of adoption in a suit *inter alios*. What we spoke of were decrees or judgments *inter alios*, and we never intended to speak of the admissibility or inadmissibility of thakbust maps or other similar surveys, as to whether they would or would not be evidence against persons who were not parties to them.

It is not necessary now to decide whether this thakbust map will or will not be admissible in evidence in any future proceeding upon a question of boundary to which the plaintiff may be a party. When such proceeding shall arise, if the map should be admissible, the plaintiff may show, if he can, that it is wrong. But the plaintiff has no right to come now to clear away what he calls a cloud upon his title, inasmuch as he did not think fit to attend before the Deputy Collector when he was making that map, or, after he had made it, to point out that he was in error in laying down the line as he did. It was his own fault if there is this cloud in consequence of the boundary-lines being so laid down. But he is not entitled to put the parties to the expense of a suit in order to obtain a declaratory decree respecting a matter which, if wrong, might have been set right by a proceeding before the Revenue Authorities.

Under these circumstances, without saying that we agree in the reasons of the Principal Sudder Ameen, we think that he was right in rejecting the plaint.

Further, the Principal Sudder Ameen says that this suit relates to the boundary-line of three different estates on the southern side of it. The plaintiff joined the proprietors of these three different estates in the suit. But it was not shown that the case was the same as regards the estates of the three defendants. It by no means follows that, because it may be wrong as to one, it is also wrong as to the others. Although the plaintiff is interested in showing that the whole line is wrong, the defendants are interested only so far as their respective lands are concerned, and each of the defendants may have a separate case, and different witnesses to prove that the line is laid down correctly so far as his estate is concerned. The Principal Sudder Ameen says that the plaintiffs were wrong in joining these several defendants in one suit, and on that ground he substantially rejected the plaint. In a recent Full Bench decision* the Court pointed out the inconvenience of joining in one case a number of defendants whose cases might be wholly distinct from each other. If the plaintiff is correct in joining these three defendants in one suit, he might have found 20 different defendants if there had been as many separately interested in maintaining the correctness of the thakbust map in as many different parts of it of which the plaintiff had an interest to dispute the correctness. In that case, a suit was brought against several defendants, each of whom claimed under a separate sale made by the father of a joint Hindoo family under the Mitakshara. The Court, in delivering judgment, made the following remarks: "It is very inconvenient that a suit of this "nature should be brought against a number "of defendants whose interests are altogether "distinct from each other. Section 8, Act "VIII. of 1859, allows causes of action to be "joined in the same suit by and against the "same parties. But there is no Clause "which authorizes different causes of action "to be joined in one suit against different "parties, where each of those parties has a "distinct and separate interest. In this "case, the validity of the different deeds "depends each upon its own merits. It "would be just as reasonable to sue four

* See Vol. 7, p. 388.

* *Ante*, p. 15.

"different defendants on bonds given by "each of them or even to join them with a "few other defendants for trespassing on the "plaintiff's lands, as it was to join all the "defendants in the present suit. Such a "joinder in one suit of distinct causes of "action against different defendants, each of "whom is unconnected with the cause of "action against the other, complicates the "case before the Judge, and renders it "exceedingly difficult for him in dealing "with the case of each defendant to exclude "from his consideration those portions of "the evidence which may not be admissible "against him, though admissible against one "or more of the others. Moreover, it is "vexatious and harassing to the different "defendants. Such a procedure renders it "almost compulsory on all the defendants "to be present, either in person, or by their "pleaders, whilst the case is going on "against the others in respect of matters in "which they are not interested; moreover, "it is harassing and inconvenient as regards "the attendance of the witnesses of the "several defendants, as it renders it "necessary for the witnesses of each to be "present and to be detained whilst the case "of the others is being heard and determined. "Again, in appeal, each case must be argued "as a separate and distinct case.

"I think, therefore, that the Judges below "ought to be more careful, and to reject "plaints when brought against several defend-"ants for causes of action which have "occurred against each of them separately, "and in respect of which they are not jointly "concerned."

And then, again, at the end of the decision, the Court pointed out the inconvenience which arose in that particular case, inasmuch as out of one suit there had arisen six or eight appeals, each depending upon a different state of facts which the Court was compelled to hear separately, and in which it became necessary to give separate judgments. The Court observed: "The necessity of "separating all these different cases in deli-"vering judgment in appeal shows the "difficulty and annoyance to which defend-"ants must be put by being joined in one "action in respect of different causes of "action to set aside various deeds executed "under different circumstances, and in "respect of which they have no common "interest."

In the present case, the several defendants had no common interest in the land to the south of the boundary-line which the plaintiff disputed, and it by no means followed that, because the line might have gone too much to the north on that part where the plaintiff's estate abutted upon the estate of one of the defendants to the south, it was also too much to the north on those parts where the plaintiff's estate abutted upon those of the other defendants. I do not mean to say that it is an inflexible rule that all the defendants must have a joint interest in all the matters of the suit; but in this case, as well as in the case cited, the causes of action against the several defendants were wholly distinct and unconnected with each other. The Principal Sudder Ameen was acting quite in accordance with the principle laid down in the Full Bench case, and was right in rejecting the plaint. His decree will be affirmed except as to the award of costs. The appellant will pay the costs of this appeal to the owners of Mulikpore according to the valuation of that estate in the plaint, and to the owners of Mohunpore and Hybutpore, who appear by the same pleader, according to the joint valuation of those two estates as given in the plaint.

The decree of the Lower Court will be amended by awarding costs in that Court to the defendants to be assessed according to the same mentioned principle and valuation.

The 20th June 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, *Judge.*

Mortgage by wives—Estoppel—Execution.

Case No. 354 of 1866.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 31st July 1866.

Bancepershad and others (Defendants), *Appellants,*

versus

Baboo Maun Singh (Plaintiff), *Respondent.*

Baboos Unnoda Pershad Banerjee and *Mohesh Chunder Chowdhry* for Appellants.

Mr. R. T. Allan and *Baboos Onookool Chunder Mookerjee* and *Bamachurn Banerjee* for Respondent.

R and *G* allowed their wives to appear as owners of a certain property; and, the wives having mortgaged it to the plaintiff, the husbands subsequently ratified what they had done, and undertook the responsibility as securities for the mortgage-debt. HELD that, as *R* and *G*

could not succeed if they brought a suit to recover the property on the ground that the wives had no authority to pledge it, so neither could the defendant, who claimed under an attachment against them, attach the property, nor had the auction-purchaser any title as against the plaintiff.

Peacock, C.J.—THIS is a very clear case. It is not disputed that the property really belonged to Reetbhunjun and Goomanbhunjun at the time when the zur-i-peshgee lease of 21st April 1864 was executed. But those gentlemen allowed their wives, Bhugwan Kooer and Asman Kooer, to appear as the owners; and they, on the 21st April 1864, as being the owners of this property which really belonged to their husbands, executed a zur-i-peshgee lease to the plaintiff. That zur-i-peshgee lease was executed prior to the execution in this case.

On the 22nd April, the day after the zur-i-peshgee had been executed, Goomanbhunjun for himself and as mooktear of Reetbhunjun, he having authority by a mooktearnamah which was proved, executed a deed by which the two brothers guaranteed the debt which had been contracted by the ladies upon the security of the estate; and in that deed they stated that the ladies had, by zur-i-peshgee, leased *their* estates. The husbands allowed the wives to appear as owners of the property; and the wives having mortgaged it to the plaintiff, the husbands subsequently ratified what they had done, and undertook the responsibility as securities for the mortgage-debt.

It is clear, then, that the husbands allowed the plaintiff to deal with the wives as if they were the owners, and that they never brought it to the notice of the plaintiff before the execution was executed that their wives were not the owners. If Reetbhunjun and Goomanbhunjun had brought a suit to recover the property on the ground that the wives had no authority to pledge it, it is quite clear that they could not have succeeded. Their own acts would have estopped them from recovering the property. Then the defendant, who claims under an execution against them subsequent to the zur-i-peshgee, is only in the same position as Reetbhunjun and Goomanbhunjun would have been. They could not have sued to set aside the zur-i-peshgee lease, and to recover the property.

It appears to me, therefore, that the Principal Sudder Ameen was right in holding that the execution-creditor was not entitled to attach the property, and the auction-purchaser has no title as against the plaintiff.

The case has been brought as if it were one of fraudulent conveyance. But it is very different. If the plaintiff had lent money to Reetbhunjun and Goomanbhunjun *bonâ fide* on the security of a zur-i-peshgee executed by them, the execution-creditor could not have attached the property. Reetbhunjun and Goomanbhunjun did substantially have the full benefit of the advance made by the plaintiff, for the money advanced was handed over by the wives to Reetbhunjun for the purpose of paying the Government revenue. The husbands, therefore, have had the benefit of the money advanced by the plaintiff, and could not sue to set aside the deed. The execution-creditor or the purchaser under the execution is not in a better position. The plaintiff advanced money in good faith. If the plaintiff had been in collusion with Reetbhunjun and Goomanbhunjun, and the zur-i-peshgee had been a mere colorable transaction to protect their property from their creditors, the case would have been different.

The decision of the Lower Court is affirmed with costs to be paid by the appellant.

The 20th June 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Sale Law—Power of purchaser to annul incumbrances—Jurisdiction—Estoppel—Possession—Title.

Case No. 443 of 1866.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Moorshedabad, dated the 25th of August 1866.

Kali Dass Ghose, purchaser of the rights of Pran Koomari Bibi (Defendant), *Appellant,*

versus

Chandra Mohini Dasi, mother and guardian of Lullit Sing (Plaintiff), *Respondent.*

Mr. R. V. Doyne and *Baboo Gopal Lall Mitter* for Appellant.

Baboos Anodapershad Banerjee and *Dwarkanath Mitter* for Respondent.

The power of a purchaser at a revenue-sale to annul all incumbrances is limited to purchasers of entire estates.

The decision of a Collector on a question of possession, and of the right to receive the rent, does not bar an action in the Civil Courts to try the title of the parties.

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Seton-Karr, J.—THE plaintiff sued, stating that her father-in-law Gour Lall, the grandfather of the minor, had acquired a putnee of Kismut Situlpara comprised in Turruf Maniadehee, and recorded in the rent-roll of the district as No. 383; and also of Kismut Situlpara recorded as No. 1008; that the putnee was granted originally on the 15th of Bhadro 1253, and was confirmed afterwards by two separate deeds in Pous 1258; that the defendant Pran Koomari purchased at a sale for arrears of revenue 8 annas of the Turruf, within which the putnee was situated, and had dispossessed the plaintiff who accordingly sued before the Collector; that the Collector dismissed the suit as untenable; and that she accordingly brought a civil suit for restoration to her rights on behalf of her minor son.

The defendant pleaded that the matter had been settled by the decision of the Collector, and could not be re-opened; that, as the estate had been purchased at a sale for arrears of revenue while it was actually under partition, the purchaser had a right under Act XI. of 1859, to avoid and annul all incumbrances; that the alleged putnee was a collusive transaction; and that the plaintiff had never been dispossessed.

The Principal Sudder Ameen drew up several issues, and, getting over the issues of law, decided, on the merits, that the putnee had been really granted; that the putneedar had been in possession, and had been dispossessed; and that the plaintiff was entitled to a modified decree.

In appeal three points are taken before us:—

1. The defendant, as purchaser at a sale for arrears of revenue, has a right to avoid all incumbrances on the estate purchased by him.

2. The decision of the Collector bars the action of the Civil Court.

3. The putnee is fraudulent and collusive, and the putneedar was never in possession.

The last point opens up the whole merits of the case.

We shall consider the two points of law first.

As regards the power of a purchaser at a revenue-sale to annul all incumbrances, the following laws have been quoted: Act XI. of 1859, Sections 13 and 14, and Sections 53 and 54, and Section 37; Regulation XIX. of 1814, Section 33.

The pleader for the appellant, Babo Gopal Lall Mitter, relies mainly on Sections 53 and 54 of the Sale Law of 1859. The first Section is as follows: "Excepting sharers "in estates under butwara who may have "saved their shares from sale under Sections "33 and 34 of Regulation XIX. of 1814, "and sharers with whom the Collector, under "Sections 13 and 14, may have opened "separate accounts, any recorded or unre- "corded proprietor or co-partner, who may "have purchased the estate of which he is "the proprietor or co-partner, or who "by re-purchase or otherwise may recover "possession of the said estate after it has "been sold for arrears under this Act, and "likewise any purchaser of an estate sold "for arrears or demands other than those "accruing on itself, shall, by such purchase, "acquire the estate subject to all its incum- "brances existing at the time of sale, and "shall not acquire any rights in respect to "under-tenants or ryots which were not "possessed by the previous proprietor at "the time of the sale of the said estate;" and the next Section says that, when shares are sold under Section 13 or 14, the purchaser shall take the same *subject to all incumbrances.*

Section 13, to which reference is made in Section 53, rules that, when a Collector shall have ordered a separate account to be kept of the shares, only that share shall be first put up to sale from which, according to the separate accounts, an arrear of revenue may be due. And Section 14 prescribes that the entire estate may be sold under certain conditions, *viz.*, if the highest offer shall not equal the amount of the arrear due.

On the other hand, the respondent lays stress on the words of Section 37, which says that the purchaser of an "entire estate" shall acquire the same free of all incumbrances with certain specified and well-known exceptions. It is contended that the defendant purchased only an eight-anna share of Turruf Maniadehee, the sudder jumma of which share was Rs. 6,458-2-1½, being the half of Rs. 12,916-4-3 as appears by the sale-certificate of the 30th of May 1863.

We think that there is weight in the respondent's contention that it is only the purchaser of an "entire estate" who acquires the same free from all the incumbrances except those specially reserved by Section 37. We think that the argument, that the mehal of which the butwara is

actually going on should be treated as a mehal of which the butwara is completed, ought not to prevail. We do not think that the defendant can claim the position of those persons contemplated in Sections 53 and 54, or that he has a right to annul existing incumbrances.

This view is further strengthened by a reference to Section 33 of Regulation XIX. of 1814, which lays down that, when a butwara has actually commenced, and the estate falls in balance, only the portions of the defaulting shareholders shall be sold, and not those of the shareholders who have paid their balances, and that the purchaser of a share under such circumstances shall acquire all the *rights* of the defaulting proprietors.

The right of such a defaulting proprietor could not be that of annulling incumbrances which he himself or his predecessor had made.

Altogether, as we find the power to annul and avoid incumbrances limited to purchasers of entire estates, and as we cannot think that the defendant has purchased an entire and separate estate, we feel bound to decide this issue against the appellant.

We now come to the decision of the Deputy Collector, dated the 27th of August 1864.

The plaintiff in that case, Chandra Mohini, sued the defendant Pran Koomari as having dispossessed her from her putnee, and the Deputy Collector, after recording the issues, overruled a plea of limitation, as he found that the suit had been instituted within one year from the time that possession had been given to the defendant by planting a bamboo on the spot; but the Deputy Collector further said that, "when "the defendant's possession originates "by order of the Collector, then it "cannot be presumed that the plaintiff "is *unlawfully* dispossessed; consequently "the plaintiff can derive no benefit from "Clause 6, Section 23 of Act X., which was "passed to give possession to those who "are unlawfully dispossessed from their "tenure."

The Deputy Collector then dismissed the suit, and the plaintiff never appealed, but brought the suit now before us.

The Deputy Collector's meaning is not very clear; but we are inclined to think that he intended to decline jurisdiction, and that he looked on the suit as originating out of a lawful order of the Collector, and as one which he was not competent to entertain.

The decision of the Full Bench reported at page 186 of the Weekly Reporter, Vol. VII., is not exactly in point; but it certainly rules that a decision on a question of possession, and of the right to receive the rent, does not bar an action in the Civil Courts to try the title of the parties.

In the case before us, the title of the contending parties is now put in issue, after a decision of the Deputy Collector which, as we read it, refuses to enquire into the question even of possession, because the possession of the defendant was not unlawful, but had arisen out of an act of the Collector himself.

On the whole, we are inclined to think that the Deputy Collector really decided and intended to decide nothing, and that the jurisdiction of the Civil Court is not barred.

We now come to the case on the merits.

It is not disputed, on the part of the defendant, that a putnee-pottah was actually executed and registered in 1253 or 1846, and that certain deeds called *pratiposhak pottros*, or confirmatory deeds, were executed and registered in Pous 1258. But it is argued by Mr. Doyne that these deeds were collusive; that no consideration ever passed; and that the plaintiff, being admittedly out of possession by the action of the Revenue authorities, is bound to prove her case.

The putnee-pottah is given by Ishan Chundra Rai and four others to Gour Lall, and it recites that, in order to pay off the debts of the lessors to the mahajuns, the portion of zemindaree Kismut Mouzah Situlpara recorded as No. 1419 on the toujih at a sudder jumma of Rs. 51-3-2 is given to Gour Lall at an annual putnee-rent of Rs. 136. The putneedar was to pay the sudder jumma to the Collectorate, and the balance, or Rs. 84-12-10, to the lessors. Then follow the usual conditions to be found in all such deeds.

The *pratiposhak* or confirmatory deeds are two in number, and they both bear the same date of 14th Pous 1258. One is from Kistomonee and three other ladies. It recites the grant of 14 annas of the Mouzah of Sitalpara by the Rais, and states that the present grantors had, in 1857, been appointed as sevaits, and were about to raise objections to the said putnee, but that, becoming aware of the true state of things, the said grantors thereby confirmed the putnee in regard to a

12-annas share. The putneedar was to pay the sudder jumma as before, and to receive a receipt *in full* from the ladies of Rs. 136, or the whole amount of the putnee rent.

The second confirmatory deed is from Ishan Chandra and four others to Gour Lall. It recites the grant of the putnee in 1253, but states that in all 14 annas were given, of which 12 annas appertained to Mehal Maniadehee, but that the deed of 1253 omitted to state that the said 12 annas of Situlpara appertained to Maniadehee. It then states that the sevaits were about to raise objections as regards 12 annas, as not included in the grant, but that they had withdrawn them; and it concludes by confirming the grant of the whole 12-annas share as included in the bonus of 12,205 Rs., and as within Mehal Maniadehee.

These deeds are not deposed to by any of the attesting witnesses, and there is no evidence to the payment of any bonus. The deeds are, however, registered, and that is proof of their existence at the time of registration.

The oral evidence for the plaintiff is that of five witnesses, Kali Pershad Ghose and four others, who say that Gour Lall was in possession, and collected rents for some years, that plaintiff then collected, and that she was dispossessed by the defendant. Some of these witnesses state that they hold lands in the putnee, but none produce any receipts; nor is any evidence given of payment of the sudder jumma to the Collectorate by the putneedar on behalf of the zemindars.

One solitary decree in a suit for rent decided by the Moonsiff of Jungeepore on the 14th of August 1851 is produced; but in that case the defendant confessed judgment, and, if anything, it tells rather against the plaintiff than in her favor.

The plaintiff, being out of possession, is bound to prove her case; and we see that no consideration for the original putnee is proved, while the circumstances, intent, and language of the subsequent deeds, by which the putnee had to be confirmed, are decidedly suspicious. The statements as to the sevaits, and as to the omission in the putnee-deed, which it was the object of the later deeds to correct, are not such as to impress us with an idea of the sincerity or good faith of the zemindars.

It is said for the respondent that the defendant, who purchased at the revenue-sale at the close of April 1863, might have objected to the butwara which was then going on, and which was not completed until 1865; and that his failure in this respect shows that he was aware that he could not successfully contest the genuineness of the putnee which was mentioned in the butwara. But we have seen nothing to show that the defendant was represented at the butwara, or that he was found to come forward and state his objections at that time.

Another point much pressed by Mr. Doyne is that, though the sudder jumma of Situlpara under No. 1008 in the toujih is Rs. 51, and though it is quite possible that this should be given in putnee at a rent of Rs. 136, yet that Situlpara, *appertaining to Maniadehee*, which bears a sudder jumma of Rs. 555, should be let out at Rs. 136 putnee-rent, a sum not equal to one-fourth of the Government revenue, is altogether incredible, absurd, and out of the question. And Baboo Anodapershad for the respondent has offered no plausible or consistent solution of this obvious inconsistency.

Then there is something which the respondent fails to clear up as to the identification of the putnee. She claims Kismut Situlpara as comprised in Turruf Maniadehee and recorded in the touzah under No. 383; and also Mehal Kismut Situlpara recorded in the touzah as No. 1008. The defendant's contention is that the respondent may take what she has got under No. 1008, but that she has not shown herself entitled to anything under No. 383. All along, this confusion of the two Situlparas and the attempt to include them both in the putnee by the creation of the two confirmatory deeds, and the discrepancy in the numbers, have appeared to us one of the weak points in the respondent's case.

It is to be observed also that the allegation of the trust in the ladies as sevaits was tried and found to be untrue by the Principal Sudder Ameen on the 31st of January 1856, when the Court found that the Rais, as judgment-debtors, were actually in possession, and were colluding with the sevaits, whose intervention was rejected accordingly.

This fact is not without its significance as showing the indebtedness of the Rais, the grantors of the putnee; and that Gour Lall, the putneedar, was related to Ishan Rai, has been established by the admission of the plaintiff's own witness Kali Ghose.

On the other hand, we can see nothing material in the plaintiff's favor in the decision of the 25th of June 1858 in a case in which Huro Soondari sued Chandra Mohini as representing an adopted son, and the adoption was set aside, a decree being given in favor of Huro Soondari.

We admit, however, that the evidence of two witnesses adduced by the defendants to prove distinctly that the putnee was benamee for Ishan Rai is not worthy of any attention or credit.

On the whole case, we are of opinion that the decision of the Lower Court should have been in favor of the defendants. To sum up the points on which the plaintiff's case is deficient, we observe that there is no proof of consideration or bonus for the original grant; that the two subsequent deeds afford matter for great suspicion; that there is a confusion in regard to the two mehals of Situlpara which has not been cleared up; that possession has not been shown by satisfactory oral evidence or by any documents; that there is a relationship between Gour Lall and Ishan Rai; and that the whole circumstances of the Rai family lead to the inference that the putnee was a collusive transaction intended to preserve the family-property or some portion of it, in that ruin of the estate to which matters had been gradually but inevitably tending.

The decision of the Principal Sudder Ameen is reversed, and the appeal is decreed with all costs.

The 20th June 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Notice of Enhancement—Service by Farmer instead of Zemindar.

Case No. 2818 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by Mr. H. R. Madocks, Judge of Bhaugulpore, dated the 31st August 1866, reversing a decision passed by the Collector of that District, dated the 27th June 1866.

Doorga Roy (Plaintiff), *Appellant,*

versus

Shyam Jha (Defendant), *Respondent.*

Baboo Debendro Narain Bose for Appellant.

Baboo Gopal Lall Mitter for Respondent.

According to Section 13, Act X. of 1859, a notice of enhancement must be served by the farmer, and not the zemindar as the person to whom the rent is payable.

Glover, J.—This was a suit by a farmer to recover enhanced rent from a tenant after notice.

The tenant replied that the notice had not been legally served, and that the tenure itself was not liable to enhancement.

The Deputy Collector found for the plaintiff.

But the Judge held that the notice must be served by the party receiving the rent, and that, as the zemindar had served it, and not the farmer, the latter could not take advantage of it. The Judge held further that the ryot was entitled to the presumption under Section 4 of Act X. of 1859.

Three points are urged in special appeal:—

(1.) That service by the zemindar was sufficient.

(2.) That no presumption arises in favor of the ryot; and

(3.) That the Judge had not decided the contention as to the quantity of land in the defendant's possession.

On the first point, we think that the Judge was right. When the notice was served, the zemindar was in possession and in receipt of rent. No farm had been given, and the farmer did not exist. The wording of Section 13 is imperative, and makes it absolutely necessary that the party to whom the rent is payable should be the one to issue notice; and, when this notice was served, the farmer was not that party. He must issue a fresh notice on his own account.

A ruling of this Court (3 Weekly Reporter 157) supports this view of the question.

We do not understand why, this point being given in the defendant's favor, the Judge went any further or decided the question of liability to enhancement. And we add to our order an intimation that his decision on this question shall not prejudice the farmer in any other suit he may bring to enhance.

The special appeal is dismissed with costs.

The 20th June 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Appeal (Time for presenting)—Limitation—Unauthorized holiday—Section 246, Act VIII. of 1859—Possession—Title.

Case No. 374 of 1866.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 7th August 1866.

Raja Bishen Perkash Narain Singh (Plaintiff), *Appellant,*

versus

Babooa Misser and others (Defendants), *Respondents.*

Baboos Kishen Kishore Ghose, Dwarkanath Mitter, and *Unnoda Pershad Banerjee* for Appellant.

Mr. C. Gregory for Respondents.

Suit laid at Rupees 22,166.

If the last day for preferring an appeal fall on a day when the Court has been unexpectedly and unauthorizedly closed, the appellant will not be barred by limitation if he can prove that he was prepared to file the appeal on that day, and if he did file it on the first open day thereafter.

A party failing to establish his claim to attached property under Section 246, Act VIII. of 1859, on the point of possession, is not debarred from afterwards bringing a suit on title within the period allowed by law for bringing such suit.

Glover, J.—This was a suit by a decree-holder to set aside an alleged fraudulent deed of partition executed by his judgment-debtor's father, whereby property, which, by Hindoo Law, belonged to the debtor, was given to other members of the family.

The plaintiff also claimed to have his debtor's rights declared in the said property, and to have the property itself sold in satisfaction of his decree by reversal of a miscellaneous proceeding under Section 246, Act VIII. of 1859, whereby the defendants were allowed to retain possession.

The defendants pleaded in answer that the deed of partition was not collusive, and that the maker of it had the right to dispose of the property as he pleased.

They further declared that the plaintiff, not having instituted his suit within one year of the miscellaneous order, was barred by limitation.

The Principal Sudder Ameen took this view of the case, and threw out the plaintiff's claim without going into the merits.

It is urged in appeal—

(1.) That the order passed in the Miscellaneous Department was based on the intervenor's title to the property, and not on their possession, and that, therefore, Section 246 of the Civil Procedure Code did not apply.

(2.) That, under the circumstances, the plaintiff's suit ought to be considered as brought within one year from the date of the miscellaneous order; and

(3.) That, in any case, the plaintiff was entitled to prove his main allegation that the title to the disputed property was with his judgment-debtor; and that, if his application to cancel the miscellaneous order were expunged from the record as barred by limitation, there would still remain the substantive issue of title to be tried for which the limitation-period would be 12 years.

The first ground of appeal seems to us untenable. In the first place, it was the plaintiff's case that the point at issue had been tried under Section 246; and it would be too late now to allow him to change his ground, and to take an entirely different stand-point. But, in fact, the Principal Sudder Ameen, in his miscellaneous proceeding, did not enter into the question of title at all. We have had his order read. It is to the effect that the intervenors (defendants in this case) claimed to be in possession under a hibbanamah, and that he (the Principal Sudder Ameen) found them to be so in possession. He, therefore, allowed their objection under Section 246, expressly reserving the question of title under the hibbanamah, and referring it to a regular suit.

With regard to the second objection. It appears from the record that the miscellaneous order under Section 246, Act VIII. of 1859, was passed on the 21st of May 1865, and that the 21st of May 1866 was consequently the last day for preferring an appeal against that order. Now, it is admitted on all hands that on that day, namely, Monday, the 21st of May 1866, the Civil Courts were closed by order of the Judge of the District. That day was not an authorized holiday, and the Courts appear to have been closed to suit the Judge's own convenience.

The appellant alleges that he was ready with his appeal on that day; but that, finding the Court unexpectedly closed, he had to go back, and finally to give in his appeal on the first open day, after the Mohurum vacation, *i. e.*, the 28th of the month.

The Principal Sudder Ameen seemed to think that the appellant knew that the Courts would be closed on the 21st, and made all his papers ready accordingly. We do not understand the Lower Court's reasoning on this point. Whether the plaintiff did or did not know of the Judge's order to close the Courts on the 21st, there could be nothing collusive in his preparing his appeal for presentation on that day. He was within time, and had the right to file it. If he did not know of the Judge's order, he was, of course, only doing what he would naturally have done, *i. e.*, file his appeal on the last day allowed; if he did know of it, he was taking the only course open to him to save his limitation, by showing, afterwards when the Court did open, that he had been prepared to file his appeal within time, but had been prevented from doing so by the action of the Court itself.

Mr. Gregory for the respondents has argued that Act XIV. of 1859 leaves the Court no option; that a suit to cancel an order passed under Section 246 of the Civil Procedure Code must be brought within one year; and, if an appellant brings his appeal on the last day of that term, and finds the Courts closed, whether the holiday be authorized or unauthorized, his case is remediless.

He quoted in support of his position a decision of the Madras High Court (Kambaizani Janajie *versus* Udajenee Venkatarye Chetty and others, Madras High Court Reports, 268), which lays it down that Statutes of Limitation are to be construed strictly, and that no equitable construction can be placed upon them.

We entirely concur with this ruling as an abstract proposition of law, and in the case before the Court the ruling had only a general application. The point was this: The Judge of Chittoor had, in consideration of some possible inconveniences which might be caused by the adjournment of the Courts for the Christmas holidays, ordered that all suits filed on the 4th of January 1862 (the Courts' opening day) should be treated *quoad* the new Limitation Law, Act XIV. of 1859, as if they had been filed before the first day of the year. And the High Court ruled that, by so doing, the Judge usurped the functions of the Legislature, and extended to the 4th of January a limitation which had been expressly restricted to the last day of the preceding year.

There is no analogy between the two cases. In the present instance, the Judge, without authority and altogether unexpectedly, on a Saturday, declares his intention of closing his Court on the following Monday, Monday not being a holiday, and no permission having been given by the High Court to close on that day. It might very fairly be argued that none but those who chanced to be present could have been aware of the proposed closing; but, in any case, we cannot hold that an appellant, bringing his appeal to be filed on that day, and not being able to file it in consequence of the illegal act of the Judge, can be brought within the Statute.

We consider that an appellant acting in this manner must be held to have filed his appeal within time.

But, before the appellant in this case can have the benefit of this opinion, he must, of course, prove to the satisfaction of the Court that he was prepared to file his appeal on the Monday. If he succeed in doing that, his appeal should be placed on the file, and the case determined on the merits.

Ordinarily, the case might stop here; but, as it is possible that the Principal Sudder Ameen may not be satisfied with the appellant's evidence as to his readiness to file his appeal on the 21st of May 1866, it will be as well to give an opinion on the third ground of appeal also.

Now, there can be no doubt that the plaintiff sued, not only for the cancelling of the miscellaneous order, but to set aside the partition by proving the title of his judgment-debtor, two very different things, though not necessarily the subject of different suits.

It is clear also that the Principal Sudder Ameen so considered the plaintiff's case, for he fixed issues to try the question of title, although, finding the plaintiff barred by the one-year limitation, he did not try them.

Now, the wording of Section 246, Act VIII. of 1859, appears to leave no doubt as to the nature of the enquiry conducted under it. Everything turns upon the fact of a *bond-fide* possession. The respondent's pleader contends that *bond-fide* possession is the same thing as title, and that a party, dissatisfied with the Court's decision, has no other remedy than a suit brought within one year. It seems hardly necessary for us to point out that there may be a real *bond-fide* possession without any good title to support it; and we are quite clear that the words of the Section refer to possession, and to possession only, and that there is no reason why a litigant, failing on the point

of possession, should not afterwards bring a suit on title within the period allowed by law for bringing such suits. It is absurd to suppose that a mere summary investigation made to give prompt relief to parties actually and *bonâ fide* in possession of property sought to be followed by a successful creditor can be made to supersede the action of a regular suit, or to debar a decree-holder who has already made use of the summary process allowed by Section 246 from proving his rights, if he can, by a more complete and searching enquiry.

We think, therefore, that there were two questions of limitation involved in this suit; and that, if the plaintiff was barred by the one so far as related to the cancelment of the miscellaneous order, he was still in time to prove his debtor's title as against the parties in possession under the deed of partition.

And that on this point also the suit should have been tried on its merits.

Our order will, therefore, be that, if the appellant can satisfy the Principal Sudder Ameen of his having been ready and willing to proceed with his appeal on the 21st of May 1866, his case will be restored to the file and heard on its merits as regards the order passed under Section 246.

And that, in any case, the appellant will be entitled to go into the question of his debtor's title under the 2nd and 3rd issues of fact raised by the Principal Sudder Ameen in his judgment of the 7th of August 1866.

The costs of this appeal will be on the respondent. The costs in the cause will depend on the result of the enquiry now ordered.

The 20th June 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Joint-family Property (Sale of)—Necessity.

Case No. 9 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 28th December 1866.

Baboo Luchmeedhur Singh *alias* Puchoo Singh (Plaintiff), *Appellant,*

versus

Ekbal Ali and others (Defendants), *Respondents.*

Baboos Dwarkanath Mitter, Unnoda Pershad Banerjee, and *Onookool Chunder Mookerjee* for Appellant.

Messrs. R. T. Allan, R. E. Twidale, and *C. Gregory, Moonshee Ameer Ali,* and *Baboo Poornoo Chunder Shome* for Respondent.

Suit laid at Rupees 9,620 0-3.

Where a joint-family property was sold in order to raise money to redeem other property which had been mortgaged, and was about to be foreclosed, and there was nothing to show that the transaction was not for the benefit of the family, the sale was declared to be good; and it was held that, as a large sum was due on the mortgage, the purchaser was not bound to enquire into the original necessity for giving the mortgage.

The rule that only so much of the property should be sold as will meet the necessity does not apply to cases where the excess is small, or where the money really required cannot otherwise be raised.

Macpherson, J.—We think that the decree of the Lower Court in this case ought to be affirmed.

The appellant is the youngest son of one Lalljeet Singh, who on the 12th Pous 1260 F. S., more than twelve years before the institution of this suit, executed the kubala, or deed of conveyance, which it is the object of the present suit to set aside. At the time when he executed the conveyance, Lalljeet had three sons, of whom the present plaintiff is the youngest. The sale in question was, after the death of Lalljeet Singh, confirmed and declared in Court to be good by the plaintiff's eldest brother Bunseedhur, who was (at the time he admitted the validity of the sale) of full age, and acted as well on his own behalf as on behalf of the plaintiff and his other brother who were then both minors. The plaint is somewhat unusual in form, and is framed in a double aspect. In one aspect, it charges the principal respondents (who are the purchasers under the kubala of the 10th Pous 1260 F. S.) and the plaintiff's brother Bunseedhur with fraud and collusion. It recites that the ancestors of the purchasers had for many years held a zur-i-peshgee lease of the property which is the subject of this suit, and alleges that the purchasers, "finding your petitioner's father to be a "*sadaluk* (simpleton), *wheedled him into* "*carrying out their wishes, and, with the* "*ultimate object of dealing a fatal blow to* "*your petitioner's interest,* caused the pay- "ment in cash of the sum of Rupees 65,585-3-8 "to be entered into the kubala of 10th "Pous 1260 F. S., for the estate in ques- "tion." Further on, the plaint states that, "after the decease of your petitioner's father "Lalljeet Singh, the first party defendants

"brought an action with a view to establish "the validity of the kubala, and to effect "the entry of name in reference to the "usufructuary mehal, and Mouzah Ghoke "and Mouzah Bulwah aforesaid which are "not mentioned in their kubala, *and with "intent to defraud your petitioner, a "minor, caused a collusive confession* to "their claim to be filed by Mussamut "Soondur Koomaree, a perfect stranger, "*and your petitioner's brother, Baboo "Bunseedhur Singh, in his own right as "principal, and as guardian on part of your "petitioner and another brother of your "petitioner named Baboo Babooan Singh.*" So far, the plaintiff rests his claim on positive fraud on the part of the purchasers. In its other aspect, the plaint seeks simply to have the sale declared invalid under the Mitakshara Law, on the ground that there was no legal necessity for the sale, and that, in the absence of such necessity, the sale being without the plaintiff's consent to it, was invalid.

Now, as regards the alleged fraud and collusion, the plaintiff has placed before the Court absolutely no evidence whatever. And, so far as there is any evidence as to the state of Lalljeet's intellect, there is nothing whatever to lead us to suppose that he was otherwise than perfectly competent to manage his own affairs.

As regards the other aspect of the case, which involves the bare question whether this sale by the father is invalid because not made with the consent of all his sons, the plaintiff makes no *positive* case. He simply relies on his legal right under the Mitakshara Law, and leaves the defendants to prove that the sale is valid. It appears to us that the purchasers have amply and satisfactorily discharged the *onus* thus put upon them.

Their case is that the property was sold to them in order to pay off three classes of debts due by Lalljeet, namely, *firstly*, certain monies due under the old zur-i-peshgee lease given originally to the ancestors of the purchasers themselves; *secondly*, a debt due to Raja Teknarain, the re-payment of which was secured by the mortgage of two other properties belonging to the joint family estate; and, *thirdly*, certain other debts of smaller amount. The mortgage (by conditional sale), which Raja Teknarain held to secure the debt due to him, bore date the 5th of Aghran 1258, or 24th November 1850; and the proceedings taken by Raja Teknarain to enforce his security seem to have been the immediate cause of Lalljeet's making the sale, the validity of which is now under discussion.

About a year before the sale took place, Teknarain issued notice of foreclosure of his mortgage. The notice was issued on the 9th of January 1852, and the bill of sale, under which the respondents claim, bore date the 5th of January 1853, only four days before the year of grace expired. Now, the mortgage to Teknarain is not in any way disputed by the plaintiff, and it is not disputed that a large sum of money accrued due to Teknarain under that mortgage, and was paid off by Lalljeet. The plaintiff's contention is that the amount due to Teknarain was paid off some considerable time before the sale to the respondents, and, therefore, that the debt due to Teknarain could not have constituted one of the debts to raise money for the payment of which the sale was made. An attempt was made on the plaintiff's behalf to prove a farkhutee alleged to have been given to Lalljeet by Teknarain on the debt to him being paid off as suggested by the plaintiff. The farkhutee in question was produced in Court by the plaintiff's brother Bunseedhur, the same person who, as already said, has, in another proceeding, openly in Court acknowledged the validity of the defendants' purchase—and witnesses were called who deposed to the execution of the farkhutee. But the conclusion which the Lower Court came to with reference to it was that it was a forgery; and that finding is not disputed before us in appeal. The farkhutee and the matters connected with it are of comparatively little importance in assisting us to come to a decision in the case now, excepting in this, that they confirm the purchasers' statement that, at the time of their purchase, a large sum was really due by Lalljeet to Teknarain. This debt being due to Teknarain, and the notice of foreclosure having been issued nearly a year previously, it seems to us that, so far as money was paid by the purchasers in order to enable Lalljeet to discharge his debt to Raja Teknarain, it was money paid in order to enable Lalljeet to do that which it was necessary and for the benefit of the family that he should do. To this extent, we have no hesitation in saying that the sale is good as against the plaintiff according to the Law of the Mitakshara.

The case falls distinctly within the rule laid down by the Privy Council in the case

of Hoonooman Pershad Panday (6 Moore's Indian Appeal Cases 393); and it has been repeatedly held by this Court that the general rule laid down in that case applies to cases such as the present, as well as to cases arising with reference to alienations by a guardian or manager. According to that rule, "the lender is bound to enquire into "the necessities for the loan, and to satisfy "himself, as well as he can, with reference "to the parties with whom he is dealing, "that the manager is acting in the par- "ticular instance for the benefit of the "estate." In this particular instance, the lender, or rather purchaser, *did* ascertain that there was a certain debt due, and did ascertain that notice of foreclosure had been issued, and that the year of grace was just about to expire; and, so far as we can see, the purchaser *did*, with reference to the parties with whom he was dealing, satisfy himself of the necessity for the debt incurred, so far as it related to paying off what was due on Raja Teknarain's mortgage.

It is said that the purchasers were bound to go further; that they were bound to travel back to the time when the original loan from Raja Teknarain was taken, and to have enquired into the original object for which the money was borrowed by Lalljeet. But it seems to us that it would be most unreasonable to impose any such duty upon the purchaser. Where is to be the end of it, if it is necessary for him to go back to enquire into the primary origin of the necessity for the mortgage he finds about to be foreclosed, and which may be of many years' standing? If he must go back and enquire into the causes which led to the giving up the mortgage, the probabilities are, it would be equally necessary for him to go further back still, and enquire into the causes which formed the first foundation of the necessity for raising money, which ultimately resulted in the necessity which led to the mortgage. It appears to us that the rights of the members of a joint Hindoo family under the Mitakshara Law are very sufficiently protected—protected quite as fully as the Hindoo Law itself intended them to be protected—if the rule laid down by their Lordships of the Privy Council in Hoonooman Pershad's case be strictly applied. So far, then, as relates to the mortgage of Raja Teknarain, we think the respondent's purchase is good.

Another portion of the money paid by the purchaser was applied in paying off the loan in respect of which the zur-i-peshgee lease already referred to was granted. This lease was executed so far back as the 4th of Chyet 1241, being more than thirty years ago, and the mortgagees seem to have been from that time in possession. It is admitted that the consideration for that lease was a payment of 55,250 sicca rupees, and there is no allegation that any distinct payment was ever made to reduce that amount. It is, however, alleged for the plaintiff that the lessee had been in possession for very many years, and that, if an account had been taken, it would, or might, have been discovered that the debt had been paid off. There is, however, no proof —neither does it appear to us—that such was the case, or that the money which is alleged to have been paid to the zur-i-peshgeedar was not really due to him.

Here, also, as in respect of the debt due to Raja Teknarain, we think that the respondents bring themselves within the rule laid down in Hoonooman Pershad Panday's case. There *was* a debt due to the zur-i-peshgeedar, and, inasmuch as, by selling the property outright, Lalljeet was enabled to pay off that debt, and also to pay off the debt to Raja Teknarain, and so to release the two estates under mortgage to Teknarain, the sale was a reasonable and proper transaction which was for the benefit of those interested in the estate generally.

But the amounts due to the zur-i-peshgeedar and to Raja Teknarain did not consume the whole purchase-money paid. There was admittedly a surplus of about Rupees 14,000. As to this surplus and the mode of its application, there is no very distinct evidence. There is, however, some evidence that it was used by Lalljeet in paying off debts owing to other creditors. It was contended by Baboo Dwarkanath Mitter for the appellant that, even supposing that there was any necessity as to a certain portion of the amount received by Lalljeet on the sale of this property, there was not any necessity as to the other portion of it, and that, therefore, the sale was bad. And, no doubt, only so much of the property should be sold as will meet the necessity; and, if a larger portion than is required is sold, it must be shown by the purchaser that the money required to pay off the claim could not be raised otherwise. But this rule does not apply to cases where the excess is comparatively but small, or where the money really required could not be raised otherwise than by the course

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But the amounts due to the zur-i-peshgeedar and to Raja Teknarain did not consume the whole purchase-money paid. There was admittedly a surplus of about Rupees 14,000. As to this surplus and the mode of its application, there is no very distinct evidence. There is, however, some evidence that it was used by Lalljeet in paying off debts owing to other creditors. It was contended by Baboo Dwarkanath Mitter for the appellant that, even supposing that there was any necessity as to a certain portion of the amount received by Lalljeet on the sale of this property, there was not any necessity as to the other portion of it, and that, therefore, the sale was bad. And, no doubt, only so much of the property should be sold as will meet the necessity; and, if a larger portion than is required is sold, it must be shown by the purchaser that the money required to pay off the claim could not be raised otherwise. But this rule does not apply to cases where the excess is comparatively but small, or where the money really required could not be raised otherwise than by the course

adopted. It appears to us that, in the present instance, the sale was made for the best, and that no better course could have been followed. It is not shown to us that by any other means than by the sale of this property out-and-out Lalljeet could have freed the estate from the claims of Raja Teknarain and the zur-i-peshgeedar. Moreover, there is evidence that the surplus of Rupees 14,000 also went in payment of debts. Looking at the transaction as a whole, we consider it to be one in which it is proved that the purchaser acted with reasonable and sufficient care and caution, and in which a sufficient necessity did exist. We, therefore, declare the sale to be good and valid as against the plaintiff.

The plaintiff comes into Court putting the purchaser to the proof of matters which occurred many years ago, and seeking to set aside the acts of his own father, and also the acts of his own brother who professed to be his guardian. He comes into Court alleging his father to be a person of weak mind, and incompetent to manage his own affairs, and alleging fraud and collusion on the part of the purchaser and on the part of his brother, Bunseedhur, of which various allegations he gives no proof whatever. The plaintiff has failed to show that he is entitled to any relief whatever; and, under the circumstances, we affirm the decree of the Lower Court, and dismiss the plaintiff's appeal with costs and interest.

The 20th June 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Intervenors (under Act X. of 1859).

Case No. 269 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 10th January 1867, reversing a decision passed by the Deputy Collector of Sathirah, dated the 29th May 1866.

Jogendur Chunder Ghose (Plaintiff), *Appellant,*

versus

Lukhee Preea Dassee (Defendant) and another (Objector), *Respondents.*

Baboos Romesh Chunder Mitter and *Hem Chunder Banerjee* for Appellant.

Baboos Oopendur Chunder Bose and *Bhowanee Churn Dutt* for Respondents.

Act X. of 1859 does not provide for an intervention by a third party under any other circumstances than those contemplated in Section 77, *i. e.*, only where the title to receive the rent is disputed.

Kemp, J.—This was a suit for arrears of rent at an enhanced rate after issue of notice. The zemindar, plaintiff, sued the party whose name is registered in his serishta, *viz.*, Lukhee Preea. Lukhee Preea did not appear.

On local enquiry, an Ameen reported that the area of the tenure was 22 beegahs odd cottahs, but that about 4 beegahs of this had been asserted to be lakheraj, but that no proof of that averment was adduced.

The first Court gave the plaintiff a decree after exempting the 4 beegahs said to be lakheraj.

Bholanath, a third party, had intervened, claiming to hold the tenure under a mokurruree, and that he was the party in possession as tenant of the plaintiff, and not Lukhee Preea. It was also alleged that the suit of the plaintiff was brought in collusion with Lukhee Preea to get rid of the intervenor's rights.

Both the plaintiff and the intervenor appealed to the Judge; the plaintiff against that portion of the decision of the first Court exempting the alleged lakheraj; the intervenor against the rejection of his claim.

The Judge has remanded the suit in order that the intervenor may be made a party, and his claims decided. No decision has been passed by the Judge with reference to the alleged lakheraj lands.

In appeal, it is contended that the Judge was wrong in remanding the case, as the intervention of Bholanath was not one which could be entertained under the provisions of Section 77, Act X. of 1859.

We think that this contention is good.

Act X. of 1859, unlike Act VIII. of 1859, does not provide for the intervention by a third party under any other circumstances than those contemplated in Section 77 of Act X.

To admit of an intervenor being made a party to a suit under the provisions of Act X., the title to receive the rent must be disputed, and not any such question as arises in this suit, *viz.*, whether Bholanath is the tenant or Lukhee Preea. Bholanath does not claim to have received or enjoyed the rent. He simply contends that he, and not Lukhee

Preea, is the tenant of the plaintiff. The plaintiff is, therefore, clearly entitled to obtain a decree against Lukhee Preea, who has not objected to the plaintiff's claim, and this decree cannot in any way prejudice the rights, if any, of the intervenor Bholanath.

The pleader for the respondent has called our attention to two decisions, one published in the Revenue and Police Journal, dated 18th June 1865, and another in Volume III., Weekly Reporter, page 166.

In the first case, the question was, whether the defendant, the registered ryot, who had been sued, could transfer his tenure by sale without the permission of the zemindar, and the vendor-ryot was properly directed to be made a party to try that question. In the latter case, the Judges do not allude to Section 77 of Act X. of 1859, and they admit that Act X. does not, like Act VIII. of 1859, lay down any special rules under which third parties can intervene. They also say that, where the intervenor's rights and interests would be affected by the decision under Act X., the practice of the Court was to permit the party to intervene. In the case before us, it is clear that the claim of the plaintiff against Lukhee Preea can in no way prejudice the intervenor Bholanath.

For these reasons, we think that the Judge was wrong in remanding the suit in order that Bholanath's claims might be tried. We reverse his decision remanding the case, and direct the Judge to try the plaintiff's appeal against that portion of the decision of the Court of first instance exempting the lakheraj land.

This special appeal is decreed with costs and interest.

The 20th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Execution of decree (Immoveable property)—Sections 224, 225, and 227, Act VIII. of 1859.

Case No. 173 of 1867.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Midnapore, dated the 11th January 1867.

Brojo Mohun Sutputty (Judgment-debtor), *Appellant,*

versus

Shooda Monee Dabee and others (Decree-holders), *Respondents.*

Baboo Otool Chundur Mookerjee for Appellant.

Mr. R. T. Allan for Respondents.

Procedure to be observed where, while execution of decree is going on against immoveable property, the decree-holder alleges that he is obstructed in getting possession of certain lands included in the decree.

Jackson, J.—THIS is an order in execution of a decree of the Principal Sudder Ameen of Midnapore. That decree appears to have been affirmed by the High Court in regular appeal. An appeal having been preferred to England, the decree-holder has been allowed to execute her decree on giving sufficient security for the due performance of the decree of Her Majesty in Council. The decree was for possession of 1rd share in certain undivided immoveable property paying revenue to Government. It appears that, while the officers of the Court below were engaged in giving possession of the property decreed, an obstruction was created, and that obstruction led to a complaint on the part of the decree-holder that she had not been allowed to obtain possession of certain mouzahs which, she alleged, were comprised in the landed property which passed under the decree. Upon enquiry, it turned out that this obstruction was offered by the defendant, on the ground that the mouzahs in question were not included in the decree. Under such circumstances, the duty of the Court plainly was under Section 227 of the Civil Procedure Code to enquire into the matter of complaint, that is, the complaint of the decree-holder, and pass such order as might be proper under the circumstances. Now, instead of enquiring into the matter, the Court, after stating certain vague generalities, made this order, "that the copy of the quinquennial registry book filed by the decree-holders be made over to the nazir; that a perwannah be issued in his (nazir's) name to carry out the above views, that is for lawfully giving possession of the several mouzahs included in the estates covered by the decree by beat of tom-tom." It is evident that this order in effect delegated to the nazir a function which properly belonged to the Court itself, namely, of determining

and declaring what mouzahs were or were not covered by the decree. Assuming that this was a decree which was to be executed in the manner prescribed by Section 224, the function of the Court in delivering possession is extremely simple, for it has only to order delivery to be made by affixing copy of the warrant on some conspicuous place on the lands, and proclaiming to occupants of the property by beat of drum the substance of the decree in respect of the property. The Act does not distinctly specify whether, in case of the decree relating to several mouzahs comprised in one estate, such affixing of copy of the warrant and such proclamation are to be made in each mouzah, or only at the sudder cutcherry, or other conspicuous place on the estate. If the proclamation were to be made, and the return to be affixed only at the sudder cutcherry, then it would be unnecessary to enquire into the subject-matter of this complaint. But if, on the other hand, the proclamation was to be made, and the return was to be affixed on every mouzah, it would then be necessary to determine whether the mouzahs in question were covered by the decree or no, and that must be done by the Court itself. But it seems to me doubtful whether this is not a case falling under Section 225 of the Civil Procedure Code, which provides for the case of a decree for separate possession of a share in an undivided estate. In that case, separation of the share is to be made by the Collector. This is a point, however, which must be determined in the first instance by the Principal Sudder Ameen. If he find that the case is one falling under Section 224, he must then proceed to determine the question under Section 227, that is, if it be necessary to make proclamation in separate mouzahs, and if it should turn out that any mouzahs to which the decree-holder's complaint related are not comprised in the decree, and if, notwithstanding such fact, possession shall have been delivered to the decree-holder, it will then certainly be necessary to order restitution of such mouzahs, otherwise, of course, possession need not be disturbed. The proceedings, therefore, must be remanded, I think, to the Principal Sudder Ameen with instructions of the kind I have mentioned, that is to say, the Principal Sudder Ameen will first consider and determine whether possession is to be given under Section 224 or 225; if under the latter, he must refer the decree-holder to the Collector; if under the former, then he will decide whether proclamation and affixing of notice are to be made in each mouzah or otherwise; and, if necessary, he will then make the enquiry prescribed in Section 227. But, in any case, he will restrict the action of his Court to doing that which is directed by the Sections referred to.

Hobhouse, J.—I concur with my learned colleague.

As I understand the matter, while execution of decree was going on, the decree-holder alleged that certain villages were within the decree, and that he was obstructed in getting possession. Thereupon, there should have been an enquiry under Section 227, and after the enquiry such order as might be proper under the circumstances, but that order should have been passed by the Court, and should not have been delegated to any body else. Then, when, after enquiry, an order had been passed, if that order was for delivery over of the property to the decree-holder, either wholly or to any extent, then possession should have been given under Section 224 or 225, as the case might be.

The 20th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Limitation—Execution of decree (against several defendants with separate liability).

Case No. 171 of 1867.

Miscellaneous Appeal from an order passed by the Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of Rajshahye, dated the 18th January 1867.

Mohesh Chunder Chowdhry (Decree-holder), *Appellant,*

versus

Mohun Lal Sircar (Judgment-debtor), *Respondent.*

Baboo Mohinee Mohun Burdhun for Appellant.

Baboo Kalee Kishen Sein for Respondent.

Where a decree has passed against several defendants, each of whom is declared to have a separate liability in respect of a definite amount, execution against one or more of such judgment-debtors keeps the decree in force against all simultaneously.

Jackson, J.—THIS is a case of execution of a decree obtained by one co-sharer of a

joint estate against his different co-sharers for sums of money paid on their behalf on account of Government revenue. It appears that the suit was brought against all the co-sharers, but that in the decree the amounts for which the several co-sharers were liable, together with costs in proportion to those amounts, were awarded against them separately. The decree bears date 1854, and the first application to execute was in the year 1855, at which time notice was served upon all the judgment-debtors. The decree was one of the Mymensingh Court. The judgment-debtor before us (the respondent) resides in Zillah Rajshahye. It appears that, although notice was served on this debtor in 1856, no further steps were taken against him; but that execution has gone on effectually against the other co-sharers down to 1863, and in 1864, in April, the case, which up to this time had been proceeding against them, was struck off the file. The present application to execute against the respondent was made on the 2nd of June 1866.

The Lower Court appears to have held that, inasmuch as no proceedings have been taken against the respondent for upwards of three years, execution as against him was barred.

It has frequently been held in this Court, where the decree has passed against several defendants declaring them to be jointly and severally liable, that execution against one or more of such judgment-debtors keeps the decree in force as against all. The contention in this case is that the defendants were not declared to have under the decree a joint and several liability, but each a separate liability in respect of definite amounts. There is no precedent of this Court bearing upon the point; but the respondent's vakeel refers us to the case of Mrs. Stevenson and another, Appellants, to be found at page 18, VI. Weekly Reporter. There is a passage in page 21 of the judgment in which the learned Judges, after remarking that in that case the proceedings taken against another judgment-debtor effectually kept the decree in force against the then appellant, go on to observe: "It may be that "some decrees, though passed nominally on "one document, are, in reality, separate de-"crees against separate individuals. In such "cases, the Court might, and probably would, "consider them to be separate, and in exe-"cution put the Law of Limitation into force "against the different defendants as if they "were separate." That is cited as a ruling by those two learned Judges to show that, in a case like the present, execution against several defendants would be separate, and that, consequently, execution-proceedings against one defendant would not be effectual to keep the decree in force against the other. This, with all respect to the learned Judges, appears to me to be an *obiter dictum*; it was not the case before them, and is not, therefore, strictly an authority to guide us now. It is an opinion which is entitled to much weight, and which I have accordingly considered; but, looking at the stringent terms of the Law of Limitations, I think that we are bound not to apply any provision of it in such a manner as to shut out a decree-holder from the benefit of his decree unless the terms of that provision are such as expressly to apply to such a case. Section 20 of that law runs: "No process of execu-"tion shall issue from any Court not estab-"lished by Royal Charter to enforce any "judgment, decree, or order of such Court, "unless some proceeding shall have been "taken to enforce such judgment, decree, or "order, or to keep the same in force, within "three years next preceding the applica-"tion for such execution." Can it be said that in this case no proceeding has been taken to enforce such judgment, decree, or order? That is not the contention; but it is contended that we are to read that Section as if it ran in this way: "No process of execution shall "issue from any Court against any judgment-"debtor unless some proceeding shall have "been taken to enforce such judgment, de-"cree, or order, or to keep the same in force "against the same judgment-debtor within "three years preceding the application."—— I cannot see that we are bound, or that we should be at liberty, to introduce into this Section words of additional stringency to deprive the decree-holder of the judgment which he has obtained. The law is quite rigorous enough, as it is, and I do not think it is the business of the Courts to make it additionally stringent.

For these reasons, I think that the decision of the Court below was wrong, and that the decree-holder ought to be allowed to execute his decree against the respondent.

The appellant will get his costs.

I may add that it was a contention of the vakeel for the respondent in this case that the decree-holder might have carried on execution, and was bound to carry on execution, against all the defendants simultaneously.

It appears to me that that would in many cases be more than a decree-holder could reasonably be expected to do. In the present case, as it happens, the majority of the persons liable under the decree resided in Mymensingh; this particular party resides in Rajshahye. I do not think anything in reason requires that the decree-holder should be obliged to carry on all proceedings against these different persons, in different districts, at the same moment. It would be very inconvenient that the same decree should be in execution (if, indeed, it would be possible) at the same time in several districts.

Section 284 makes no express provision for decrees which can be partly executed within the jurisdiction of the Court which passed it, and I see nothing to prevent a plaintiff from executing his decree in the first instance, as far as he can, within that jurisdiction, and afterwards proceeding to carry it into another.

If, indeed, separate decrees were given, as where several causes had been joined, and the trials had been separate (Section 9, Code of Civil Procedure), no doubt the case would be otherwise.

This, therefore, is an additional circumstance which, I think, shows the justice and propriety of allowing this decree to be executed now.

Hobhouse, J.—I concur with my learned colleague.

The 21st June 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hindoo Law—Partition.

Case No. 3157 of 1866.

Special Appeal from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 19th September 1866, reversing a decision passed by Moulvie Syud Sukhawut Hossein Khan, Principal Sudder Ameen of that District, dated the 7th April 1866.

Mussamut Vato Koer and others (Defendants), *Appellants,*

versus

Rowshun Singh and others (Plaintiffs), *Respondents.*

Baboos Dwarkanath Milter, Chunder Madhub Ghose, and *Mohesh Chunder Chowdhry* for Appellants.

Baboos Onookool Chunder Mookerjee and *Nil Monee Sein* and *Moonshee Ameer Ali* for Respondents.

According to Hindoo Law, the declaration of an intention to become divided in estate amounts to a valid separation, though not immediately perfected by an actual partition of the estate by metes and bounds.

Kemp, J.—THIS was a suit for confirmation of possession and for determination of a right of inheritance by setting aside a deed of gift and a mokurruree lease, laid at Rupees 156-9-9.

The plaintiff alleges that the family was joint and undivided. The defendants, on the other land, assert that the defendant's donor and lessor, Sohun Singh, separated himself from the family.

The Principal Sudder Ameen found that it was clearly proved that Sohun separated himself from the family. The suit of the plaintiff was, therefore, dismissed. On appeal, the Zillah Judge laid down the following issue, namely, whether the plaintiff and Sohun Singh were joint or separated?

The Judge observes that there are numerous cases in which the rule is laid down that the presumption in a Hindoo family is that it is joint, and that the *onus probandi* lies on him who alleges separation; and the case of Badamo Kooer, 5th February 1866, rules that, notwithstanding separation in food and residence, where no formal partition has taken place, the family must be considered joint and undivided. Mr. Justice L. S. Jackson further says: "It will not establish "a separation in estate to show that the "different members of the family dealt se- "parately with their shares of the proceeds, "or even that they collected rents or profits "from different parts of the estate, unless "there has been a definitive separation in es- "tate indicated by separate enjoyment and "distinct liabilities."

With reference to the evidence adduced to the partition, the Judge observed: "The "two witnesses for the defendant on whose "evidence the Lower Court relies do not "give any account of the partition. They "merely allege it in general terms. Their "evidence appears to me wholly insufficient "to establish the *actual* division of the "family-estate which the defendants were "bound to prove." The decision of the Principal Sudder Ameen was reversed, and the suit of the plaintiff decreed.

In appeal it is urged—

1st.—That the Judge has decided the case upon an erroneous view of the Hindoo Law, inasmuch as he appears to think that nothing short of a partition by metes and bounds can constitute a valid partition according to the Hindoo Law.

2nd.—That the ruling in the case of Badamo Kooer has since been considerably modified by subsequent decisions of this Court.

3rd.—That the *onus* of proving the separation was not, under the circumstances of the case, upon the defendants, and that the Judge has improperly rejected the evidence to the partition.

On the first and second issues, we are of opinion that the Judge has wrongly applied the principles of the Hindoo Law in regard to what constitutes a valid separation. It has been lately ruled by their Lordships of the Privy Council in a case heard by them on the 17th of November 1866 that a division of title can be effected without the actual division of the estate by metes and bounds, and that, "when members of an undivided "family agree with regard to particular pro-"perty that it shall thenceforth be the sub-"ject of ownership in certain defined shares, "that then the character of undivided pro-"perty and joint enjoyment is taken away "from the subject-matter so agreed to be "dealt with, and in the estate each member "has thenceforth a definite and certain share "which he may claim the right to receive "and enjoy, although the property itself has "not been severed or divided."

The dictum of the learned Judge, Mr. Justice L. S. Jackson, in the case of Badamo Kooer, upon which the Judge has apparently relied, has been modified by subsequent decisions, one of which (a most elaborate one, in which all the authorities are reviewed) is quoted in the margin. The remarks of the learned Judge, Mr. Justice L. S. Jackson, are, we may observe, "obiter dicta." The point referred to him was whether the mere fact of separation in mess and dwelling gave rise to a presumption that a Hindoo family was separate in estate, Mr. Justice Elphinstone Jackson being of opinion that such presumption did arise, Mr. Justice Seton-Karr being of a contrary opinion. Mr. Justice L. S. Jackson, agreeing with Mr. Justice Seton-Karr on the question referred to him, went, in our opinion, beyond the issues, and beyond what was necessary for the decision of the case, and stated "that, unless there be a definitive separation "in estate indicated by separate enjoyment "and distinct liabilities, the family must be "held to be joint, and that it will not estab-"lish a separation in estate to show that the "different members of the family dealt se-"parately with their shares of the proceeds, "or even that they collected rents or profits "from different parts of the estate."

Weekly Reporter, Volume VI., page 139.
Present:
Loch and Macpherson, JJ.

This dictum, independently of its being an "obiter," appears to us to be opposed to the view taken by their Lordships of the Privy Council quoted above.

Taking, then, the admitted facts of the case before us, we find that Sohun Singh did publicly and unequivocally, by petition presented in Court, declare his intention to become from that date divided in estate. Such an intention amounts to a valid separation, though not immediately perfected by an actual partition of the estate by metes and bounds. The acts and declarations of Sohun Singh, showing an unmistakable intention to hold and enjoy his own estate separately, and to renounce all rights upon the shares of his co-parceners, constitute, in our judgment, a complete severance or partition. The community of interest and unity of possession, which are the very essence of a joint Hindoo family, no longer existed. Further, the parties, it is admitted, have separated in food and residence. Sohun Singh in his lifetime dealt with his share in a manner inconsistent with the theory of a joint interest and liability, and his separate enjoyment was not merely a matter of arrangement for the private convenience of the family.

The evidence to the partition in this case, which the Judge broadly states to be wholly insufficient, is of that character which the Hindoo Law pronounces to be the very best, *viz.*, that of kinsmen, who were also, we may observe, co-parceners. *See* page 310 of the Vivada Chintamoni and Colebrooke's Treatise on the Hindoo Law of Inheritance, Chapter II., Section 12, Part 1, page 376. Such evidence ought not to have been summarily rejected.

The consent of the other members of the family was not necessary, for a son may force even a father, however reluctant, to divide the ancestral estate. Chapter I., Section 5, Para. 11, Colebrooke's Treatise, page 279.

The pleader for the respondent has laid great stress upon the passage to be found in page 243, Colebrooke's Treatise, Chapter I.,

Section I., Para. 4, *viz.*: "Partition is the "adjustment of owners' rights regarding the "whole by distributing them or particular "portions of the aggregate," and contends that there must be an actual division, field by field; but, as observed by their Lordships of the Privy Council in the decision quoted above, "this argument proceeds on the error "of confounding the division of title with "the division of the subject to which the "title is applied."

For these reasons, we are of opinion that the Judge has wrongly applied the law, and that his decision must be reversed, and that of the Court of first instance restored with costs and interest of all the Courts payable by the respondents.

The 21st June 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Section 102, Act VIII. of 1859—Survivance of Appeal—Gift (by Mahomedan lady)—Onus probandi—Confirmation of possession.

Case No. 402 of 1866.

Regular Appeal from a decision passed by Mr. F. J. Cockburn, Judge of Sylhet, dated the 13th August 1866.

Mussamut Luteefoonissa Bibee (Plaintiff), *Appellant,*

versus

Syud Rajaoor Ruhman and others (Defendants), *Respondents.*

Baboo Nuleet Chunder Sein for Appellant.

Baboo Greesh Chunder Ghose for Respondents.

Section 102, Act VIII. of 1859, does not bar the right of heirs to proceed with an appeal as against joint heirs.

A Mahomedan widow or any other woman, holding property in her own right, may give it away to whomever she pleases, unless she delays the gift till upon her death-bed, when such a gift would be looked upon as a will, and be inoperative beyond a certain limit.

A plaintiff suing for confirmation of possession must prove that he was actually in possession.

Glover, J.—THIS was a suit for declaration of title and confirmation of possession in various plots of land situate within the Zillah of Sylhet, by setting aside as fraudulent a hibbanama under which the defendants claimed. The plaint sets forth that the defendants are plaintiff's grand-children, and have executed the false deed of gift to get possession of the whole of her property to the detriment of her other grand-children.

The defence was simply that the hibbanama had been really executed by Luteefoonissa and that possession of her estates had gone with it.

The Judge went through the evidence in detail, and, for reasons given at some length, decided that the hibbanama was genuine and that the defendants were in possession under it. He decreed for them with costs.

An appeal is now preferred on the part of the plaintiff, but, before going into it, we will dispose of an *in limine* objection put forward by the respondents.

They allege (and the fact is not denied) that Mussamut Luteefoonissa died since this appeal was preferred, and that the present appellants, who are her grand-children, claim the property, not as her heirs, but under a hibbanama dated some time after the defendants' deed of gift, and that, therefore, until this second hibbanama be proved, the appellants have no "*locus standi*," and cannot be permitted to go on, as they do not represent Luteefoonissa's interest as it stood when the appeal was first preferred.

As the appellants' hibbanama is not alleged to have been given till after this appeal was filed, the appellants would have no claim to be heard under it; but they are admittedly near relatives of the deceased and joint heirs of her property, supposing it to have been in her hands at the time of her death. From this position as heirs, we think that they have a right to proceed with this appeal to try the validity of the hibba propounded by the respondents, but not to set up their own hibba, *vide* Section 102, Act VIII. of 1859.

On the merits of the case the appellants urge—

(1.)—That the Judge improperly laid the "*onus*" of proving possession on Luteefoonissa. The respondents urged a special plea, which they ought to have been called upon to prove.

(2.)—That the hibbanama has not been proved.

(3.)—That, under the Mahomedan Law, a widow has no power to divest herself of her property in favor of one heir to the detriment of all the others.

We may dispose of this last objection very shortly. It was never pleaded below and is not to be found in the grounds of

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appeal here. It is, moreover, bad in law, there existing no prohibition against a widow or any other woman holding property in her own right, giving it away during her lifetime to whom she pleases, unless, indeed, she delays the gift till upon her death-bed, when such a gift would be looked upon as a will, and be inoperative beyond a certain limit.

Then, with regard to the "onus probandi." The circumstances of the case are, no doubt, somewhat peculiar. The respondents are admitted by the appellants, and indeed themselves allow that, up to the date of the hibbanama, they were in possession of the disputed property as managers only, and the appellants urge the extreme difficulty to them of proving that the nature of their possession has not really changed, and that the respondent's possession now, though avowedly hostile, is not really so.

Still, we see no reason to depart from the rule laid down by this Court in a long current of decisions that a plaintiff, suing merely for confirmation of her possession to land, should be made to prove that she was actually in possession. In the present case, Luteefoonissa had had no actual possession of the land for many years, and it depends on the proof of the hibbanama whether she had or had not actual possession through her managers, the respondents, at the time she brought this suit. Her case on this point depends on proof of the deed of gift, and we proceed to consider the evidence adduced to support it.

The appellants object to it generally on the ground that it purports to have been executed in an unusual place, under most suspicious circumstances; that there is no proof that Luteefoonissa executed it at all; and that a deed, which disinherits many members of the family, without any reason assigned, must be looked on with grave suspicion.

We have gone carefully through the whole of the evidence in support of this hibbanama, and think it sufficient to warrant the Judge's finding.

The actual execution of the hibbanama by Luteefoonissa is deposed to by three witnesses, Azgur Ali, Mahomed Anees, and Moheeboolla; these three men are relatives of the lady, and used to see her behind the purdah. They state precisely that they saw Luteefoonissa put her mark on the hibbanama.

Other witnesses, who were standing outside the screen, depose that Luteefoonissa, or rather a person who was said to have been Luteefoonissa, declared that she had signed the hibbanama then produced.

The mooktear Azbar Alee deposes that Luteefoonissa executed a mooktearnamah to him for the purpose of getting the deed of gift registered.

And the witness Kally Coomar, the Registry mohurrir, who was sent down to the boat to make enquiry, deposes that a woman (whom, of course, he did not see) declared to him that she had given the mooktearnamah for the purpose of having the deed registered.

The witness Abdool Torab, the surkoom of the Mahomedan endowment at Sylhet, a man of admitted position and respectability, and a nephew of Luteefoonissa, deposed to having visited his relative in her boat at the ghat, and to having had a conversation with her on the subject of the disposal of her property; that Luteefoonissa expressed her intention of giving the hibbanama to the respondents, on which witness asked for a share, on behalf of his nephew Abookhair, likewise a relative of Luteefoonissa; that she agreed to include his name though she eventually did not do so. This witness further deposes that Luteefoonissa told him afterwards that she had executed the hibbanama.

Now, this is a very strong array of evidence in favor of the respondents, and nothing has been adduced on the part of the appellants to rebut it. They rely on what they call the inherent improbability of Mussamut Luteefoonissa having executed any such deed, and on the various suspicious circumstances attending its alleged execution.

They say, why should Luteefoonissa remain for so many days in a boat at the ghat when she had a house in the town itself? To this it is replied that her house is shown by the evidence of relatives to have been in a ruinous condition, and temporarily, at all events, uninhabitable.

Again, how is it possible to believe that the hibbanama was executed, as stated, at half-past ten o'clock in the morning, seeing that the deed itself was registered between the hours of 10 and 11? The Judge appears to us to have disposed of this objection, as well as that regarding the stamp; but, in any case, considering the lax way

in which natives of this country are accustomed to speak of time, we attach no importance to the discrepancy; standing by itself, it might be something, but it cannot affect the direct evidence in support of the hibbanama.

Again it is objected. Why was not the writer of the draft of the deed examined? He would have been in a position to give important evidence, and was at the same time an independent witness. To this it may be replied that it was sufficient for the respondents to prove the hibbanama, as it was actually executed; and that, if the appellants had wished for Ram Kinkur's testimony, they should have summoned that individual themselves.

Again, that the only respectable witness Abdool Torab did not witness the hibba. Abdool Torab explains why he was not present at the time of execution, and there might, perhaps, have been another reason for his not appearing as an attesting witness in the fact that he expected his nephew's name to be included in the deed. But, be this as it may, if Abdool Torab be the respectable man he is said to be, his statement of what Luteefoonissa said to him, both before and after the execution of the hibbanama, is strong corroborative proof that that deed was given by the lady, and is proof positive that Luteefoonissa herself was present in the boat, and not, as the appellants insinuate, an impostor employed to personate Luteefoonissa for the occasion.

On the whole, we see no reason to disbelieve the evidence in support of the hibbanama or of the respondent's possession under it; and we, therefore, dismiss this appeal with costs.

The 21st June 1867.

Present:

The Hon'ble W. S. Seton-Karr and

A. G. Macpherson, *Judges.*

Registration—Section 17, Act XVI. of 1864.

Case No. 426 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Purneah, dated the 13th December 1866, affirming a decision passed by the Assistant Collector of that District, dated the 10th July 1866.

Karoo Lal Thakoor (Plaintiff), *Appellant,*

versus

Dhoonal Mundul and others (Defendants), *Respondents.*

Baboo Tarucknath Sein for Appellant.

Mr. R. E. Twidale for Respondents.

Section 17, Act XVI. of 1864, does not say that deeds executed prior to the passing of the Act shall not be received as evidence in Courts. It was intended merely to encourage parties to register old deeds at once.

Seton-Karr, J.—THIS case must be remanded to the Deputy Collector for trial upon the merits. Both the Lower Courts seem to have overlooked, or misapprehended the purport of the Registration Act, XVI. of 1864. Section 13 of that Act refers to instruments executed *on or after* the date on which the Act came into operation, which was the first of January 1865; and Section 17, referring to Section 13, merely prescribes that instruments executed before the date on which the Act came into operation shall not be accepted for registration unless presented for that purpose within 12 months from such date. This Section was intended merely to encourage parties to register old deeds at once. It does not say that deeds executed prior to the passing of the Act shall not be received as evidence in Courts.

The Deputy Collector further refers to Section 49 of the same Act, which concerns depositors of wills, and has no bearing whatever on the question before the Court.

The case is remanded to the first Court for trial on the merits.

The 21st June 1867.

Present:

The Hon'ble W. S. Seton-Karr and

A. G. Macpherson, *Judges.*

Presumption—Joint-family Property—Partition.

Case No. 415 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 4th December 1866, modifying a decision of the Sudder Ameen of that District, dated the 23rd January 1865.

Mussamut Rambuddun Koer, mother and guardian of Sheo Suhay Singh, and another (Defendants), *Appellants,*

versus

Gopal Singh (Plaintiff), *Respondent.*

Baboo Doorga Dass Dutt for Appellants.

Baboo Kishen Succa Mookerjee for Respondent.

From the mere fact of an old factory being allowed to remain joint at the time when the rest of the joint property was partitioned, it is not to be inferred that the shareholders agreed to continue to work that old factory, or that they agreed never to raise any new factories.

Macpherson, J.—In this case we think that the decree of the Lower Appellate Court must be reversed.

It seems to us that both the Lower Courts overlooked that which was the chief issue in the cause, namely, whether the appellants were under any agreement or legal obligation to continue to work the old ijmalee factory, and were under any contract or obligation not to open new factories on their respective lands.

The Lower Courts have apparently considered that, because, when the rest of the joint property was partitioned, it was agreed that the then existing factories should remain joint, therefore the various sharers, either directly or indirectly, agreed that they would continue to work the joint factory, and never would raise new factories on their respective lands.

But the agreement which the parties entered into does not allude to these questions at all; and we are of opinion that, from the mere fact of the old factory being allowed to remain joint, it is impossible to infer that the shareholders agreed to continue to work that old factory, or that they agreed never to raise any new factories.

The decree of the Lower Court will be reversed, and the plaintiff's suit dismissed as against these appellants, who are entitled to recover costs in all the Courts.

The 21st June 1867.

Present :

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Special appeal—Ex-parte decree (under Act X. of 1859)—Second application to set aside.

Case No. 55 of 1867 under Act X. of 1859.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 17th December 1866, affirming an order passed by the Deputy Collector of that District, dated the 6th June 1867.

Sudeerooddeen, *Appellant,*

versus

Huronath Sein, *Respondent.*

Baboo Roopnath Baneriee for Appellant.

Baboo Greeja Sunkur Muzoomdar for Respondent.

A special appeal will lie from an order rejecting an application to set aside an *ex-parte* decree passed under Act X. of 1859.

The procedure under that Act does not provide for the entertainment of a second application to set aside an *ex-parte* decree after the first application has been dismissed for default.

[Upon the vakeel for the appellant rising to open his appeal, a preliminary objection was taken by Baboo Greeja Sunkur Muzoomdar, to the effect that, the case having been decreed *ex parte* against the defendant by the Deputy Collector, and defendant's application for a re-trial having been dismissed on default, and a second application to restore the case having been also rejected, and that order upheld in appeal by the Judge, no special appeal would lie under Act X. of 1859, whereupon the Court passed the following order.]

Jackson, J.—We are both of opinion that the objection must be overruled, and that the special appeal must be heard.

The effect of Section 13, Act VI. of 1862 of the Bengal Council, is, we think, to place decrees of the Collector's Courts passed *ex parte* on the same footing as decrees of the Civil Courts passed under the same circumstances, for the Section allows an appeal to the Court to which appeals against the decision of the Court passing the order would lie in the same way as is allowed by Section 119 of Act VIII. of 1859, and that brings the matter under the general provisions of appeals and of special appeals to this Court, and, consequently, we think that a special appeal in this case will lie.

[The appeal then proceeded, and, after hearing argument on both sides, the Court delivered judgment.]

Jackson, J.—I think that the Collector was right in holding that the procedure under Act X. of 1859 did not provide for the entertainment of a second petition such as that presented by the special appellant.

It is satisfactory to know that, in coming to that conclusion, the Deputy Collector was acting strictly in accordance with what appears to be the justice of the case for a more frivolous excuse for non-appearance after six weeks had been allowed for the purpose,

perhaps never was heard in a Court of Justice.

The special appeal, therefore, will be dismissed with costs.

Hobhouse, J.—I concur.

The 21st June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Limitation—Execution—Section 21, Act XIV. of 1859.

Case No. 116 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 23rd December 1866, affirming an order passed by the Sudder Ameen of that District, dated the 21st July 1866.

Deegendur Narain Ghose (Decree-holder), *Appellant,*

versus

Hurkishore Dutt and others (Judgment-debtors), *Respondents.*

Baboo Hem Chunder Banerjee for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

Interpretation of Full Bench decision (7 W. R., p. 515) with regard to limitation in cases of execution of decrees under Section 21, Act XIV. of 1859.

Jackson, J.—THE order of the Judge in this case seems to me to have been passed under a misconception.

The Judge states that "this decree was in "force when Act XIV. was passed, and there-"fore Section 21 of the Act applies. The "Full Bench decision, which refers only to "applications under Section 20, accordingly, "does not apply to this case which must be "governed by the law." If the Judge intends by that observation to say that, according to the decision of the Full Bench, cases under Section 20 were not to be governed by the law, he has grievously misunderstood that decision.

There can be no doubt, I think, and it has been so held by the Full Bench of this Court (subsequently, indeed, to the decision now under consideration), that Section 21 is merely a proviso upon Section 20; that cases are not to be dealt with upon a different principle under Section 21, but that, in respect of such cases, instead of looking merely to the point whether a proceeding had been taken within three years next preceding the application, a period of three years was allowed from the passing of Act XIV. of 1859, unless the period of limitation allowed under the formerly existing practice should first have expired, and this without reference to the date at which the last proceeding might have been taken, or to the fact of any previous proceeding having been taken to enforce the decree or to keep it in force. That is the only difference in respect of cases coming under Section 21; and consequently the Judge will have to decide whether, in respect of this case, any proceeding had been taken within three years from the passing of the Act (execution not having been previously barred by the expiration of the period formerly allowed), and if such proceeding had been taken, and subsequent application has been made, then whether the proceeding so taken within three years after the passing of the Act and within three years next before the present application was a *bonâ fide* and effectual application to keep the decree in force.

This being a case of special appeal, we are not competent to deal with the fact ourselves, and must, therefore, remit the case to the Judge in order that he may determine it.

The Judge will find the law fully stated in a decision of the Full Bench, Miscellaneous Appeals Nos. 719 and 445 of 1866, dated 31st May 1867, which will be shortly published.*

The 22nd June 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble F. A. Glover, *Judge.*

Jurisdiction (of Small Cause Courts)—Execution of decree against Government—Damages.

Reference to the High Court by Mr. C. D. Field, Officiating Judge of the Principal Court of Small Causes at Kishnaghur.

Mr. J. J. Doyle, Manager on behalf of the Bengal Indigo Company, *Plaintiff,*

versus

Dwarkanath Chatterjee and another, *Defendants.*

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* *See* Vol. 7, p. 515.

Baboo Bhowany Churn Dutt for Plaintiff.

No one for Defendants.

The Small Cause Court at Kishnaghur has no jurisdiction to execute a decree against Government. If the Court should attempt to execute such decree, the plaintiff who applied for that execution would be liable to be sued for damages.

Case.—THIS was an action for damages brought by the Bengal Indigo Company against Dwarkanath and Ohit Kazee. The damages alleged was that defendants had made excavations in the plaintiff's land, and used a quantity of the soil for the manufacture of bricks. The defendants pleaded the orders of Judoonath Sein, an Assistant Overseer in the Public Works Department. It does not appear from the record that any evidence was taken in support of this plea, or to show that the above defendants acted on such orders without knowing that they were doing a wrongful act. Summonses were, however, issued against Judoonath Sein and Government, who were thus made parties to the suit. The summons in the case of the latter was served on the Government pleader who entered an appearance and pleaded *non-liability*. This plea was overruled by the former Judge, Baboo Doorga Proshad Ghose, and a decree passed against Judoonath Sein and Government in the following terms: "Decreed for Rupees "28-15-9 with costs proportionately, and "interest at 12 per cent. against Government "and Judoonath Sein."

Execution of this decree against Government is now applied for, and the decree was given on the 13th December 1865, *or after the passing of Act XI. of 1865*, Section 9 of which is as follows: "Suits "against the Local Government or against "the Government of India shall be brought "in the Court having jurisdiction at the "place which is the seat of such Government."

With advertence to this Section of the Small Cause Court Act for the Mofussil, it is clear that the Court of Small Causes at Kishnaghur had no jurisdiction to pass a decree against Government. The question which I then beg to submit for the decision of the High Court under the provisions of Act X. of 1867 is, whether I should now grant execution of the above decree against Government.

The question being one of jurisdiction, I conceive that it is incumbent on me to enter into it of my own motion, as the defect is plainly apparent on the face of the judgment (*vide* the remarks of the Court in case No. 2220 of 1865, Kisto Chunder Chuttopadhia and others, Appellants, *vs.* Ramlochun Roy and others, Respondents, 16th December 1865, IV. Weekly Reporter, Act X. Rulings, p. 47; and case No. 494 of 1865, Anund Coomar, Appellant, *vs.* Takur Pandey, Respondent, 20th December 1865, IV. Weekly Reporter, Miscellaneous Appeals, p. 21).

Under English Law, a judgment (even a judgment *in rem*) can be impeached by extrinsic evidence showing that the Court which pronounced it had no jurisdiction (Havelock *vs.* Rockwood, 8 T. R. 268); *see* also Smith's Leading Cases, Vol. II., pp. 659, 684, 686, 694. Mr. Taylor lays it down (Work on Evidence, Vol. II., para. 1523) that every species of judgment will be rendered inadmissible in evidence by showing that the Court from which it emanated had no jurisdiction, and it will be abundantly clear from the cases quoted by him in paragraphs 1523 to 1532 that it has been the practice in England to quash or otherwise treat as nullities the judicial proceedings of inferior tribunals held without jurisdiction (para. 1525).

In case No. 211 of 1865 Bhowani Prosad Surma Khan, Appellant, *vs.* Dharm Narain Neogy and others, Respondents, 16th May 1865, III. Weekly Reporter, Civil Rulings, p. 25, the High Court set aside an order passed by a Principal Sudder Ameen without jurisdiction in a case of that class cognizable by Courts of Small Causes.

For the above reasons, I am of opinion that execution of the present decree against Government ought to be refused, and that so much of the judgment as makes Government liable ought to be treated as a nullity.

In a case somewhat similar which I had the honor to refer to the High Court before the passing of Act X. of 1867, and which is reported at pages 19 and 20, V. Weekly Reporter, Small Cause Court References, I quoted some decisions of the old Sudder Court and of the present High Court, which may not be inapplicable to the present case.

The High Court (present Peacock, C. J., and L. S. Jackson, J.), on the 18th May 1867, made the following order:—

Let the Judge be informed that this case is not sufficiently stated, inasmuch as it does not state when the suit was commenced, whether it was commenced under Act XI. of 1865 or under Act XLII. of 1860.

and declaring what mouzahs were or were not covered by the decree. Assuming that this was a decree which was to be executed in the manner prescribed by Section 224, the function of the Court in delivering possession is extremely simple, for it has only to order delivery to be made by affixing copy of the warrant on some conspicuous place on the lands, and proclaiming to occupants of the property by beat of drum the substance of the decree in respect of the property. The Act does not distinctly specify whether, in case of the decree relating to several mouzahs comprised in one estate, such affixing of copy of the warrant and such proclamation are to be made in each mouzah, or only at the sudder cutcherry, or other conspicuous place on the estate. If the proclamation were to be made, and the return to be affixed only at the sudder cutcherry, then it would be unnecessary to enquire into the subject-matter of this complaint. But if, on the other hand, the proclamation was to be made, and the return was to be affixed on every mouzah, it would then be necessary to determine whether the mouzahs in question were covered by the decree or no, and that must be done by the Court itself. But it seems to me doubtful whether this is not a case falling under Section 225 of the Civil Procedure Code, which provides for the case of a decree for separate possession of a share in an undivided estate. In that case, separation of the share is to be made by the Collector. This is a point, however, which must be determined in the first instance by the Principal Sudder Ameen. If he find that the case is one falling under Section 224, he must then proceed to determine the question under Section 227, that is, if it be necessary to make proclamation in separate mouzahs, and if it should turn out that any mouzahs to which the decree-holder's complaint related are not comprised in the decree, and if, notwithstanding such fact, possession shall have been delivered to the decree-holder, it will then certainly be necessary to order restitution of such mouzahs, otherwise, of course, possession need not be disturbed. The proceedings, therefore, must be remanded, I think, to the Principal Sudder Ameen with instructions of the kind I have mentioned, that is to say, the Principal Sudder Ameen will first consider and determine whether possession is to be given under Section 224 or 225; if under the latter, he must refer the decree-holder to the Collector; if under the former, then he will decide whether proclamation and affixing of notice are to be made in each mouzah or otherwise; and, if necessary, he will then make the enquiry prescribed in Section 227. But, in any case, he will restrict the action of his Court to doing that which is directed by the Sections referred to.

Hobhouse, J.—I concur with my learned colleague.

As I understand the matter, while execution of decree was going on, the decree-holder alleged that certain villages were within the decree, and that he was obstructed in getting possession. Thereupon, there should have been an enquiry under Section 227, and after the enquiry such order as might be proper under the circumstances, but that order should have been passed by the Court, and should not have been delegated to any body else. Then, when, after enquiry, an order had been passed, if that order was for delivery over of the property to the decree-holder, either wholly or to any extent, then possession should have been given under Section 224 or 225, as the case might be.

The 20th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Limitation—Execution of decree (against several defendants with separate liability).

Case No. 171 of 1867.

Miscellaneous Appeal from an order passed by the Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of Rajshahye, dated the 18th January 1867.

Mohesh Chunder Chowdhry (Decree-holder), *Appellant,*

versus

Mohun Lal Sircar (Judgment-debtor), *Respondent.*

Baboo Mohinee Mohun Burdhun for Appellant.

Baboo Kalee Kishen Sein for Respondent.

Where a decree has passed against several defendants, each of whom is declared to have a separate liability in respect of a definite amount, execution against one or more of such judgment-debtors keeps the decree in force against all simultaneously.

Jackson, J.—THIS is a case of execution of a decree obtained by one co-sharer of a

joint estate against his different co-sharers for sums of money paid on their behalf on account of Government revenue. It appears that the suit was brought against all the co-sharers, but that in the decree the amounts for which the several co-sharers were liable, together with costs in proportion to those amounts, were awarded against them separately. The decree bears date 1854, and the first application to execute was in the year 1855, at which time notice was served upon all the judgment-debtors. The decree was one of the Mymensingh Court. The judgment-debtor before us (the respondent) resides in Zillah Rajshahye. It appears that, although notice was served on this debtor in 1856, no further steps were taken against him; but that execution has gone on effectually against the other co-sharers down to 1863, and in 1864, in April, the case, which up to this time had been proceeding against them, was struck off the file. The present application to execute against the respondent was made on the 2nd of June 1866.

The Lower Court appears to have held that, inasmuch as no proceedings have been taken against the respondent for upwards of three years, execution as against him was barred.

It has frequently been held in this Court, where the decree has passed against several defendants declaring them to be jointly and severally liable, that execution against one or more of such judgment-debtors keeps the decree in force as against all. The contention in this case is that the defendants were not declared to have under the decree a joint and several liability, but each a separate liability in respect of definite amounts. There is no precedent of this Court bearing upon the point; but the respondent's vakeel refers us to the case of Mrs. Stevenson and another, Appellants, to be found at page 18, VI. Weekly Reporter. There is a passage in page 21 of the judgment in which the learned Judges, after remarking that in that case the proceedings taken against another judgment-debtor effectually kept the decree in force against the then appellant, go on to observe: "It may be that "some decrees, though passed nominally on "one document, are, in reality, separate de-"crees against separate individuals. In such "cases, the Court might, and probably would, "consider them to be separate, and in exe-"cution put the Law of Limitation into force "against the different defendants as if they "were separate." That is cited as a ruling by those two learned Judges to show that, in a case like the present, execution against several defendants would be separate, and that, consequently, execution-proceedings against one defendant would not be effectual to keep the decree in force against the other. This, with all respect to the learned Judges, appears to me to be an *obiter dictum;* it was not the case before them, and is not, therefore, strictly an authority to guide us now. It is an opinion which is entitled to much weight, and which I have accordingly considered; but, looking at the stringent terms of the Law of Limitations, I think that we are bound not to apply any provision of it in such a manner as to shut out a decree-holder from the benefit of his decree unless the terms of that provision are such as expressly to apply to such a case. Section 20 of that law runs: "No process of execu-"tion shall issue from any Court not estab-"lished by Royal Charter to enforce any "judgment, decree, or order of such Court, "unless some proceeding shall have been "taken to enforce such judgment, decree, or "order, or to keep the same in force, within "three years next preceding the applica-"tion for such execution." Can it be said that in this case no proceeding has been taken to enforce such judgment, decree, or order? That is not the contention; but it is contended that we are to read that Section as if it ran in this way: "No process of execution shall "issue from any Court against any judgment-"debtor unless some proceeding shall have "been taken to enforce such judgment, de-"cree, or order, or to keep the same in force "against the same judgment-debtor within "three years preceding the application."—— I cannot see that we are bound, or that we should be at liberty, to introduce into this Section words of additional stringency to deprive the decree-holder of the judgment which he has obtained. The law is quite rigorous enough, as it is, and I do not think it is the business of the Courts to make it additionally stringent.

For these reasons, I think that the decision of the Court below was wrong, and that the decree-holder ought to be allowed to execute his decree against the respondent.

The appellant will get his costs.

I may add that it was a contention of the vakeel for the respondent in this case that the decree-holder might have carried on execution, and was bound to carry on execution, against all the defendants simultaneously.

The only occasion on which documents are to be produced, and then returned to the parties, as far as I understand the Act, and as I believe is the practice in all Mofussil Courts, is the occasion mentioned in Section 391, that is, when the document on which the plaintiff relies is presented or produced with the plaint, and a copy is filed with the plaint. On that occasion such documents are compared with the copies, the copies are retained, and the originals returned. But when, at the first hearing, documents are produced in Court, and received by the Court, they are then filed as part of the record, and they so continue until after the determination of the suit, and, if necessary, of the appeal.

In respect to the documents to which the present application relates, I have before me what purport to be office-copies authenticated by the seal of the Zillah Court, and the signature of the sheristadar. These copies bear an endorsement which, as far as I can judge, is intended to be a compliance, though it is an imperfect compliance, with the directions of Section 132. It does not contain the particulars directed in that Section, but it merely contains the date on which the document was put in, and is signed by the Judge. It must be borne in mind that these documents have a double aspect. In one sense they are the documents which the plaintiff had vainly demanded from the defendant, and of which the wrongful detention by the defendant and the consequent damages arising to the plaintiff constituted the cause of action. On the other hand, the contents of these documents would be evidence to prove the damage which resulted to the plaintiff from their wrongful detention. They were, therefore, it seems to me, doubly in the custody of the Court, *firstly*, as the subject of litigation itself; and, *secondly*, as evidence in the cause. From inspection of these office-copies as well as from the terms of the judgment of the Zillah Court, it cannot be doubted that these 15 documents were produced by the defendant upon notice, that in that way they came into the custody of the Court, and that the Court actually made an order for their delivery to the plaintiff. There is nothing before me to show either that they were delivered to the plaintiff, or what has become of them. I shall, therefore, call upon the Judge by precept to explain within a fortnight what has become of these documents in the best manner he can. On receipt of the Judge's return, I shall make further orders.

The 22nd June 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Pleaders—Appeal to Privy Council—Review—Section 18, Act VIII. of 1859.

Shah Mukhun Lal and another, *Appellants to England,*

versus

Sreekishen Singh and others, *Respondents to England.*

Mr. C. Gregory for Appellants.

Moonshee Ameer Ali for Respondents.

When a pleader appears in a regular appeal before the High Court, he is competent under that vakalutnàmah, unless it is revoked, to appear for the client in the subsequent stages of that case and in the appeal, if preferred, to the Privy Council.

Section 18, Act VIII. of 1859, applies to Appellate Courts, as well as to Courts of original jurisdiction, and enables pleaders to appear in such subsequent proceedings as the appeal to the Privy Council, as well as in reviews.

Jackson, J.—THIS is a very old decree. I think the decree-holder must be permitted to execute it on giving security.

It is proper to mention that, on the argument in this matter, Mr. Gregory objected to Moonshee Ameer Ali, who appears for the respondent to England, the decree-holder, being heard, because he filed no fresh vakalutnamah, although he was engaged in the appeal in this Court.

I wish it to be distinctly understood that, when a vakeel appears in a regular appeal before this Court, he is competent, in my opinion, under that vakalutnamah, unless it is revoked, to appear for the client in the subsequent stages of that case and in the appeal, if preferred, to the Privy Council. It is very much to the convenience of the public and of parties that that should be so. The Procedure Code, Section 18, declares that the appointment of a pleader, when filed in Court, shall be considered to be in full force until revoked by a writing filed in the Court. I understand that that Section applies to Appellate Courts, as well as to Courts of original jurisdiction, and I understand that Section to enable vakeels to appear in such subsequent proceedings as the appeal to Her Majesty in Council, as well as in reviews.

The 24th June 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Section 246, Act VIII. of 1859—Limitation.

Case No. 356 of 1867.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 4th December 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 29th July 1866.

Bhyrub Lall Bhukut (Plaintiff), *Appellant,*

versus

Meer Abdool Hossein and others (Defendants), *Respondents.*

Baboos Umbika Churn Banerjee and *Obhoy Churn Bose* for Appellant.

Baboo Motee Lall Mookerjee for Respondents.

In disposing of a claim under Section 246, Act VIII. of 1859, if the Court be of opinion that the property attached ought not to be sold, the proper order for the Court to make is a simple order to release the property from attachment.

A suit brought, not to set aside an order of release under Section 246 of Act VIII. of 1859, but to recover possession from the successful claimant of the property released, is not governed by the limitation prescribed by Clause 5, Section 1, Act XIV. of 1859.

Macpherson, J.—THE facts in this case, as they appear from the judgment of the Lower Court, are as follows: The land of which the appellant seeks to be put in possession originally belonged to one Hossein Ali Beg, whose daughter was married to the respondent Meer Abdool Hossein. After the death of Hossein Ali Beg, a decree was obtained by one Soodee Mull against Meer Abdool Hossein, and the land now in dispute was attached in execution of the decree. The respondent, Mussamut Futtee Bibee (as mother and guardian of the minor sons of the deceased Hossein Ali Beg), put in a claim to the property so attached, alleging that it belonged to her husband's estate, and not to the judgment-debtor. The claim was investigated and disposed of under Section 246 of Act VIII. of 1859, and eventually the Court, considering that the land was not proved to belong to the judgment-debtor, passed an order releasing it from attachment. This order was passed on the 8th of September 1863.

On the 11th of November 1863, Abdool Hossein and his brother, the respondent Abdool Mohossein, sold this same property to the appellant, who had full notice of Futtee Bibee's claim and of every thing that had passed in Court in connection therewith. On the 18th of September 1865, the appellant instituted this suit to recover possession of the land by virtue of his purchase from Abdool Hossein and his brother. The defendants are Abdool Hossein and his brother, and Futtee Bibee as mother and guardian of her minor sons.

The Lower Appellate Court has dismissed the suit as barred by Clause 5 of Section 1 of Act XIV. of 1859.

We do not concur in the judgment of the Lower Court. We agree with the Judge in holding that, so far as the appellant makes title through Abdool Hossein, he can be in no better position than Abdool Hossein himself would occupy, were he the plaintiff. But, in our opinion, Clause 5 of Section 1 of Act XIV. of 1859 does not apply to this case at all, and the suit is not barred.

The property in question having been attached under Soodee Mull's decree as belonging to Abdool Hossein, Futtee Bibee claimed it for her sons, and the Court ordered its release. But the Court decided no question of title as between Abdool Hossein and Futtee Bibee or her sons. The order is a simple order that the property should be released from attachment, and should not be sold in execution of Soodee Mull's decree. The terms of Section 246 are clear and imperative. If the Court finds the property ought not to be sold, "the Court shall pass an order *for releasing the said property from attachment*," and it is not provided that the Court shall make any declaration as to who is to be deemed the real owner of the property. It may be that the order of release is based upon the fact that the Court considers it proved that the property belongs to the claimant; but nevertheless the order cannot, and certainly ought not, to contain any declaration of the claimant's title as against the judgment-debtor. The observations which we made in our judgment in the recent case of Mussamut Emam Bandee Begum *versus* Mahomed Tukee Khan (reported at page 27 of Weekly Reporter, Volume VIII.) bear upon this question; and we see no reason to doubt the soundness of these observations.

Clause 5, Section 1 of Act XIV. of 1859, enacts that "suits to alter or set aside summary decisions and orders, &c.," must be brought within one year from the date of the final decision or order in the case. But this suit is not, in fact, a suit to alter or set

The only occasion on which documents are to be produced, and then returned to the parties, as far as I understand the Act, and as I believe is the practice in all Mofussil Courts, is the occasion mentioned in Section 391, that is, when the document on which the plaintiff relies is presented or produced with the plaint, and a copy is filed with the plaint. On that occasion such documents are compared with the copies, the copies are retained, and the originals returned. But when, at the first hearing, documents are produced in Court, and received by the Court, they are then filed as part of the record, and they so continue until after the determination of the suit, and, if necessary, of the appeal.

In respect to the documents to which the present application relates, I have before me what purport to be office-copies authenticated by the seal of the Zillah Court, and the signature of the sheristadar. These copies bear an endorsement which, as far as I can judge, is intended to be a compliance, though it is an imperfect compliance, with the directions of Section 132. It does not contain the particulars directed in that Section, but it merely contains the date on which the document was put in, and is signed by the Judge. It must be borne in mind that these documents have a double aspect. In one sense they are the documents which the plaintiff had vainly demanded from the defendant, and of which the wrongful detention by the defendant and the consequent damages arising to the plaintiff constituted the cause of action. On the other hand, the contents of these documents would be evidence to prove the damage which resulted to the plaintiff from their wrongful detention. They were, therefore, it seems to me, doubly in the custody of the Court, *firstly*, as the subject of litigation itself; and, *secondly*, as evidence in the cause. From inspection of these office-copies as well as from the terms of the judgment of the Zillah Court, it cannot be doubted that these 15 documents were produced by the defendant upon notice, that in that way they came into the custody of the Court, and that the Court actually made an order for their delivery to the plaintiff. There is nothing before me to show either that they were delivered to the plaintiff, or what has become of them. I shall, therefore, call upon the Judge by precept to explain within a fortnight what has become of these documents in the best manner he can. On receipt of the Judge's return, I shall make further orders.

The 22nd June 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Pleaders—Appeal to Privy Council—Review —Section 18, Act VIII. of 1859.

Shah Mukhun Lal and another, *Appellants to England,*

versus

Sreekishen Singh and others, *Respondents to England.*

Mr. C. Gregory for Appellants.

Moonshee Ameer Ali for Respondents.

When a pleader appears in a regular appeal before the High Court, he is competent under that vakalutnámah, unless it is revoked, to appear for the client in the subsequent stages of that case and in the appeal, if preferred, to the Privy Council.

Section 18, Act VIII. of 1859, applies to Appellate Courts, as well as to Courts of original jurisdiction, and enables pleaders to appear in such subsequent proceedings as the appeal to the Privy Council, as well as in reviews.

Jackson, J.—This is a very old decree. I think the decree-holder must be permitted to execute it on giving security.

It is proper to mention that, on the argument in this matter, Mr. Gregory objected to Moonshee Ameer Ali, who appears for the respondent to England, the decree-holder, being heard, because he filed no fresh vakalutnamah, although he was engaged in the appeal in this Court.

I wish it to be distinctly understood that, when a vakeel appears in a regular appeal before this Court, he is competent, in my opinion, under that vakalutnamah, unless it is revoked, to appear for the client in the subsequent stages of that case and in the appeal, if preferred, to the Privy Council. It is very much to the convenience of the public and of parties that that should be so. The Procedure Code, Section 18, declares that the appointment of a pleader, when filed in Court, shall be considered to be in full force until revoked by a writing filed in the Court. I understand that that Section applies to Appellate Courts, as well as to Courts of original jurisdiction, and I understand that Section to enable vakeels to appear in such subsequent proceedings as the appeal to Her Majesty in Council, as well as in reviews.

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The 24th June 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Section 246, Act VIII. of 1859—Limitation.

Case No. 356 of 1867.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 4th December 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 29th July 1866.

Bhyrub Lall Bhukut (Plaintiff), *Appellant,*

versus

Meer Abdool Hossein and others (Defendants), *Respondents.*

Baboos Umbika Churn Banerjee and *Obhoy Churn Bose* for Appellant.

Baboo Motee Lall Mookerjee for Respondents.

In disposing of a claim under Section 246, Act VIII. of 1859, if the Court be of opinion that the property attached ought not to be sold, the proper order for the Court to make is a simple order to release the property from attachment.

A suit brought, not to set aside an order of release under Section 246 of Act VIII. of 1859, but to recover possession from the successful claimant of the property released, is not governed by the limitation prescribed by Clause 5, Section 1, Act XIV. of 1859.

Macpherson, J.—The facts in this case, as they appear from the judgment of the Lower Court, are as follows: The land of which the appellant seeks to be put in possession originally belonged to one Hossein Ali Beg, whose daughter was married to the respondent Meer Abdool Hossein. After the death of Hossein Ali Beg, a decree was obtained by one Soodee Mull against Meer Abdool Hossein, and the land now in dispute was attached in execution of the decree. The respondent, Mussamut Futtee Bibee (as mother and guardian of the minor sons of the deceased Hossein Ali Beg), put in a claim to the property so attached, alleging that it belonged to her husband's estate, and not to the judgment-debtor. The claim was investigated and disposed of under Section 246 of Act VIII. of 1859, and eventually the Court, considering that the land was not proved to belong to the judgment-debtor, passed an order releasing it from attachment. This order was passed on the 8th of September 1863.

On the 11th of November 1863, Abdool Hossein and his brother, the respondent Abdool Mohossein, sold this same property to the appellant, who had full notice of Futtee Bibee's claim and of every thing that had passed in Court in connection therewith. On the 18th of September 1865, the appellant instituted this suit to recover possession of the land by virtue of his purchase from Abdool Hossein and his brother. The defendants are Abdool Hossein and his brother, and Futtee Bibee as mother and guardian of her minor sons.

The Lower Appellate Court has dismissed the suit as barred by Clause 5 of Section 1 of Act XIV. of 1859.

We do not concur in the judgment of the Lower Court. We agree with the Judge in holding that, so far as the appellant makes title through Abdool Hossein, he can be in no better position than Abdool Hossein himself would occupy, were he the plaintiff. But, in our opinion, Clause 5 of Section 1 of Act XIV. of 1859 does not apply to this case at all, and the suit is not barred.

The property in question having been attached under Soodee Mull's decree as belonging to Abdool Hossein, Futtee Bibee claimed it for her sons, and the Court ordered its release. But the Court decided no question of title as between Abdool Hossein and Futtee Bibee or her sons. The order is a simple order that the property should be released from attachment, and should not be sold in execution of Soodee Mull's decree. The terms of Section 246 are clear and imperative. If the Court finds the property ought not to be sold, "the Court shall pass an order *for releasing the said property from attachment,*" and it is not provided that the Court shall make any declaration as to who is to be deemed the real owner of the property. It may be that the order of release is based upon the fact that the Court considers it proved that the property belongs to the claimant; but nevertheless the order cannot, and certainly ought not, to contain any declaration of the claimant's title as against the judgment-debtor. The observations which we made in our judgment in the recent case of Mussamut Emam Bandee Begum *versus* Mahomed Tukee Khan (reported at page 27 of Weekly Reporter, Volume VIII.) bear upon this question; and we see no reason to doubt the soundness of these observations.

Clause 5, Section 1 of Act XIV. of 1859, enacts that "suits to alter or set aside summary decisions and orders, &c.," must be brought within one year from the date of the final decision or order in the case. But this suit is not, in fact, a suit to alter or set

aside the order passed under Section 246. Neither the appellant nor the respondents under whom he claims can have any desire to see the order releasing the property set aside; and the provisions of Clause 5 of Section 1 of the Limitation Act, therefore, have really nothing to do with the matter. We have been referred by the pleader for Futtee Bibee to the case of Shaikh Khyrat Ali *versus* Khurnk Dharee Singh (Marshall's Reports, page 520). But that case has no bearing on the point in question, inasmuch as there the suit was one brought to set aside a sale of property which had been actually sold in execution of a decree, *not* under the provisions of the Code of Civil Procedure, but under the old law which existed before the new Code came into force.

Moreover, even if the appellant, so far as he claims through Abdool Hossein, were to be held barred by the order passed on Futtee Bibee's claim, it would not necessarily follow that he would be barred so far as he claims through Abdool Mohossein, who was no party to the proceedings in Soodee Mull's suit, and who, therefore, cannot be affected by them; and this is another reason why the Lower Court was wrong in declaring the whole suit barred.

The case is remanded to the Court of first instance for trial upon the merits.

Although we hold that the appellant's suit is not barred, we must not be supposed to hold that the proceedings under Section 246 do not, as *evidence*, militate against him. If Abdool Hossein assisted Futtee Bibee in getting the property released, or even if he kept quiet and allowed it without any opposition to be released, his conduct will be most cogent evidence now as against him and the appellant claiming under him. That is matter for consideration by the Lower Courts when they come to deal with the case on the merits. All we now decide is that the suit is not barred under Clause 5, Section 1 of Act XIV. of 1859.

The 24th June 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Section 9, Act VI. of 1862 B. C.—Measurement—Joinder.

Case No. 468 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 31st January 1867, affirming a decision passed by the Deputy Collector of that District, dated the 13th January 1866.

Shushee Bhoosun Banerjee and others (Defendants), *Appellants,*

versus

Nubo Coomar Chatterjee (Plaintiff), *Respondent.*

Baboo Khettur Mohun Mookerjee for Appellants.

Baboo Bhuggobutty Churn Ghose for Respondent.

A single suit simply to measure lands may be brought under Section 9, Act VI. of 1862 B. C., against several defendants, although their rights and tenures are different.

Seton-Karr, J.—This was a suit brought by a putneedar against a number of ryots in order to the measurement of their lands under Section 9, Act VI. of 1862, Bengal Council. Both Courts have given the plaintiff a decree, allowing him to measure the lands.

In appeal before us, the only point taken is that the plaintiff should not have included in one suit a number of ryots whose rights and tenures are different, but that he should have instituted a separate suit against each tenant.

We think that the plaintiff was entitled to include the several parties, whose lands he claimed to measure, in one suit. His suit is simply for right to measure, and no adjudication of the rights of the defendants in their several tenures is prayed for.

No case exactly in point has been quoted. But we find a judgment of Trevor and Campbell, *JJ.*, reported at page 4, Act X Rulings, Weekly Reporter, Volume VI., in which it was held that a suit brought under Section 10 of Act VI. of 1862, owing by a combination of ryots, might lie against several defendants in two villages, and that separate suits against each ryot need not be instituted.

Looking to the analogy of this case and to the scope and object of the Act under which the suit is brought, which Act was intended to facilitate the collection of rents by the zemindar generally, we see no error of law in the decision of the Lower Courts, and we dismiss the appeal with costs.

The 25th June 1867.

Present:

The Hon'ble G. Loch and H. V. Bayley,

Judges.

Estoppel—Section 269, Act VIII. of 1859—Dismissal of Claim—Sale.

Case No. 3180 of 1866.

Special Appeal from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 18th September 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 31st May 1866.

Mussamut Bibee Khanum Jan (Plaintiff), *Appellant,*

versus

Ruttun Lal and others (Defendants), *Respondents.*

Mr. C. Gregory for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

A statement of dispossession made in a petition preferred under Section 269, Act VIII. of 1859, by a person claiming land sold in execution of a decree, and ordered to be put in possession of the auction-purchaser, cannot operate as an estoppel in a suit subsequently brought by the claimant to "establish her right" on the allegation of her being in possession of the land in question.

The plaintiff's asking the Court to set aside a sale, which did not comprise the property claimed, is not a sufficient reason for dismissing the claim.

Loch, J.—The plaintiff sues for a declaration of title, being, as she alleges, in possession of the property in litigation.

It appears that, in execution of a decree, certain property belonging to the debtors was sold and purchased by the defendant in this suit. The auction-purchaser was ordered to be put in possession, and the plaintiff filed a petition under the provisions of Section 269, Act VIII. of 1859, claiming the land now in suit, from which she alleged that she had been dispossessed by the auction-purchaser, though it formed no portion of the property sold. Her claim was rejected, and she has brought the present suit to establish her title, alleging that she is in possession, and she prays that the sale may be reversed.

The Lower Court dismissed the suit, the Judge pointing out that her present allegation of possession is distinctly at variance with her previous statement of dispossession; and, further, that she sues to set aside a sale which, according to her own showing, does not affect her, for the property in suit was not sold as she alleges.

In special appeal it is urged that the expression used in plaintiff's petition, presented under Section 269, to the effect of her being dispossessed, was an incorrect and loose mode of expression setting forth rather what she anticipated than what had actually occurred. It is further urged that the plaint is in no way contradictory in its terms to her former statements; that she seeks to establish her title to the land, and on proof thereof to be confirmed in possession; that she has brought her present suit for the purpose of "establishing her right" as directed in the concluding words of Section 269; and if she does so, she will be entitled to possession of the property whether she be now in or out of possession; that, even if she was in error in asking the Court to set aside a sale which did not comprise the property she claims in this suit, yet this was not a sufficient reason for dismissing the claim; the fact, however, was that the defendants did claim it as included in their purchase.

We think that the Lower Appellate Court has been somewhat hasty in dismissing this case without going into the merits. No doubt, there is an inconsistency in plaintiff's statements; but the suit is brought to establish her right to the property which has been called in question by the decision adverse to her passed under Section 269. The statement then made by the plaintiff may be used against her, but it is not an estoppel. It, of course, makes it more difficult for her to prove her present allegation of possession if it be needful to prove this in the present suit. We do not think this a very material point. In the words of Section 269, plaintiff has to "establish her right," and this is the point which the Courts have to look to. Has she proved her right to the property? There was nothing inconsistent in the plaintiff asking for the reversal of the sale, though she alleged that this property was not included in the sale. The auction-purchasers claimed it as part of their purchase, and had been successful in sustaining their claim against her in the suit brought under Section 269. All plaintiff really seeks is that the defendants under cover of that sale may not take her property as they seek to do.

Under this view of the case, we think it must be remanded to the Lower Appellate Court for determination on its merits, and we direct that it be disposed of without delay.

The 25th June 1867.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Jurisdiction—Transfer of tenure—Registration.

Case No. 243 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 11th December 1866, reversing a decision passed by the Moonsiff of that District, dated the 6th November 1865.

Nobeen Kishen Mookerjee (Defendant), *Appellant,*

versus

Shib Pershad Pattuck (Plaintiff), *Respondent.*

Baboos Umbika Churn Banerjee and *Nubo Kishen Mookerjee* for Appellant.

Baboos Kishen Succa Mookerjee and *Nil Madhub Sein* for Respondent.

A suit by the purchaser of a permanent transferable tenure for a declaration of his title as tenant to possession is cognizable in the Civil Court, and not by the Collector.

The unregistered transferee of a transferable tenure cannot be treated by the zemindar as a trespasser, but, as against the zemindar who has evicted him, has a right to be restored to possession.

Markby, J.—In this case the plaintiff sued for a declaration of his title as tenant to the possession of certain lands.

The nature of the tenure was not very clearly stated, but it has been assumed by both parties to be a permanent transferable interest within the meaning of Section 27 of Act X. of 1859.

The title which the plaintiff set up was a purchase from one Shaikh Asheeroodeen, who purchased the interest of the former tenant at a sale by auction, when it was sold at the instance of one of the tenant's judgment-creditors.

Shaikh Asheeroodeen purchased in Bysack 1271, and there were then due from the tenant certain arrears of rent in respect of the year 1270. Subsequently to this sale, the plaintiff tendered to the zemindar the rent which had accrued due from Bysack to Aughran 1271, which the zemindar refused to take, and he accordingly deposited the amount in the Collector's Court on the 5th of Aughran 1271 under the provisions of Act VI. of 1862 of the Acts of the Bengal Council. This was done apparently under some misconception, for the circumstances under which this rent could be deposited in the Collector's Court under that Act do not seem to have arisen.

After this deposit, the zemindar, on the 1st of Magh 1271, brought a suit under Act X. against the former tenant to eject him for non-payment of rent.

The plaintiff applied to be allowed to intervene in this suit, but his application was refused. The zemindar in this suit obtained a verdict of ejectment against the former tenant.

The plaintiff then brought the present suit to declare his title to the possession, and the first Court, though it goes into the merits, appears to have decided that it had no jurisdiction to entertain the suit. The second Court reversed the decree, and declared in favor of the plaintiff's title.

On the first occasion, when this case came before us, we held,* in accordance with some of the earlier decisions of this Court, that the suit lay in the Collector's Court, and that the ordinary Civil Courts had no jurisdiction. But, on our attention being called to a recent decision of the Full Bench, which decides otherwise, we granted a review, and the case now comes on to be argued on the merits.

I am not quite sure that I understand all the expressions of the Lower Appellate Court, which possibly may be from its having been originally written in a different language from that in which it comes before me; but, in the main, it appears to me that that Court took the right view of this case. It appears to me to be clear that, even supposing that a tenant, with a permanent transferable interest of this kind, is liable to be ejected under the provisions of Section 21 of Act X. of 1859, still such proceedings taken *after* a transfer has taken place as against the former tenant are futile, because he has already quitted the land; and, as against the *new* tenant, they are inefficacious because he is not a party to the suit.

On the other hand, I agree with what I understand to be the opinion of the Principal

See Vol. VII., p. 490.

Sudder Ameen that a zemindar, who has not recognized the new tenant, may, notwithstanding the transfer, sue the former tenant for arrears of rent which accrued due during his tenancy, and, having obtained a decree, may sell the tenure under Section 105 without regard to the rights of the new tenant, who, however, has ample opportunity of protecting himself under the provisions of Act VI. of 1862 of the Bengal Council, by coming in and paying up the arrears. But, as found by the Lower Appellate Court, this course has not been followed in this case. The necessary steps for bringing the tenure to sale have not been taken, and the tenure has not been sold by the zemindar.

Supposing, therefore, the tenure to have been *bonâ fide* transferred, it appears to me that neither the existence of arrears of rent for which the tenure has *not* been sold, nor the proceedings in ejectment, in any way invalidate the plaintiff's title.

It remains to be considered whether the tenure has been validly transferred to the plaintiff. That it has been so in fact is not denied; but it is contended that the transfer is inoperative, and that the zemindar may ignore the new tenant altogether, because his name has not been registered in the zemindar's serishta, nor any application made for that purpose.

In support of this contention, Section 27 of Act X. of 1859 was relied on. That Section, which is in some respects similar to Regulation VII. of 1799, Section 15, Clause 8, and Regulation VIII. of 1819, Section 5, provides that "all dependent "talookdars and other persons, possessing "a permanent transferable interest in land "intermediate between the zemindar and "the cultivator, are required to register in "the serishta of the zemindar or superior "tenant to whom the rents of their talooks "or tenures are payable, all transfers of "such talooks or tenures, or portions of "them by sale, gift, or otherwise, as well "as all successions thereto, and divisions "among heirs in cases of inheritance. And "every zemindar or superior tenant is re-"quired to admit to registry, and other-"wise give effect to all such transfers, "when made in good faith, and all such "successions and divisions. If any zemin-"dar or superior tenant refuse to admit "to registry, or otherwise give effect to any "such transfer or succession, the trans-"feree or successor may make application "to the Collector, and the Collector shall "thereupon proceed to enquire into the case "in the manner provided for suits under "this Act, and, if no sufficient grounds are "shown for the refusal, shall pass an order "enjoining the zemindar or superior tenant "to admit to registry, and otherwise give "effect to such transfer or succession."

I do not find in this Section any express provision that an unregistered transfer is void as against the landlord, and, in the absence of such an express provision, I should have much hesitation in implying one. Such an enactment would be of a highly penal character, and I think we ought not to attach such a penalty to the omission of a formality, unless it is quite clear that it was intended by the Legislature. Nothing, however, has been brought forward to show that such a severe penalty was intended. The only object of the provision appears to have been that the zemindar might have information as to who was his tenant; he has no power to refuse to register him, or to accept him as his tenant, whoever he may be. It is true that no express penalty for omission to register is provided; but I cannot assume that, because the Legislature has not expressly provided a penalty, therefore this severe one was intended. It appears to me quite sufficient that the zemindar should retain his right to sell the tenure for arrears of rent, and should have (as he probably would have) an action against the tenant who has omitted to register, for any damages he may have suffered from non-registration.

A case has been cited from Volume 3 of the Revenue, Judicial, and Police Journal, page 34,* in which it is said:—

"The objection in special appeal is that the "Lower Appellate Court has improperly "ruled that mere cognizance or supposed "cognizance of the zemindar of the fact of "a party having purchased a tenure is suffi-"cient to cure any defect arising from non-"registration of such tenure in the zemin-"dar's serishta.

"The current of decisions on this point "has uniformly been that a zemindar is not "bound to recognize any transfer in regard "to which application has not been made to "have such transfer registered in the zemin-"daree serishta, unless it can be proved "that the zemindar has not only known of "the transfer, but has also accepted the "transferee as his tenant; and the receipt

* *See* Sutherland's Reports for July 1864 (Act X. Rulings), p. 98.

"of rent by the zemindar after such transfer "has been held as one of the best proofs of "the fact of a zemindar having so accepted "the transferee. The Lower Appellate "Court has held that mere cognizance is "sufficient, and has cited a case of the "7th September 1861, as favoring his view. "But we cannot find this case ; nor has the "pleader for the respondent, arguing in "support of the judgment below, been able "to produce it or anything to the same "effect. The plea, therefore, of special ap- "pellant, so far as it goes, is valid. But, "on the other hand, it is to be observed that "the respondents clearly pleaded that pay- "ments had been made and accepted by the "zemindar after the transfer. The Lower "Court alludes to the production of the "alleged dakhilas evidencing such payments "in another case, but that was not one in "which the zemindar was a party. The "Lower Court, however, in this case did "not investigate and adjudicate whether the "alleged payments were proved or not, "and it is still open for respondent to prove "such payments if he can. We, accordingly, "remand this case for re-trial with reference "to the above remarks, and for re-decision "according to the result."

It is not said in the report whether or no the tenure in that case was transferable. If it was not so, of course the decision is not in point. If it was so, it is in point, and in favor of the contention of the zemindar in this case. But, then, it is opposed to another decision which I find in Vol. II. of the Weekly Reporter at p. 19 of the Act X. Rulings. It was there held that the transferee of a transferable tenure, which has not been registered, cannot be treated by the zemindar as a trespasser, and that, as against the zemindar who has evicted him, he has a right to be restored to possession.

In this state of the authorities, I consider myself at liberty to act upon the opinion which I have formed that there was such a transfer in this case as entitles the plaintiff to have his right declared to the possession of these lands as against the zemindar or any one claiming under him.

Bayley, J.—The review having been admitted, and the jurisdiction of the Collector's Court having been allowed, I am of opinion, on the special appeal, that we may follow the case, p. 19, Act X. Rulings, Vol. II., Weekly Reporter. Section 27 applies to intermediate tenures, but not to ordinary jotes; but this case has been treated by the pleaders as coming under Section 27.

The 25th June 1867.

Present :

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Limitation—Execution.

Case No. 102 of 1867.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 6th December 1866, reversing an order passed by the Additional Principal Sudder Ameen of that District, dated the 27th July 1866.

Ishan Chunder Bose and others (Judgment-debtors), *Appellants,*

versus

Jugobundhoo Ghose (Decree-holder), *Respondent.*

Baboo Greeja Sunkur Muzoomdar for Appellants.

Baboo Rash Beharee Ghose for Respondent.

An unsuccessful suit by a decree-holder to establish his right to have certain land which formerly belonged to him, and which he had sold to a third party, but which, under the belief that the third party had only purchased *benamee* for the judgment-debtor, he alleged to be the land of the judgment-debtor, was held to be, if *bond fide* a proceeding, within the meaning of Section 20, Act XIV. of 1859, to keep the decree in force.

Jackson, J.—We do not think it necessary to call upon the other side.

It appears to me that the decision of the Judge was right. The decree-holder instituted a suit to establish his right to have certain land, which he alleged to be the land of the judgment-debtor, attached and sold in execution of this decree. The land, it appears, had formerly belonged to the decree-holder himself. This he did not dispute, and he also admitted that it had been sold to the claimant ; but he (the decree-holder) was under the belief that the claimant had only purchased benamee for the judgment-debtor. This the decree-holder alleged and offered to prove. It seems that he failed to prove this fact, and, consequently, his suit was dismissed. That, it seems to me, if honestly done, was a proceeding tending to keep this decree in force, and to recover the amount due to the decree-holder.

The vakeel for the appellant contends that, when, first in the summary proceeding and afterwards in the regular suit, it was clearly proved that the property belonged, not to the judgment-debtor, but to the claimant, that must be taken as an indication of the bad faith of the decree-holder. This

does not appear to me to follow by any means. The decree-holder might have honestly believed that the property belonged to his judgment-debtor; and, although he failed to substantiate that, yet bad faith cannot be imputed to him by reason of his failure. I think, therefore, that the Judge was right in holding this suit to be a proceeding within the meaning of Section 20 of Act XIV. of 1859; consequently, execution ought to proceed.

A case directly in point (Brojessuree Chowdhrain *versus* Ram Coomar Chowdhry) is to be found at page 112 of Thomson on "Limitation of Suits."

The judgment of the Court below will be affirmed with costs.

Hobhouse, J.—I concur.

The 26th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Limitation—Execution.

Case No. 764 of 1866.

Miscellaneous Appeal from an order passed by the Judge of Bhaugulpore, dated the 12th August 1866, affirming an order passed by the Principal Sudder Ameen of that District, dated the 1st June 1866.

Syud Akbur Gazee and others (Judgment-debtors), *Appellants,*

versus

Mussamut Bibee Nufeezun (Decree-holder), *Respondent.*

Mr. R. E. Twidale for Appellants.

Baboos Chunder Madhub Ghose and *Tarucknath Sein* for Respondent.

An unsuccessful suit by a decree-holder for the purpose of having specified property made liable under his decree is a proceeding to keep the decree in force.

Jackson, J.—THE point raised in this case is a point which has been often decided.

The decree-holder, seeking to enforce his decree, brought a regular suit to have specified property made liable under the decree. The question is whether that is a proceeding to keep the decree in force. The suit failed, but, notwithstanding that, there can be no doubt that it was such a proceeding.

Mr. Twidale observes that the suit would be only a proceeding if brought in good faith, but he was unable to point to any thing whatever which suggested that the suit was not brought in good faith.

The appeal is dismissed, and the judgment of the Court below affirmed.

The Court thinks it right to notice the extremely dilatory character of the proceedings before the Principal Sudder Ameen in this suit.

Upon application to execute this decree put in on the 24th February 1864, the Principal Sudder Ameen, instead of issuing notice at once to the judgment-debtor, and simultaneously sending for the record, appears to have called upon the *seristah* to state whether there was any objection to executing the decree, and then the Principal Sudder Ameen carried on a long correspondence with the Judge, after which the notice to the judgment-debtors was finally issued on the 6th March 1865, more than a year after the application. It is obvious that objections to the execution of the decree may, in general, be safely left to the judgment-debtors, and the Principal Sudder Ameen and all Courts should take care that proceedings are not unduly delayed, as this appears to have been.

Hobhouse, J.—I concur.

The 26th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Limitation—Execution—Possession—Mesne-profits.

Case No. 147 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 26th January 1867, reversing an order passed by the Sudder Ameen of that District, dated the 15th December 1866.

Buroda Kant Roy (Judgment-debtor), *Appellant,*

versus

Ram Kishore Dutt and another (Decree-holders), *Respondents.*

Baboos Roopnath Banerjee and *Gopal Lal Mitter* for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

The holder of a decree for possession and wassilat is not obliged to apply for execution of both within three years from the passing of the decree. He may first apply for execution as to possession and costs, and then, within three years from the date of such application, seek to enforce the decree as to wassilat.

Jackson, J.—This is a very clear case I think.

The Judge appears to me to be perfectly right. The decree-holder in this case had got a decree for possession of the land for which he sued, and for wassilat which was to-be ascertained in execution of his decree. Very shortly after the decree had been passed, the plaintiff applied for execution as to the possession of the land and costs, that being something definite and ascertained. He obtained execution, accordingly, in July 1864. On the 10th April 1866, he put in a petition that the decree might be executed for mesne-profits. It is contended by the special appellant before us that he was barred, because no application for mesne-profits had been made within 3 years from the passing of the decree. It appears to me that that is not the question, but that we must see whether, within 3 years next before the application, any proceeding has been taken to enforce the decree. It is quite clear that a proceeding had been taken, but then the special appellant contends that that was no sufficient proceeding, because it was not a proceeding to enforce the whole of the decree. It appears to me that nothing obliges the plaintiff in such a case as this to apply at once for possession of the land, and also for ascertainment of the wassilat.

In some cases we have had occasion to observe that the plaintiff, having recovered a decree for land with wassilat, has refrained from carrying out the decree in any part, in this way accumulating heavy claims against the defendant for wassilat. In this case there is nothing of the kind. The decree-holder has with fair promptitude availed himself of his decree to get possession of the land, and the claim against the defendant has not been unduly swollen by wassilat after decree. It is easy to conceive a case in which it would not be convenient for a plaintiff, who has already been put to considerable expense in respect of litigation, to go immediately to the further expense of having an Ameen deputed to investigate the wassilat. That being so, it would be quite regular for him, I think, first to obtain possession of the lands and to recover his costs, and then subsequently to recover wassilat. In point of fact, wassilat may be recovered by separate suit, and not in the same suit. I think, therefore, the appeal must be dismissed, and the Judge's order upheld with costs.

Hobhouse, J.—I concur.

The 26th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Execution (by one or more of several decree-holders).

Case No. 211 of 1867.

Miscellaneous Appeal from an order passed by the Second Principal Sudder Ameen of the 24-Pergunnahs, dated the 18th March 1867.

Roy Preeonath Chowdhry and others (Judgment-debtors), *Appellants,*

versus

Prannath Roy Chowdhry (Decree-holder), *Respondent.*

Baboo Anund Chunder Ghossal for Appellants.

Baboo Mohendro Lal Shome for Respondent.

Every application made by one or more out of several decree-holders is an application made in the interests of all, and every proceeding taken by one is a proceeding taken for the benefit of all to enforce the judgment or to keep it in force.

Jackson, J.—The point in this case appears to me to be very simple—so simple as hardly to bear the amount of argument which has been expended upon it by the appellant.

Prannath Chowdhry obtained a decree against the appellants in 1845. Years afterwards, his nephews sued Prannath to have themselves declared entitled to the benefit of that decree. The Court, accordingly, decreed so, and the nephews, having obtained a decree, have since taken various steps to gather the fruits of it, by proceedings against the judgment-debtors, appellants. The last of these steps was taken in March 1865. Prannath now, in 1867, presents a fresh application on his own behalf, and it is contended that, because he has taken in his own person no steps within three years next preceding his application, he is barred. It seems to be quite clear that he is not barred, because Section 20 of Act XIV. of 1859

only requires that no process of execution shall issue, unless "some proceeding shall have been taken to enforce such judgment" within three years next before the application. In this case proceedings have been taken to enforce such judgment. Whether they were taken by one of the decree-holders or by another, appears to be perfectly immaterial. No decree-holder is allowed to execute a decree merely for his own share of that decree. He may be allowed to execute the whole decree, the Court taking care to protect the interests of the whole of the decree-holders. Consequently every application made by one or more decree-holders out of several is an application made in the interests of all, and every proceeding taken by one is a proceeding taken for the benefit of all to enforce the judgment or to keep it in force.

The appeal must be dismissed, and the order affirmed with costs.

Hobhouse, J.—I concur.

The 26th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Execution—Liability of deceased defendant's heirs.

Case No. 843 of 1866.

Miscellaneous Appeal from an order passed by the Officiating Principal Sudder Ameen of Rungpore, dated the 21st August 1866.

Doorga Soonduree Debia (Decree-holder), *Appellant,*

versus

Soorjo Monee Debia and another (Judgment-debtors), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondents.

A decree was obtained against *A*, and on his death execution was taken out against his widows. *B* came in, and, alleging that *A* was merely a *benamee* holder for *B*, applied to be substituted for the widows as defendant. HELD that the Court was not right in exempting from liability *A's* heirs to the extent of any assets which might have come into their hands.

Jackson, J.—I THINK the appellant must succeed in this appeal.

The original decree was obtained against Huree Narain Gossain; and on his death, execution was taken out against his two widows. Subsequently, Maharanee Shibeshuree came in, and, alleging that the deceased Gossain was merely a *benamee* holder for her, applied to be substituted for the two widows as defendant in this case. The Maharanee was doubtless at liberty to undertake any responsibility in respect of the damages and costs which she thought fit to accept, but the Court was not right, I think, on her application, in exempting from liability the heirs of the deceased defendant to the extent of any assets which might have come into their hands. I think, therefore, his order must be amended so far as it strikes out the widows of the deceased defendant from the category of defendants, and with costs.

Hobhouse, J.—I concur.

The 26th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Ejectment—Mesne-profits (Mode of assessing).

Case No. 104 of 1867.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Rungpore, dated the 12th December 1866.

Doorga Soonduree Debia (Decree-holder), *Appellant,*

versus

Maharanee Shibeshuree Debia (Judgment-debtor), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

In a case of wrongful dispossession, the principle upon which wassilat should be assessed is to ascertain what the actual rents or proceeds of the estate were, and to make the wrong-doer account for them to the party dispossessed, everything being assumed against the wrong-doer.

Jackson, J.—IT appears to me that the appeal of the plaintiff decree-holder in this case is well-founded.

The plaintiff took a lease of certain lands from the defendant for the Bengalee years 1259—1264 at an annual rent of 7,007 rupees. Before the third year had quite expired, the plaintiff was dispossessed by the landlord. He brought his suit with very unusual promptitude, and recovered a decree entitling

him to repossession of the lands with wassilat for the time that he had been out of possession. He applied for execution of his decree, but the defendants, having appealed to the Sudder Court and put in security, procured execution to be stayed. The decree, however, was affirmed by the late Sudder Court, but after the term had expired; and it then became necessary to ascertain the amount of the wassilat. It appears that no less than 3 Ameens, one after another, had been deputed by the Court to ascertain this wassilat. The first Ameen made his report on the 25th June 1863, in which he estimated the profits which were due to the plaintiff upon a very simple, and, as I think, very reasonable, principle. He found that the plaintiff, on obtaining the lease, had made an arrangement with certain other parties to sub-let the lands to them at annual rents aggregating 9,250 rupees. He found that the plaintiff had reserved certain lands under the name of *huzoori* jote, from which the annual rent of 666 rupees were to be derived, and he also found that the plaintiff would be entitled to 123 rupees as profits of certain julkur. Assuming these items as aggregating 10,040 rupees annually, and deducting the amount of the zemindar's rent, and also of the sum allowed as *surunjamee* to one of the dur-ijaradars, the net annual profits would be 2,191 rupees, which, multiplied by 3, would give Rupees 9,853 for the three years and three months. Now, that, it appears to me, was a simple and intelligible basis on which the calculation might be rested. But the Principal Sudder Ameen, instead of affirming this report, listens to the representation of the judgment-debtor, and deputes a second Ameen; and, after receiving his report, again deputes a third Ameen. The last of these two gave his report in on the 13th September 1866. The effect of these two last reports is that, as far as the Ameens could ascertain, the total sum of Rupees 23,963 in the one report, and somewhat less in the other, appear to have been realized by the judgment-debtor, but the Ameens both expressly say that, in their opinion, the zemindars had caused sources of information to be withheld, and that, in reality, the amounts actually collected had been in excess of the amount mentioned.

The Principal Sudder Ameen, however, takes the actual amounts which had been shown to be collected; from that he deducts the amounts of the zemindar's rent, and allows the plaintiff the balance as wassilat. Against this order of the Principal Sudder Ameen, the plaintiff has two principal objections. The first is, that the principle on which the Principal Sudder Ameen has awarded wassilat is not the true principle.

It is contended for the appellant, and as I think rightly, that the principle upon which our Courts now proceed to assess wassilat is to ascertain what the actual rents or proceeds of the mehal were, and to make the defendant account for them to the party dispossessed. This, I think, is undoubtedly the correct principle, because the wrong-doer should have every thing presumed against him. If the wassilat of this mehal were to be ascertained by direct enquiry from the ryots, no doubt there might be a good deal of difficulty in determining the precise sum to be allowed. But it appears to me that it is not necessary to go so far as that. This was a case where the zemindar, having granted a lease of lands to the farmer, in breach of his contract dispossessed the farmer, and resumed possession of the lands. This was clearly, I think, a case for damages. And although the suit has been brought in the shape of a suit for possession with wassilat, I see no reason why the wassilat should not be now looked upon as damages. And it appears to me that the principle on which the Ameen first deputed ascertained the profits which would have come to the plaintiff is a principle which we should now adopt. It is not denied that the rents of the sub-farming arrangement were actually collected; it is not contended that the rents which those sub-farmers contracted to give were such as could not have been realized. I think, therefore, considering that defendant is a wrong-doer, and liable to pay exemplary damages to the party whom he ejected, we shall not do wrong if we adjudge him to pay the whole of the dur-ijarah rents which the plaintiff would have received together with the other items which I at first stated.

I think, therefore, it would be right to award to the plaintiff, in respect of the 3 years and 3 months during which he was out of possession, the amount of Rupees 9,853.

The second objection which the appellant urged was that the Principal Sudder Ameen had adverted in support of the view which he took of the proper wassilat to be awarded to the plaintiff's claim of 104 rupees as the actual amount of wassilat accruing for the

five months previous to the plaint. Now, it has been most clearly shown by Baboo Mohinee Mohun Roy, and not gainsaid by the respondent's vakeel, that this observation of the Principal Sudder Ameen is founded upon what I must call a negligent mistake. The plaint (which was one under the old form of procedure) set out the facts with great fulness, and distinctly stated that the yearly profits of this mehal were 2,546 rupees. The kists were not of uniform amount, but varied in proportion to the crops which were to be got in by the ryots at different seasons of the year. It was for this reason that the costs of the 5 months preceding the plaint were extremely small; therefore, to take the costs of these 5 months, and to apply this by way of proportion for three years, was wholly unreasonable.

I think, therefore, the two objections urged by the appellant to the Principal Sudder Ameen's award are well founded. The award must be set aside, and the amount of wassilat which I have stated should be given to the plaintiff.

I think it right upon this occasion to remark upon the extremely dilatory proceedings which the Principal Sudder Ameen has allowed in this matter. As far as I can see, there was really no ground whatever for overruling the report of the first Ameen. If the report was to be overruled, I cannot see that it answered any good purpose to depute a second and third Ameen to repeat the investigation in the Mofussil. The Principal Sudder Ameen, if dissatisfied with the report of his Ameen, ought to have obliged the parties to come in before him at once, and to have offered such evidence as might support a proper award. In point of fact, it seems to me that this was a case in which the plaintiff ought to have sued for damages, and in which the Court, in considering the original suit, ought to have ascertained and assessed those damages. If that had been done, there would have been an end to the litigation years and years ago.

The appellant is clearly entitled to the whole costs of these proceedings both in this and in the Lower Court.

Baboo Unnoda Pershad Banerjee appeared to intimate that the appellant, if he thought that the report of the first Ameen ought to have been acted upon, should have appealed against the order disallowing it. It does not appear to me that there is any force in the objection, because the plaintiff might very reasonably say, "I have no objection "to a further enquiry if it be at the expense "of the judgment-debtor, provided that I "obtain my rights in the end." I think it was not until the Court had finally determined the amount of wassilat it would award that he was bound to appeal.

Hobhouse, J.—I concur.

The 26th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Mesne-profits (Meaning of).

Case No. 166 of 1857.

Miscellaneous Appeal from an order passed by Mr. H. B. Lawford, Judge of Jessore, dated the 23rd January 1867, modifying an order passed by Baboo Tarakant Bidyasagur, Principal Sudder Ameen of that District, dated the 30th December 1864.

Dwarkanath Mitter (Decree-holder), *Appellant,*

versus

Ram Dhun Biswas and others (Judgment-debtors), *Respondents.*

Baboos Chunder Madhub Ghose and *Motee Lall Mookerjee* for Appellant.

Baboo Gopal Lall Mitter for Respondents.

Mesne-profits mean those profits which the person in actual wrongful possession of the land did actually receive, or might, with ordinary and due diligence, have received from that land.

Jackson, J.—It appears to me that the two objections raised here to the decision of the Court below are untenable.

The first of them is that the Judge has not found, but that he ought to have found, what rent the judgment-debtors ought to have realized from the land in dispute. The Judge has, upon the Ameen's report and upon the evidence before him, determined what the rents of the land in dispute were for the time during which wassilat was due to the decree-holders. Baboo Chunder Madhub Ghose considers that the Judge ought to have gone far beyond this; and that, because his client proposed to show that a considerably higher rate of rent might by certain means have been realized from the land, the Judge ought to have gone into that fact, and to have enquired the highest rate that could have been realized,

and to have given wassilat at that rate. I wholly dissent from this doctrine. A case was referred to from V. Weekly Reporter, page 35, in which the learned Judges cited a decision, which is to be found in Marshall's Reports, page 122, in which these words occur—the decree-holder was "entitled "to recover as those profits such sums as "may have been collected and appropriated "by others in wrongful possession, or such "sums as the party ousted wrongfully "would have collected had he been in pos- "session, and which he was prevented from "collecting by having been kept wrongfully "out of possession, because one or other "of these descriptions of profits are profits "which have been lost in the meantime to "the party ousted, that is, during the inter- "val of his wrongful dispossession by "others." The meaning of these words it is proposed to carry to this length, *viz.*, that the amount of rent or profits that might have been derived by the party ousted from those lands if he had put into practice every process known to the law for the enhancement of the rents, if he had availed himself of all the resources of science to develope the resources of those lands during the time of his possession—that amount is to be awarded by way of wassilat. This process, as I have observed in the course of the argument, might lead to an enquiry, on the part of the Ameen, deputed to investigate the wassilat, into every ryot's tenure upon the land. He might have to determine whether each ryot had or had not a right of occupancy; whether each ryot had or had not a *mowrosee* or a *mokurruree* tenure; whether, if he had not a tenure so protected, the circumstances under which enhancement may be claimed had arisen; whether increase in the several crops had been due to the industry of the ryot, or, in fact, every one of the innumerable questions which may arise under Act X. of 1859. To suppose that questions of that kind could be gone into in the ascertainment of wassilat, is one of the most extravagant propositions I have ever heard in this Court. The meaning of the words referred to in the decision above cited, I take it, is merely this, that the defendant in wrongful possession of the lands is liable to account to the decree-holder for the actual rents of these lands, whether he has actually collected or appropriated them, or has negligently omitted to do so. No doubt, if it can be shown that, for the purpose of defrauding the decree-holder, and of injuriously lowering the rent of the estate, the judgment-debtor had let the lands at a rate below what they had been previously paying or ought to have paid, that would be a separate question, and the decree-holder might be entitled to recover special damages on such ground. That is not the question here. It is merely contended that lands were let at a certain rate, but might have been let at a higher rate, and that the decree-holder is entitled to have it ascertained what that higher rate might have been, and to recover the same from the decree-holder. That argument, as I have before stated, appears to me to be wholly untenable.

The second ground is that, as to the 54 beegahs comprised in this decree, the defendant is bound by an admission of his own, to the effect that the proper rent of these 54 beegahs is Rupees 99. As far as I can see, the defendant has made no admission of the kind. After this decree had been passed, the defendant brought a suit against the decree-holder, alleging that, under color of his judgment, the decree-holder had taken forcibly from his possession 54 beegahs of land not comprised in this decree but the property of this defendant, and he alleged the profits of these 54 beegahs to be 99 rupees. It appears that the suit was dismissed, and that, for the purpose of dismissing that suit, the Court held that the 54 beegahs in question were actually part of the lands decreed in the suit now before us. But that holding of the Court can never convert the allegation of the plaintiff which he intended to apply to lands not comprised in this suit into an admission as to the profits of the land so comprised. In fact, the appellant before us wishes to make use of something calling it an admission, which is really a compound product of the allegation of the plaintiff, with a determination of the Court. That is not an admission. It appears to me, therefore, that upon neither of these grounds is the judgment of the Lower Court assailable, and that the appeal must be dismissed with costs.

Hobhouse, J.—I concur.

I would adhere to the exact words of the decision which my learned colleague has quoted, and on which the pleader for the appellant has relied, and I would interpret mesne-profits according to that judgment to be those profits which the person in actual wrongful possession of the land did actually receive from that land, or might with ordi-

nary and due diligence have received from that land, that is to say, that if, for instance, there were certain ryots on that land, whose rent was say 20 rupees each, and if the person in wrongful possession only collected 10 rupees out of those 20 rupees, then he would be responsible, not for that which he only did collect, but for those 20 rupees which ought with due diligence to have been collected by him.

On the subject of the admission, I think there can be no doubt, as my learned colleague has put it, that it was no admission at all. What was actually stated was this. These 54 beegahs are not the 54 beegahs covered by the decree. They are other 54 beegahs, and the mesne-profits on these other 54 beegahs are 99 rupees. To say that that is an admission that the mesne-profits, not on the other 54, but on these 54 beegahs, is 99 and no more, is very likely a finding of the Court, but is certainly not an admission of the party who made the statement.

The 26th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Will—Certificates (under Acts XXVII. of 1860 and XL. of 1858).

Cases Nos. 136, 137, and 177 of 1867..

Miscellaneous Appeals from an order passed by the Judge of Rajshahye, dated the 23rd January 1867.

Makhun Chunder Shaha and others, *Appellants,*

versus

Chand Monee Dossee and others, *Respondents.*

Baboo Chunder Madhub Ghose for Appellants.

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Respondents.

Where a will appointed the nephews of the testator to manage 4 annas of the property (the subject of the will) in their own right, and 12 annas as guardians of a minor son—HELD that the nephews were entitled to one certificate under Act XXVII. of 1860 to collect the debts of the whole estate, and to another certificate under Act XL. of 1858 to take charge of the minor's 12 annas.

Jackson, J.—IT appears to me that the Judge has completely miscarried in the order which he has passed on the petitioner's application.

The two petitioners, it seems, were nephews of one Nuddiar Chand Shaha, who in the year 1269 made an instrument in the nature of a will by which he bequeathed one-fourth of his property to these two nephews, and; empowering his wife to adopt in succession five sons, bequeathed the remaining three-fourths of his property to such son to be adopted. He directed that the nephews were to manage the property, to be the guardians of the son, that they were to enjoy the profits or proceeds of one-fourth of the property jointly with such son until the son attained majority, after which, if necessary, they would be at liberty to divide. He then directed that all acts of the nephews were to be carried on in accord with and by consent of the widow; and that, if, they did not act under her directions or with her consent, that they were to be *deprived of* the one-fourth share of the property. The testator, it appears, died in Bysack 1273, and shortly after the nephews applied to the Judge for two certificates under Act XXVII. of 1860, one in their own right in respect of one-fourth of the testator's estate, and one on behalf of the minor who, it seems, has been adopted, in respect of the three-fourths of that estate. They also applied for a certificate, under Act XL. of 1858, to enable them to represent the minor son. The widow objected to the grant of these certificates, accused the petitioners of misconduct, alleged that they did not act in concert with her in respect of the management of the property, and also that, under the will, she was competent to refuse her assent to their obtaining these certificates.

The exact expression used is "paibek-na," "shall not get," but I am quite satisfied that this must be interpreted to mean "shall not retain."

The Judge has held that the terms of the will are such as to enable the widow to withhold her assent, and that, for want of her assent, the certificates cannot be granted, and he refers the petitioners to a civil suit to obtain what he calls specific performance of the will.

It is quite clear that the testator intended two things in respect of these nephews. One was to make them guardians of his minor son, with the direction that they should consult with the widow; the other was that they were to have a bequest of one-fourth of his estate, but that was coupled with a direction that they were to obey and consult with the widow in all matters; and, in default thereof, they were to forfeit the one-fourth.

It appears to me that, upon the death of the testator, the nephews became immediately vested with one-fourth of his estate; whether or not they would be liable to be divested upon the widow making it clear, upon a civil suit to be brought by her for the purpose, that they had misconducted themselves or had refused to act in compliance with her wishes is a matter which we need not enter into at present. It is quite clear that, under that will, and until they are divested in the mode I have stated, the nephews are entitled to one-fourth of the estate, and would be also entitled to collect on their own account the debts due to the estate in the proportion of one-fourth.

It is also quite clear that they are absolutely entitled to be guardian to the estate of the minor. Whether the widow, on proof of such facts as I have stated, could have them removed from the office of guardian, is another question. But that, at present, they are entitled to be made guardian of the minor, and to the certificate of representation, is, I think, unquestionable.

With reference to the wish of the deceased that the nephews and the minor son should enjoy the estate jointly during the minority of the son, I think the proper course would be to grant one certificate under Act XXVII. of 1860 to the petitioners. In that certificate, of course, it should be stated that they received it in respect of one-fourth in their own right, and in respect of three-fourths in right of the minor. It should be declared that they would have to account, and the Judge would do well to take security from them for the proper carrying out of the intentions of the will. In respect also of the certificate granted under Act XL. of 1858, I think it might be proper to insert in that certificate that they were to act in consultation with and under the direction of the widow, but on this point I do not wish to give any positive direction.

With these qualifications I think certificates ought to be granted, and these appeals ought to be allowed with costs of both Courts.

Hobhouse, J.—I concur with my learned colleague.

It seems to me that, under the terms of the will which is admitted to have been executed, there was a direct instruction that these petitioners, the nephews, should be the managers of the property of the deceased, of the whole property, that is, of 16 annas, 4 annas in their own right, and 12 annas in the right of the minor, and until that minor arrived at majority.

It follows from this that, where there is a will appointing these persons there to manage 12 annas of the minor's estate, under Section 7 of Act XL. of 1858, there was no option but to grant a certificate to the nephews to take charge of the estate of the minors; and also when those persons were appointed by the will to have charge of the whole of the estate—4 annas in their own right, and 12 annas in the right of the minor—then it followed that they were the persons, who were entitled, within the meaning of Act XXVII. of 1860, to collect the debts due upon the estate; therefore, I concur entirely that there must be one certificate under Act XXVII., worded as my learned colleague would have it, to collect the debts of the whole estate, and another certificate under Act XL. of 1858 to take charge of the particular 12 annas of the estate of the minor.

As to another point, whether the widow may take the estate by reason of those nephews not managing the estate, or not collecting the debts of the estate with her concurrence or her consent, that, it seems to me, will more properly form the subject of a civil suit.

The 27th June 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Pre-emption—Sale—Perpetual Lease.

Case No. 444 of 1867.

Special Appeal from a decision passed by the Judge of Patna, dated the 15th January 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 18th August 1866.

Moorooly Ram (Plaintiff), *Appellant,*

versus

Baboo Huree Ram and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Woomesh Chunder Banerjee* for Appellant.

Baboos Kishen Kishore Ghose and *Greeja Sunkur Muzoomdar* for Respondents.

Pre-emption applies only to sales. A lease in perpetuity with a rent (however small) reserved is not a sale, and cannot therefore be the subject of pre-emption.

Macpherson, J.— THE Lower Appellate Court holds that "pre-emption applies to *sales* only; and a lease in perpetuity, however small the reserved rent, is not a sale," and in this opinion we concur.

Mr. Allan, in appeal, contends that, under the circumstances, the transaction was really a sale. The Lower Courts treat it as a lease, which it certainly was, an annual rent of one rupee being reserved. No *sale* has taken place, and therefore no right of pre-emption has arisen.

We dismiss the appeal with costs, affirming the decree of the Lower Court.

The 27th June 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Irregularity — Nati shamil pesh orders—Non-recording of evidence.

Cases Nos. 304 and 305 of 1867.

Special Appeals from a decision passed by the Additional Judge of Tirhoot, dated the 5th December 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 18th April 1865.

Luchmee Narain Sahee (Defendant), *Appellant,*

versus

Koshukee Dutt Jha (Plaintiff), *Respondent.*

Baboo Roopnath Banerjee for Appellant.

No one for Respondent.

Nati shamil pesh orders again condemned, as well as the passing of judgment against a party before recording the evidence of witnesses.

Seton-Karr. J.—BOTH these cases must be remanded to the first Court by reason of a piece of neglect on the part of the Sudder Ameen.

The special appellant, on the 16th of January 1865, presented a petition to the Sudder Ameen, stating that fifteen of his witnesses were present, praying that their evidence might be taken, and asking that measures might be resorted to in order to enforce the attendance of several other witnesses who had acknowledged the receipt of summonses, but had not attended.

Nothing was done on this except to record the objectionable order, so often condemned by this Court, of "*nati shamil pesh*," which literally amounted to nothing.

On the 15th of February, the fifteen witnesses, themselves apparently, presented another petition, saying that they had gone away and had returned, and praying that their depositions might be recorded. The order passed by the Court was that the depositions should be taken, but this was not done, and nothing further took place until the 18th of April, when the Sudder Ameen delivered judgment on the evidence of four witnesses duly recorded. It was the business of the Court, in this case, to see that its own orders were carried out, or to state the reason why they were not carried out.

The omission of the Sudder Ameen was distinctly raised before the Judge, who apparently took no notice of it.

The cases are remanded to the first Court, who will take them up at once, will record the evidence of any witness whom the special appellant may produce within a reasonable time, and will pass a fresh judgment in the two cases.

The 27th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse. *Judges.*

Section 27, Act XXIII. of 1861—Special appeal—Small Cause Courts.

Case No. 167 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 3rd January 1867, affirming an order passed by the Sudder Ameen of that District, dated the 16th August 1866.

Mobarukoonissa Begum (Objector), *Appellant,*

versus

Ozeer Jemadar (Decree-holder), *Respondent.*

Mr. R. T. Allan for Appellant.

Baboo Nuleet Chunder Sein for Respondent.

Under Section 27, Act XXIII. of 1861, no special appeal lies from a regular appeal against an order passed in a suit of a nature cognizable by Courts of Small Causes, no matter how long ago the suit was instituted, provided the appeal was decided after the passing of Act VIII. of 1859.

Jackson, J.—THIS is an appeal by the judgment-debtor against an order made for executing a decree.

Two preliminary objections have been urged by the respondents—one to the effect that no special appeal will lie against this order, inasmuch as it purports to be an order under Section 271 of the Civil Procedure Code, for distributing the surplus amount of a fund in Court. Upon this point, reference is made to the Full Bench case at page 116 of the collection of Full Bench Decisions. That ruling, however, is clearly not in point. In that case it was held by the Court that no appeal would lie in respect of the claims of rival decree-holders upon the distribution of such a fund. The first objection, I think therefore, has nothing in it.

But there is a second, and, as I think, a valid, objection to the hearing of this case, namely, that, as this is an order relating to the execution of a decree passed in a suit of a nature cognizable in Courts of Small Causes under Act XLII. of 1860 (now Act XI. of 1865), under the 27th Section of Act XXIII. of 1861, no special appeal lies from the order passed in regular appeal.

The special appellant, in answer to this objection, contends that the suit in which the original decree was passed was antecedent to Act VIII. of 1859, and that, consequently, the Section will not apply, and he refers us to a judgment of this Court to be found at page 19, III. Weekly Reporter. There, undoubtedly, it seems that some such objection as this was taken, and the learned Judges observed: "That section is "clearly prospective, and the decision sought "to be carried out was obtained long before "the passing of that Act." But the expressions employed by the learned Judges in this case lead me to doubt whether the precise objection urged before us was taken before them—at any rate, whether it was insisted upon.

I myself entertain so strong an opinion upon this point that, if I understand those learned Judges to be absolutely in conflict with the opinion I entertain, it would be necessary to refer this case for the consideration of a Full Bench. But, observing that this is a case decided some two years ago, that it has not been followed, and that no final decision was come to by the Court upon the appeal then before them, but the case was remanded to the Lower Court, I think that we are at liberty to come to an independent decision upon the point ourselves. For myself, therefore, I may say that I have no doubt whatever upon the point. This unquestionably was a suit of a nature cognizable by Courts of Small Causes under Act XLII. of 1860. It was a suit by a servant for his wages; it was a suit for a sum of money less than 500 rupees; and, although execution is now sought for an amount in excess of 500 rupees, that is only because the amount has been swollen by interest and costs, but the suit, as I have said, was originally for less than 500 rupees. The appeal heard by the Court below was a regular appeal against an order passed in a suit of that nature. Section 27 distinctly bars special appeals from order passed on such regular appeals. The special appellant refers to Section 387 of Act VIII. of 1859, which he says protects him from the operation of Section 27. This, it appears to me, is a mistake. The words of Section 27 are very distinct: "No special appeal shall lie "from any decision or order which shall be "passed on regular appeal after the passing "of this Act," that is to say, that, if the suit had been instituted before the passing of Act XXIII. of 1861, before the passing of Act VIII. of 1859, or before the commencement of this century, provided that the regular appeal were decided after the passing of this Act, a special appeal would be barred, and nothing in Section 387 can be construed to bar the operation of such explicit words as those. And, in fact, the allowance of special appeals at all in cases of execution of decree was not a matter expressly enacted by Act VIII. of 1859. Nor was it at all a settled doctrine of this Court, until it was so held by the Full Bench.

I think, therefore, that Section 387 has no bearing upon this point, as Section 27 is precise, and that the special appeal is taken away, and must consequently be dismissed with costs.

Hobhouse, J.—I concur.

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The 27th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Adjustment.

Case No. 155 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 10th January 1867, modifying an order passed by the Sudder Ameen of that District, dated the 3rd December 1866.

Radha Kant Doss, *Appellant,*

versus

Ayesh Ali Shaha, *Respondent.*

Baboo Woomesh Chunder Banerjee for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondent.

Where a solehnamah was based on the condition that the defendant should at once withdraw his special appeal, but, instead of doing so, he went on with the appeal, and caused notice to be served upon the plaintiff, and the plaintiff actually appeared, and the special appeal would have come on for hearing but for the accidental absence of the defendant's pleader on the day of hearing—HELD that the defendant had, by his own act, put an end to the adjustment of the case between himself and the plaintiff.

Jackson, J.—IN this case it seems very clear that the Judge was in error, and the Sudder Ameen was right.

The solehnamah or adjustment of the case between these parties proceeded entirely on the understanding and the consideration that the defendant was at once to withdraw his special appeal. Instead of doing that, it appears that he went on with the appeal, that he caused notice to be served upon the respondent, that the respondent actually appeared, and that the special appeal would have come on for hearing but for the accidental absence of the special appellant's pleader on the day of hearing. That being so, it appears to me that the defendant has, by his own act, put an end to the adjustment of the case between himself and the plaintiff.

The Judge observes that the Sudder Ameen recorded a "decree" upon the solehnamah. How the Judge could have understood the Sudder Ameen to have recorded any decree, it is difficult to understand. The Sudder Ameen had already made his decree in the suit, that decree had been affirmed in appeal, and it was at that moment actually, as the solehnamah recites, in special appeal before the High Court, and all that the Sudder Ameen could do was to record the petition acknowledging satisfaction of the claim; and, as the satisfaction was acknowledged by the plaintiff entirely upon the understanding that the special appeal was to be withdrawn, it is quite clear that the petition did not bind the plaintiff when that condition was not fulfilled, and that he is now entitled to revert to his original status, and to execute the decrees of this Court and of the Lower Courts with all costs and wassilat.

The decision below, therefore, is reversed with costs.

It is somewhat remarkable that a decision apparently of the same Judge was reversed by this Court under precisely similar circumstances, and is reported at page 30 of V. Weekly Reporter, Miscellaneous Rulings.

Hobhouse, J.—I concur.

The 27th June 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Powers of High Court—Sale in execution—Enforcement of—Reversal of—Appeal.

Petition of Moonshee Oodiut Zuman, auction-purchaser in execution of decree in the Court of the Second Principal Sudder Ameen of 24-Pergunnahs (No. 277 of 1866), praying that the order of the said Principal Sudder Ameen refusing to confirm the sale be set aside.

The High Court may, on sufficient cause being shown, make an order, upon motion, to compel a Lower Court to make absolute a sale which had been made by that Court, but which the Court had not confirmed, and thought it not expedient to confirm.

Where the Lower Court allows an objection, and makes an order setting aside the sale, such order, according to Section 257, Act VIII. of 1859, is final.

MR. ALLAN makes an application on behalf of Moonshee Oodiut Zuman, the purchaser at a sale in execution of a decree, to set aside an order of the Principal Sudder Ameen, who entertained objections made to the sale, and thereon set aside the sale.

The facts appear to be these: A decree was obtained against a defendant, Mahomed Nuseem. He has since died; and in execution of that decree against two persons described as his heirs, certain immoveable property which had belonged to the estate of the defendant, and which is now in the hands of these persons, was attached and sold. Immediately after the sale, two petitions were filed: one

Baboos Unnoda Pershad Banerjee and *Kishen Succa Mookerjee* for Respondent.

No man, acting with good faith, and believing that he has a ground for doing so, should be held liable, because, upon his application, a Magistrate makes an order which, it afterwards turns out, ought not to have been made.

Thus, where certain inhabitants of a village, which was flooded, applied to the Magistrate to open a bund, and let out the water, and the Magistrate without jurisdiction made an order that the bund should be cut, and the bund was cut by police-officers—HELD that the applicants were not liable for damages.

Markby, J.—THIS was a suit brought against a great number of defendants, inhabitants of the village Simuree, by the plaintiff, who is owner of the village Agrooya, to recover damages for the opening by the defendants of a bund between the two villages, whereby the water was let out on to the land of the plaintiff, and his crops damaged, and the plaintiff also seeks to establish his right to have the bund closed.

The Lower Appellate Court has found, after very carefully weighing the evidence, that the bund is an ancient one, and that it has always, until the present dispute arose, existed as a *closed* bund, without the opening now complained of, except when the inhabitants of the village Simuree opened it on two occasions, once in 1839, and again in 1862, in both of which cases criminal proceedings were successfully taken against the parties who had opened the bund. These proceedings are not used by the Lower Appellate Court as any evidence of the existence of the right, but to show that, on the only two occasions that the bund had been opened, it has been resisted. For this purpose, it was quite proper to use them, and the finding on this point in favor of the plaintiff must be confirmed.

With reference to the defendants' fourth ground of appeal, perhaps it may be as well to mention that it does not accord with the facts of the case. The defendants contend "that the obstruction of the natural "drainage of the surface-water of *several* "*villages* is a public nuisance, and no man "can acquire a prescriptive right to commit "a public nuisance." But it is not found that the natural drainage of several villages is obstructed by this bund, and, therefore, the legal maxim relied on does not apply.

But, with regard to the damages, it is clear that they are not recoverable from these defendants. As inhabitants of the village Simuree which was flooded, they applied to the Magistrate to open the bund, and let out the waters. The Magistrate (professing to act under Section 62 of the Code of Criminal Procedure) made an order that the bund should be cut, and after some delay this was done by certain *police-officers*. Whoever may be liable for this act, it is clearly not the defendants. It is said that they are liable, because they first set the Magistrate in motion. But, as far as I am aware, it has never been heard of in any country that a man, acting with good faith, and believing that he has a ground for doing so, should be held liable, because he makes an application to a Magistrate, and the Magistrate makes an order which, it turns out afterwards, ought not to have been made. It was the natural and proper thing for these defendants, when this disaster came upon them, to apply to the Magistrate, and they are not responsible for any error in the Magistrate's proceedings or those of the police-officers.

The plaintiff's right, therefore, to have the opening in the bund closed must be, and is hereby, declared, but the claim for damages is dismissed. Each party will pay their own costs of this appeal.

The 28th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Section 27, Act XXIII. of 1861—Special Appeal—Small Cause Courts—Execution-proceedings.

Case No. 186 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Tipperah, dated the 17th January 1867.

Anund Chunder Roy and others (Judgment-debtors), *Appellants,*

versus

Sidhy Gopal Misser (Decree-holder), *Respondent.*

Baboo Otool Chunder Mookerjee for Appellants.

Baboo Mohinee Mohun Burdhun for Respondent.

Section 27, Act XXIII. of 1861, bars a special appeal in execution-proceedings arising out of decisions passed on regular appeal in suits of a nature cognizable by Courts of Small Causes.

Jackson, J.—I CONFESS that, although I admire the ingenuity which has distinguished the argument of Baboo Otool Chunder Mookerjee in this case, I have no doubt at all upon the point which has been discussed. It is a point which we had already considered and decided yesterday in the appeal No. 167. I have given, in my judgment in that case, the reasons for which I was of opinion that the provisions of Section 27, Act XXIII. of 1861, would apply to bar a special appeal in execution-proceedings arising out of a suit which had been instituted before the passing of Act VIII. of 1859, Section 387 of that Act notwithstanding. In the case before us to-day, Baboo Otool Chunder Mookerjee has gone somewhat further than the appellant's vakeel in the case of yesterday, and he contends that Section 27 does not apply at all to cases in execution of decree. He founds his contention upon the use of the word "suit" in the Section. He says that a special appeal against a decision passed upon a regular appeal in any suit must refer to a special appeal against the appeal upon a decree in a suit, and that the term "suit" is inappropriate as applied to proceedings in execution after decree. But, if that be so, and if the word "suit" is to be applied in its strict sense of a suit up to decree, then Section 27 can have no meaning at all; because, as the suit is determined by Section 189, when the decree is passed, there can be no further proceedings in it. There can be no appeal in it. But, if we are to abandon subtle verbal distinctions, and to proceed upon what appears to be the intention of the Legislature, I think we must conclude that they intended to allow no special appeal from any decision or order passed on regular appeal in any suit of a nature cognizable by Courts of Small Causes, where the value is below 500 rupees, the words "regular appeal in any suit" meaning the first or general appeal, as explained in the judgment of the Full Bench in the collection of Full Bench Rulings at page 83. And, moreover, even if the precise terms of Section 27 did not themselves bar this special appeal, I think it is further evident that the special appeal is excluded upon the very considerations which led the Full Bench, in the case to which I have just referred, to hold that a special appeal was allowable in cases of execution of decree. The Court there held that a regular appeal means general appeal—an appeal upon questions of fact as well as of law, as opposed to a special appeal, which can only be upon a question of law. They, therefore, held that, in like manner as a special appeal would lie against decisions in regular appeal upon the suit itself, so it would also lie against a decision on regular appeal upon orders after decree. If, therefore, the analogy of special appeals in execution-proceedings follows that of special appeals in regular suits, and when the law itself does not, by any express terms, create a right of special appeal in execution-proceedings, then I think it is quite clear that, when in certain specified classes of cases the law takes away the right of special appeal in regard to the suit (that is, on the decree itself in the cause), for the same reasons the special appeal is taken away in execution-proceedings.

I have no doubt, therefore, upon this case. I think in this case, as in the case of yesterday, the special appeal must, on the preliminary objection, be dismissed with costs.

Hobhouse, J.—I concur.

As I understand the matter, it rests thus: It has been ruled that, generally speaking, there is a special appeal from an order passed in regular appeal in execution of decree. Then, this particular Section 27 says that, in particular cases, in particular exceptional cases, a special appeal allowed in other cases shall not lie. Then, what is an exceptional case? It is a case in which the suit was of a nature cognizable in a Court of Small Causes, and being so was originally less than 500 rupees in value. That being so, this particular Section seems to me to apply to this particular case, and no special appeal will lie.

The 28th June 1867.

Present:

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges.*

Execution—Appeal—Section 11, Act XXIII. of 1861—Section 230, Act VIII. of 1859—Decree of Appellate Court.

Cases Nos. 187, 188, and 195 of 1867.

Miscellaneous Appeals from an order passed by the Judge of Dacca, dated the 26th February 1867, affirming an order passed by the Principal Sudder Ameen of that District, dated the 15th January 1867.

Huree Kishore Roy and others (Judgment-debtors), *Appellants,*

versus

Kalee Kishore Sein and others (Decree-holders), *Respondents.*

Baboos Mohinee Mohun Roy and *Greesh Chunder Ghose* for Appellants.

Baboos Hem Chunder Banerjee, Gopal Lal Mitter, and *Sreenath Banerjee* for Respondents.

The first Court gave a decree to the plaintiff for possession of land against *A*, the original defendant in the suit, but exempted land in the possession of *B*, an intervenor, whom the Court had made a co-defendant. The Appellate Court reversed so much of that decree as adjudicated upon the claim as between the plaintiff and *B*, and confined its decree for possession against *A*, but awarded costs against *B*. HELD that *B* continued to be a defendant in the suit, and had a right of appeal under Section 11, Act XXIII. of 1861, and that he was not bound to come in under Section 230, Act VIII. of 1859.

Distinction pointed out between a decree of an Appellate Court simply reversing the decree of the Lower Court, and a decree which, reversing that decree, goes on to record judgment for the other party.

Jackson, J.—I THINK the decision of the Judge must be reversed.

This case has been in various shapes before the Court on at least two occasions. It appears that Obhoy Churn Doss and others brought one of several suits against certain Barorys, defendants, claiming a proprietary right over certain lands, and seeking to set aside an alleged talookdaree tenure held by these Barorys. There were several persons jointly interested in this suit against the Barorys, but, instead of preferring jointly a single suit, each co-sharer instituted a separate suit in respect of his own share. In a suit filed by Obhoy Churn Doss, Huree Kishore Roy and others, being themselves plaintiffs in one of the other suits, intervened, alleging that Obhoy Churn Doss in his suit sought to recover lands which were really in the possession of and belonged to Huree Kishore Roy* himself. Upon this, Huree Kishore Roy was made a co-defendant in the suit, and the Court of first instance, going into the case upon its merits, gave the plaintiff a decree as against the Barorys, defendants, for the lands sued for, with the exception of certain specified churs, which it found not to be in the hands of the Barorys, and to which it declared Huree Kishore Roy to have a better title. That decision, being carried in appeal before the Zillah Judge, was confirmed by him. It was then brought in special appeal to this Court, and this Court, observing that the Court below ought to have confined itself to investigating the differences between the plaintiff and the original defendant, and ought not to have enquired into any question of title as between the plaintiff and the co-defendant Huree Kishore Roy, remanded the suit in order that it might be disposed of upon that principle. Thereupon the Judge reversed the decision of the first Court as relating to Huree Kishore Roy, and as to the Barorys confirmed it.

* *Note.*—Where in this judgment Huree Kishore Roy is spoken of, the expression includes those who were co-plaintiffs in his suit.

It appears that the plaintiff Obhoy Churn Doss has now applied to execute this decree against all the defendants jointly, and upon the objection of Huree Kishore, who apparently contended that the decree gave

nothing against him except costs, the Judge observes: "I cannot alter the terms of "the decree in execution. The order is "plain, and cannot be construed two ways, "that the decree-holder take possession of "the land sued for." Then he says: "If the appellant finds himself injured, he can seek out his remedy." (I should have thought that the appellant's remedy lay in his appeal, and that the Judge was bound to try that appeal, and to give the appellant his remedy there and then.) Consequently the appellant, failing before the Judge, has appealed here specially. The objections before the Judge and on special appeal, I take it, are both preferred under Section 11, Act XXIII. of 1861.

Baboo Gopal Lall Mitter, who appears for the respondent, contends that the appellant is not entitled to be heard under that Section; that he is not really, but (under the operation of this Court's decision in special appeal) only formally, a defendant in the case, and that consequently, if he is dispossessed of any land in execution of this decree, he comes within the description, as given in Section 230 of the Code of Civil Procedure, of a person other than the defendant; that consequently he was bound to appeal under that Section and under the procedure applicable to that Section.

I think this distinction is unfounded. This Court, although it held that no question of title ought to have been investigated as between the plaintiff and the co-defendant, yet did not set aside the order of the Court which had made Huree Kishore Roy a defendant. Huree Kishore Roy continued, and is still in this suit a defendant on the record. He is so for the purpose of being liable to the plaintiff for the costs which have been awarded against him, and also for the purpose of protecting his interests against anything which may be improperly done under the decree.

Then the question is, has he anything to complain of in the Judge's order before us? I think he manifestly has. He contends that the decree-holder seeks to dispossess him under cover of this decree from the lands in his possession, and which the decree-holder sought to obtain from him by means of a suit ostensibly against the Barorys. I think it very plain that the petition of the decree-holder had that very object in view, for it sets out the names of all the defendants; it asks generally for possession of the land decreed; it asks for costs; it asks for attachment of the property and arrest of the person of all the defendants, and distinguishes in no way between one defendant and the other. And, if we may judge from the terms of the Judge's order, the defendant has not only applied for possession of the land in the second defendant's hands, but has also persuaded the Judge that the effect of the final decree given was to entitle him to possession of that land, because the Judge says that the decree gives the decree-holder possession of the land sued for. Now, manifestly as against the Barorys, the decree did not give possession of the land sued for, because certain lands were expressly excepted.

Then there has been, I should think, a contention before the Judge—a contention which has proved successful—that the plaintiff is also entitled to recover possession of the lands which were in the hands of Huree Kishore Roy, inasmuch as the decree of the Court of first instance, which declared the latter to be entitled to these lands, has been set aside. If that be so, as I have very little doubt it is, the Judge has plainly lost sight of the distinction between a decree of the Appellate Court simply reversing the decree of the Court below, and a decree which, reversing that decision, goes on to record judgment for the other party. There is all the difference in the world between these proceedings. An Appellate Court may, for various reasons, think it proper to set aside the decision which has been passed by a Court of first instance on the ground of want of jurisdiction, on the ground of issues not properly raised, or for other reasons. But, then, the effect of that simply is to leave the parties as if no decree whatever had been passed. It is quite another thing when a Court holds that the title of *A*, and not the title of *B*, must prevail, and, therefore, gives judgment for *A* instead of *B*. In that case, of course, possession must be given to the one party whose title has been held the preferable. In the case before us, manifestly there was nothing of the sort. The Court, so far from ordering possession to the plaintiff, declared that the question between him and the party, who was in possession of the land, ought never to have been gone into.

I think, therefore, that the decision of the Judge must be set aside, and that he must be directed to execute the decree in precise conformity with the decision of the Court,

that is to say, that the Barorys are to be dispossessed of the lands which were in their possession, and in respect of which they have been held to have no good title; and that, in respect of the lands in the hands of Huree Kishore Roy, there can be no execution, and the plaintiff, if he seeks to recover those lands, must bring a separate suit for the purpose. And I think the appellant is entitled to his costs.

Hobhouse, J.—I concur entirely.

The 28th June 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Money-decree (Rights of holder of).

Case No. 140 of 1867.

*Application for review of judgment passed by the Hon'ble Justices L. S. Jackson and W. Markby on the 27th February 1867, in Special Appeal No. 2170 of 1866.**

Monohur Doss and another, Defendants (Respondents), *Petitioners,*

versus

Kalee Dhun Dobey, Plaintiff (Appellant), *Opposite Party.*

Baboo Romanath Bose for Petitioners.

Baboos Sreenath Doss and *Kalee Kishen Sein* for Opposite Party.

The holder of a simple money-decree does not acquire a lien on the property of his judgment-debtor.

THIS case was set down before my brother Markby and myself, but my learned colleague being prevented by indisposition from sitting here to-day, and the case appearing to me to be one of a nature which would not need prolonged argument, I have thought fit to take it up, and dispose of it myself singly.

The review is applied for on the strength of two cases, one to be found at page 1004 of the Sudder Dewanny Reports for 1859, and the other at page 45, IV. Weekly Reporter, Civil Rulings. It appears to me that in neither of these cases is it laid down as a rule of law that, under circumstances like those of the present case, does a party obtaining a money-decree acquire a lien on the property of his judgment-debtor. The case from the IV. Weekly Reporter, on which the vakeel for the petitioner lays special stress, is manifestly a case which was decided, not upon a general rule of law, but with reference to the facts and merits of that case. It is not, therefore, a case which can be used as authority in the case before us.

Upon the merits of the case, I see no reason to suppose that we should be inclined to change our view, and upon the general rule of law it has not been shown that our decision was erroneous.

I, therefore, reject the application with costs.

* *See* Vol. 7, p. 206.

The 29th June 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

Hindoo Law of Inheritance (applicable to the Jains)—Joint undivided family—Partition—Co-parcenership—Survivorship.

Case No. 309 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 19th of August 1865.

Lalla Mohabeer Pershad and others (Defendants), *Appellants,*

versus

Mussamut Kundun Koowar (Plaintiff), *Respondent.*

Baboos Dwarkanath Mitter, Anodapershad Banerjee, Tarucknath Sein, and *Onookool Chunder Mookerjee* for Appellants.

Messrs. W. E. Peacock and *G. M. Tagore,* and *Baboos Juggodanund Mookerjee, Kali Mohun Doss,* and *Nil Monee Sein* for Respondent.

The Jains are governed by the Hindoo Law of Inheritance applicable in that part of the country in which the property is situate.

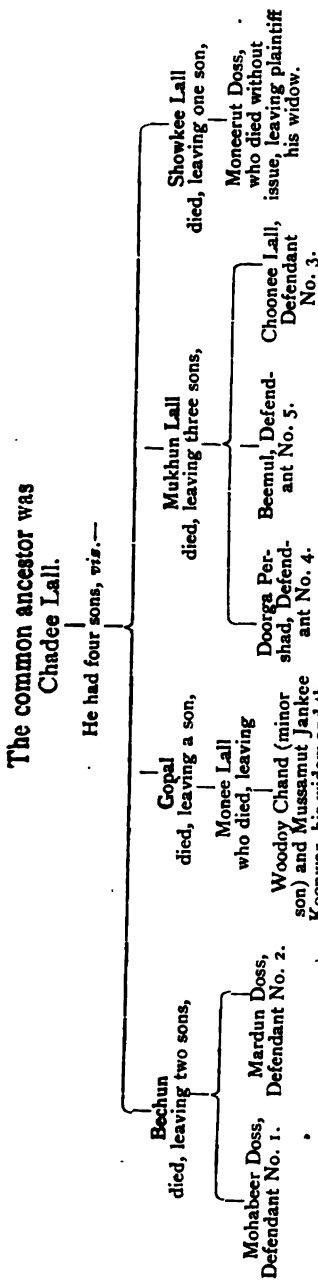
An actual partition by metes and bounds is not necessary to render a division of undivided property complete.

According to Hindoo Law, there is a co-parcenership between the different members of a united family, and survivorship follows upon it.

Peacock, C. J.—THIS is a suit brought by Mussamut Kundun Koowar as widow and heiress of Lalla Moneerut Doss for a declaration of right and inheritance, and for the recovery of possession of certain property according to the shares specified in an

ikrarnamah, dated the 30th October 1857, and also of a share in Mouzah Shahapore, Puttee Shahapore.

The property is situate in a district subject to the Mitakshara Law of Inheritance, but the family are Jains.



It is contended by the appellants that the plaintiff, as widow of Moneerut Doss, is not entitled to succeed to his share, as at the time of his death he was joint in estate with his cousins, and that the lands were situate in a district in which the Mitakshara Law prevails.

On the other hand, it was contended, *first*, that the family were Jains, and therefore not subject to the Mitakshara; and, *secondly*, that the plaintiff's husband was not joint in estate, and that, consequently, even according to the Mitakshara Law, the plaintiff was entitled to succeed in her suit.

Several issues were laid down in the cause, the most important of which were the 1st, 2nd, 3rd, 4th, and 5th, which raised the two points above mentioned.

The case was tried before the Principal Sudder Ameen, who, upon the authority of a Bywasta given in 1863 by the Pundit of the High Court in another case, held that the plaintiff was entitled to inherit her husband's share whether the property were joint or separate, and, *secondly*, that the plaintiff's husband, as regards the property in question, was separate. He consequently gave a decree in favor of the plaintiff. From this decree some of the defendants have appealed.

The Bywasta relied on was given by the Pundit of the late Sudder Court. The Pundit on that occasion referred to Gautama Sanhita, and certain books said to be of authority among the Jains; but the books were referred to generally, and no reference was made to any particular passage.

The authority of Gautama is quoted in the Mitakshara, Chapter 2, Section I., Verse 8, and of itself is no sufficient authority in support of the doctrine for which it is cited; for the author of the Mitakshara, after quoting the authority of Gautama in the Verse above cited, shows in a subsequent Verse 19 (30) that the widow does not take when the husband is unseparated. The passage in Verse 8 is: "Let kinsmen allied by funeral "oblation, by family name, and by descent "from the same patriarch, share the heritage; *or the widow of a childless man, if "she seek to raise up offspring to "him.*"

The Verse 19 says: "But the text of "Vasishta, 'An appointment shall not be "through covetousness,' must be thus interpreted: 'If the husband die, either unseparated from his co-parceners or re-united "with them, she has not a right to the succession; and, therefore, an appointment to

"raise up issue must not be accepted for the "sake of securing the succession to her "offspring.'"

In Verse 30 the conclusion is arrived at from the arguments in the previous Sections, and it is there said: "Therefore the right "interpretation is this: When a man, who "was separated from his co-heirs and not "re-united with them, dies leaving no male "issue, his widow (if chaste) takes the estate "in the first instance."

The appellants' vakeel, Baboo Anodapershad Banerjee, in the course of the argument, pointed out that the Pundit, in quoting from Gautama, had omitted a very important passage, *viz.*, "if she seek to raise up offspring to him."

But for the character which the Pundit bore, I should have been induced by the argument to think that the passage had been wilfully omitted, and that the Bywasta was a dishonest one; but the Pundit bore a high character, and it has been shown very clearly that the words omitted do not, in reality, affect the question; for it is clearly shown in other verses of the same Chapter and Section, *viz.*, Verses 2, 15, and 18, that the right to inherit is not conditional upon the widow's seeking to raise up offspring to her husband, and that an authority to raise up issue is expressly condemned by Menu. The words omitted by the Pundit have reference to a time when the widow was allowed to raise up offspring to her husband. It is thus explained in Chapter 2, Section 1, Verse 16, that the widow takes the husband's estate, and that, as an instruction to her in regard to her duty, "she may either remain chaste or seek to "obtain progeny."

This, however, does not affect the general rule laid down in Verse 30—that the widow cannot inherit, whether she remain chaste or not, unless the husband is separated.

The real error in the Bywasta was in not drawing a distinction between cases in which the husband is unseparated. The omission of the words referred to was not important, though it would have been much more correct if the Pundit had cited the text at large, and given his reasons for thinking that the words, "if she seek to raise up offspring to him," were not important at the present time.

The learned Counsel for the plaintiff, respondent, have not been able to refer us to any authority in support of their argument—that, amongst the Jains, a widow is entitled to inherit, whether the husband is separated or not.

The learned Counsel, Mr. Tagore, made use of an ingenious argument to show that there was a wide distinction between the Jains and the orthodox Hindoos, amongst whom the right of inheritance is governed by the Mitakshara. He quoted a passage from Strange's Hindoo Law, page 228, to show that, as regards the five great sacraments, the religious duty of undivided brethren is single, *i. e.*, performed by an act in which all join; and he contended that, as amongst the Jains there was no shrad, and as, according to the Mitakshara Law, the surviving parceners in a joint Hindoo family offer the funeral cake, and the widow can do so only when her husband is separate, the Law of Inheritance, as laid down in the Mitakshara, is founded upon a principle which does not apply to the Jains, and could not be considered as binding upon them.

But this argument, if carried out to its full extent, would show that the Jains are not governed by the Law of Inheritance as laid down either in the Mitakshara or in the Dyabhaga, and then there would be nothing to show that the widow inherits at all whether the husband were joint or separate. No evidence was given to show what, according to the usage amongst the Jains, are the rights of a widow as regards inheritance.

In the late case, to which we were referred, of the Rajah of Shivagunga, 9 Moore's Indian Appeals, page 539, the right of surviving co-parceners of a joint Hindoo family under the Mitakshara was stated to depend upon survivorship, and not upon inheritance—in other words, that the interest of a husband, when joint, survives to the co-sharers in preference to the widow's right of inheritance.

In the absence of evidence to prove that the rules of inheritance of the Jains are not the same as those of the orthodox Hindoos, we cannot say that the Jains are not governed by the Hindoo Law of Inheritance applicable in that part of the country in which the property is situate, *viz.*, the Dyabhaga in Lower Bengal generally, the Mitakshara in the Mitakshara Districts, and the Mithila in the Mithila country.

If the members of a particular sect of Hindoos claim to be governed by a particular law, and not by the ordinary Hindoo Law applicable to the district generally, we think it is for them to prove clearly as a matter of

fact by Pundits, or other persons acquainted with their usages, by what other rules their rights of inheritance are regulated. It was for the respondent in this case, as it was in the Shivagunga case, to show (if her case depended upon it) that the property did not descend according to the usual course of Hindoo Law prevailing in the district. (*See* 9 Moore's Indian Appeals 608.)

The respondent asked us to summon the Pundit who gave the Bywasta, and we did so; but he was not in a state of health to be able to give evidence, and no application was made to allow her to examine other Pundits or other persons acquainted with the usages of the Jains. She ought to have called them, if she intended to do so, in the Lower Court. Not having done so, and not having applied to us to be allowed to do so now, or shown us that she could, if allowed to do so, give material additional evidence upon the subject, we must assume that she is unable to prove as a fact that the Jains are governed, as regards inheritance, by rules different from those of other Hindoos. We must, therefore, hold that the plaintiff in this case is bound by the rules of the Mitakshara.

The Bywasta produced in evidence was not acted upon in the case in which it was given. It is very unsatisfactory, and it is not shown that the Pundit who gave it had any peculiar knowledge of the usages of the Jains in respect of inheritance, or that they were not governed by the general law which is binding upon other Hindoos. He does not state why he considers the rule laid down in general terms by Gautama as to a widow's right of inheritance to be applicable to the Jains whether the husband was separate or not, notwithstanding it has been shown by Verse 30, Chapter 2, Section I., of the Mitakshara, that it is applicable only when the husband was separate in estate.

We are of opinion that the Bywasta does not contain a correct exposition of the law, and that it cannot be acted upon as an authority, and that, in that part of the country in which the Mitakshara prevails, the Jains, like other Hindoos, are bound by that reading of the law.

We do not, therefore, concur with the Principal Sudder Ameen so far as his decision relates to the 3rd issue.

The question, then, arises whether the family was undivided or divided in estate in respect of the property which is the subject of this action. It is unnecessary to refer particularly to the cases which have been cited in support of the doctrine that a division of undivided property is not complete until there has been an actual partition by metes and bounds.

The question has been very recently considered and decided by the Privy Council in an appeal from Madras, Appoovier *vs.* Ramasubba Aiyan and others. The judgment was pronounced on the 17th of November 1866, though, I believe, the case has not yet been published in any of the regular reports.*

That case appears to be so very similar to the present that I cannot do better than read the following extract from that judgment:—

The Lords of the Judicial Committee of the Privy Council say: "The present appeal is "founded upon an allegation that certain "property, shares in which are claimed by "the appellant, continues the undivided "property of the family of which the appel-"lant was a member, and which was origi-"nally an undivided family. The founda-"tion of the defence to the appellant's claim "is an instrument which we will call, for "the present purpose, a deed of division, "dated 22nd of March 1834.

"Certain principles, or alleged rules of "law, have been strongly contended for by "the appellant. One of them is, that if "there be a deed of division between the "members of an undivided family, which "speaks of a division having been agreed "upon, to be thereafter made, of the pro-"perty of that family, that deed is ineffec-"tual to convert the undivided property "into divided property until it has been "completed by an actual partition by metes "and bounds.

"Their Lordships do not find that any "such doctrine has been established; and "the argument appears to their Lordships to "proceed upon error in confounding the "division of title with the division of the "subject to which the title is applied.

"According to the true notion of an un-"divided family in Hindoo Law, no indivi-"dual member of that family, whilst it re-"mains undivided, can predicate of the joint "and undivided property, that he, that par-"ticular member, has a certain definite share. "No individual member of an undivided

* Since published.—*See* Vol. VIII., p. 1.

"family could go to the place of the receipt "of rent, and claim to take from the Collect- "or or bailiff of the rents a certain definite "share. The proceeds of undivided proper- "ty must be brought, according to the "theory of an undivided family, to the "common chest or purse, and then dealt "with according to the modes of enjoyment "of the members of an undivided family. "But when the members of an undivided "family agree among themselves with re- "gard to particular property, that it shall "thenceforth be the subject of ownership "in certain defined shares, then the character "of undivided property and joint enjoyment "is taken away from the subject-matter so "agreed to be dealt with; and in the estate "each member has thenceforth a definite "and certain share, which he may claim a "right to receive and to enjoy in severalty, "although the property itself has not been "actually severed and divided.

"With reference to the cases in the infe- "rior Courts which have been relied upon "by the appellant, we believe, upon an "examination of them, that there is not "to be found in any, clearly and affirma- "tively, the doctrine contended for with "reference to an agreement for the conver- "sion of joint ownership into separate owner- "ship, namely, that such agreement is of "no effect to convert an undivided family "into a divided family without an actual "partition.

"In the last case cited and relied upon "by the appellant, decided in the month "of February 1865 in the High Court at "Madras, the Court refuses to assent to the "doctrine that nothing short of an absolute "partition by metes and bounds in the life- "time of the different members will make "the shares of the property divided.

"Undoubtedly, their Lordships would be "unwilling to reverse any rule of property "which had been long and consistently acted "upon in the Courts of the Presidency; but "it is impossible for them here to come to "the conclusion that the doctrine contended "for by the appellant is to be considered "a rule which has been so accepted or acted "upon by those Courts. Upon an exami- "nation of the cases, it will be found that in "some the deed of partition was not attended "by any subsequent act, and had been "repudiated by the subsequent conduct of the "parties; and in another of the cases cited, "where there had been a decree of partition, "it seems that the decree of partition had "been abandoned.

"If, then, the rules derivable from the true "theory of undivided family are such as we "have described, and are not at variance with "any settled course of legal decision—let "us apply those rules to the deed upon "which this case, in reality, depends.

"The appellant admits that the deed "was operative with regard to a certain "number of villages; because, he says, those "were actually divided; but he contended "it was not a deed which made the family "a divided family with regard to the rest "of the villages, because it has not been "followed by actual partition.

"It is necessary to bear in mind the two- "fold application of the word 'division.' "There may be a division of right, and there "may be a division of property; and thus, "after the execution of this instrument, "there was a division of right in the whole "property, although, in some portions, that "division of right was not intended to be "followed up by an actual partition by "metes and bounds, that being postponed till "some future time when it would be "convenient to make that partition.

"The deed, after dealing with the villages "that were intended at once to be the sub- "ject of an actual partition, proceeds thus: "'But inasmuch as it is not intended to "divide now'—What is the meaning of the "words 'divide now'? Clearly to make the "same partition of the villages that follow as "had previously been directed to be made "of the villages which precede. 'But in- "asmuch as it is not convenient to divide "now our moiety of the villages' (then "follows an enumeration of the villages) "'we shall divide every year in six "shares the produce of them and enjoy it, "after deducting the *sarkar sist* and charges "on the villages.' Nothing can express "more definitely a conversion of the ten- "ancy, and with that conversion a change "of the *status* of the family *quoad* this "property. The produce is no longer to be "brought to the common chest as represent- "ing the income of an undivided property, "but the proceeds are to be enjoyed in six "distinct equal shares by the members of "the family who are thenceforth to become "entitled to those definite shares. Thus, "using the language of the English Law "merely by way of illustration, the joint "tenancy is severed, and converted into a "tenancy in common.

"Then, if there be a conversion of the "joint tenancy of an undivided family into

"a tenancy in common of the members of "that undivided family, the undivided "family becomes a divided family with "reference to the property that is the sub-"ject of that agreement, and that is a "separation in interest and in right, although "not immediately followed by a *de-facto* "actual division of the subject-matter. "This may at any time be claimed by virtue "of the separate right.

"The words with which this instrument "of the 22nd of March 1834 concludes "manifest an intention to become divided, "for, after expressing that they have "already divided the silver, brass utensils, "the parties use these words: 'We have "henceforward no interest in each other's "effects and debts except friendship between "us.' We find, therefore, a clear intention "to subject the whole of the property to a "division of interest, although it was not "immediately to be perfected by an actual "partition.

"We have examined the whole of these "papers with great anxiety and care; we "have been very much assisted by the argu-"ment at the bar and by the able manner in "which the cases on both sides have been "prepared. We have no doubt of the true "principle which is applicable to the matter, "or of the legal effect of this deed of March "1834. It operated in law a conversion of "the character of the property and an al-"teration of the title of the family, convert-"ing it from a joint to separate ownership, "and we think the conclusion of law is "correct, *viz.*, that that is sufficient to make "a divided family, and to make a divided "possession of what was previously un-"divided, without the necessity of its being "carried out into an actual partition of the "subject-matter."

This decision is, in my opinion, quite consistent with justice and common sense, and, also with the Law of Inheritance as laid down in the Mitakshara when carefully read and studied; but, even if it were not so, it is an authority by which we are governed.

Reading the ikrarnamah of the 30th of October 1851, it appears clear that, although the four parties to the instrument had been jointly carrying on the business of the kotee and purchasing landed properties, taking zur-i-peshgee and other usufructuary leases, they had been still separate in point of interest, and each had been receiving one-fourth share of the profits, and appropriating it to his own use. The ikrarnamah, it was admitted, was between Mukhun Lall, son of Chadee Lall, the two sons of Bechun, the son of Gopalchand, and Moneerut Doss, the plaintiff's husband, the son of Showkee Lall. When I speak of the four parties to the deed, I consider the grandsons of each of the sons of Chadee Lall, the common ancestor, as taking *per stirpes* the shares of their respective fathers and as forming one party entitled to the same one-fourth share, as their respective fathers would have been, if living.

This is made clear by that part of the deed which says that it is expedient that the declarants should have the names of themselves recorded in the books of the Collector as proprietors in equal fourth shares as follows: that is to say, one-fourth share in the name of Mukhun Lall, who was the surviving son of Chadee Lall; one-fourth in the names of Lalla Mohabeer Pershad and Monohur Doss, sons of Bechun Lall; one-fourth in the name of Munnee Lall, son of Gopal Chund; and one-fourth in the name of Moneerut Doss, son of Showkee Lall.

It appears from the deed that the four sharers had previously made a settlement by which they were entitled to the lands and the profits of the kotee in equal fourth shares, and that the four sharers were in possession each of one-fourth share of the lands, and had contributed in those shares to the payment of the Government revenue; that the lands stood, some in the name of one, and some in the names of others of the four sharers; and that, with a view of making the settlement more sure and of removing future doubts, the ikrarnamah was executed and four lists regarding the kotee; and that four schedules of houses, ancestral and acquired, had been made out, and one of them deposited with each of the parties. It is then declared solemnly by the ikrarnamah that, according to the terms inserted therein, the parties would cause the names of the four sharers to be inserted in the register of the Collector as proprietors of equal shares in the said mehals and the direction of the zemindarees and of the mouzahs in mokurruree. It then declares that the villages held under zur-i-peshgee mortgages, the putwa villages, and other villages which might in future be held under zur-i-peshgee mortgages, a certain village held under a conditional sale, and certain other properties, as well as the capital and the debts and assets mentioned in the chitta of the kotee, should be the property of them-

selves, the four sharers, in equal shares, without reference to the person in whose names the documents were made out; and that they should enjoy the profits or sustain the loss in equal shares, that is to say, each to the extent of his one-fourth share. It is then declared that, of their mutual accord, they left the business of the kotee to be conjointly conducted and managed as heretofore; that the affairs of the kotee should be managed in the best possible manner in consultation with and with the consent of all the sharers; that they would share and appropriate the profits thereof according to the shares aforementioned, that is to say, one-fourth share each; that, if in future any property should be purchased with the assets of the kotee, or any transaction in the shape of peshgee, putwa, usufructuary lease, or conditional sale, should be made with the profits of the joint kotee in favor of any of the co-sharers, they should all be entitled thereto each receiving a fourth share; that the houses, shops, and gardens mentioned in the schedule which stood in the name of all the four co-sharers, the silver plates, tents, carpets, household furniture, and conveyances, should remain in the possession of themselves, the four co-sharers, as they had hitherto been.

Nothing can be clearer to my mind than that the parties were separate in interest although an actual partition had not been effected, and that their object in executing the ikrarnamah was to render the settlement by which their interests had been divided more sure and to prevent future disputes. The parties were content to separate in interest; they did not require a formal partition so long as there was no disagreement between them. Indeed, it would have been impossible to have had an actual partition of the banking business without destroying it, even if it were a subject for a formal partition; and, as long as the business was carried on jointly under the joint management of the sharers, it would have been useless to have had an actual partition of the mortgages, debts, and securities belonging to it. The parties were content to share the profits and bear the losses in equal shares, one-fourth to each of them. But, lest any disagreement should arise, the following Clause was inserted in the ikrarnamah providing for an actual partition whenever it should become necessary. They say, "God forbid! If at any time "there arise between ourselves or our "heirs any contention or disagreement, "then we or our heirs shall, in accordance "with the shares aforesaid, partition all "the property entered in the chitta of "the kotee and schedules, and also what-"ever property may hereafter be acquired "with joint funds, and take equal shares, "that is to say, each one-fourth. On this "point no one shall have any plea to urge, "nor shall any one have anything to do "with the share of another."

This part of the deed was relied upon to show that no actual division was intended. But clearly it is not so strong in support of that contention as the words "it is not intended to divide now," which are referred to by the Lords of the Judicial Committee as having been contained in the deed in that case. It is clear that the parties in this case intended that there should be a division of the interest, although there was no formal partition by metes and bounds.

The parties then declared that, "save "and except the business of the kotee, the "trade, monetary transactions, khatta-books "of shop-keeping, silver plates, golden or-"naments, and also other furniture, such "as conveyances, which were in the posses-"sion of any one, should remain in his "seisin as before; that no one should have "any dispute or demand on another, either "then or thereafter; and, further, that what-"ever should thereafter be acquired by any "of them exclusively, the same should be "his own property."

The words "trade, monetary transactions" in this part of the deed evidently refer to the separate trades and transactions which, it was proved, the parties carried on on their separate accounts, and were intended to show that no alteration, as regards such separate trades, &c., was intended to be made.

They then point out certain properties which were the exclusive property of some of the sharers, and declare that in these none of the others has any right or interest.

The ikrarnamah contains strong evidence to show that the parties were separate before that document was executed; but, even if they were not, the ikrarnamah affected a division of right as to the property in which the parties agreed they should be entitled to equal fourth shares.

It is unnecessary to go into the evidence to show that the ikrarnamah was acted upon, and that the joint receipts and profits,

after deducting expenses, were divided into four shares, and carried to separate accounts. The evidence upon this and other points, showing that the parties were separated, are pointed out in the judgment of the Principal Sudder Ameen on the 1st issue.

We must ascertain what the parties intended to do, and what they did, and then decide what were the legal consequences of their acts. They could not separate in interest without being subject to the consequences of that separation. In the Shivagunga case, 9 Moore's Indian Appeals 611, it was laid down clearly that, according to the principles of Hindoo Law, there is a co-parceneryship between the different members of a united family and survivorship following upon it; that there was a community of interest and unity of possession between all the members of the family; and that, upon the death of any one of them, the others take by survivorship that in which, during the deceased's lifetime, they had a common interest and a common possession.

In this case there was no community of interest, and it appears to me, therefore, that the interest of the plaintiff's husband did not pass by survivorship to the other sharers, but descended to his widow, the plaintiff. I am, therefore, of opinion that the Principal Sudder Ameen was right in holding that the parties were separate as to the properties included in the ikrarnamah.

It was not disputed that the four-annas share in Mouzah Shahpore, Putnee Shahpore, was, subsequently to the death of the plaintiff's husband, purchased with funds covered by a decree-bond and belonging to the firm, and no separate ground of appeal has been filed against the decision of the Principal Sudder Ameen as to the one-anna share of that mouzah.

The plaintiff has not claimed mesne-profits or any account or share of the profits of the Banking Kotee since her husband's death. The Principal Sudder Ameen was, therefore, correct in confirming his judgment in the plaintiff's favor to that which was the subject of her claim in the suit.

The decision of the Lower Court must be affirmed with costs of this appeal to be paid by the appellants, with interest thereon at 12 per cent. from this date to the date of realization.

Jackson, J.—I will add only a few words to the judgment of my Lord, in which, after long and anxious deliberation on the case, I desire now to express my concurrence.

Not, indeed, that I suppose any weight is likely to be added, by the expression of my opinion, to the authority of that very convincing judgment, but because, adverting to the peculiar constitution of this Court as a Court of Appeal, I think it is far more convenient that a junior Judge, if he be inclined to a contrary opinion, unless his impression be very strong and very clear, should give way and acquiesce in the judgment of his senior.

In this case I have never entertained any doubt as to the failure of any evidence to show that the Jains, living in a part of the country where Hindoos are governed by the Mitakshara Law, had among themselves any rule or principle of inheritance other than that prescribed in the Mitakshara; and it, therefore, unquestionably followed that the widow, plaintiff in this case, would only take the inheritance of her husband if he, at the time of his death, had been separate in estate.

But I had the most serious doubts upon the question of fact.

Looking at the state of knowledge, among even fairly-educated Hindoos, as to the exact principles of their own law (a point on which I do not mean to draw a comparison between them and the people of any European country at all to the disadvantage of the Hindoos)—looking to this fact, and to the inveterate habit of the natives to have documents of the most important kinds drawn up by mere scribes, neither acquainted with law nor trained to precision of language, I have a strong repugnance to hold parties bound to a legal consequence arising from the use of particular terms, where surrounding circumstances appear to show that the parties had no such intention as that consequence would indicate, and that, in truth, the consequence was unforeseen.

And thus, although, on general principles, a written instrument is far more satisfactory to our minds as evidence of the conduct and intention of the parties than mere oral testimony can ever be, the necessity is often, I think, forced upon us of looking to such testimony in order to see whether those who executed the instrument really contemplated that which, by intendment of law so to speak, follows from the words employed.

Now, in the judgment of the Privy Council in the case cited by His Lordship, the

law is laid down in these terms: "When the "members of an undivided family agree "among themselves with regard to particular "property, that it shall henceforth be the "subject of ownership in certain defined "shares, then the character of undivided "property and joint enjoyment is taken "away from the subject-matter so agreed to "be dealt with; and in the estate each "member has thenceforth a definite and "certain share, which he may claim the "right to receive and to enjoy in severalty, "although the property itself has not been "actually severed and divided." This, although now for the first time enunciated with the authority of their Lordships of the Judicial Committee, is in substance the view urged upon us for the plaintiff.

The uncertainty which oppressed me was whether the parties, when they executed the ikrarnamah, had this rule of law (supposing the rule to be as stated) present to their minds. Was it their design, in coming to that arrangement, to effect the very important change, one of the most important that can occur to a Hindoo family, from community to separation in estate?

On this point, as I have said, I entertained very serious doubts, suggested as well by the oral evidence as by the language, in places, of the ikrarnamah—I should be wrong if I did not add, doubts from which my mind is not yet wholly free.

I think I am justified in further saying that my doubt mentioned with such particulars of the case as I could verbally state, to a valued colleague of ours, who has since been taken from us, but whose opinion upon questions of Hindoo Law and of native usage deservedly carried the greatest weight—my doubt, I say, mentioned to the late Justice Shumbhoonath Pundit, received confirmation.

But, after the decision of the Privy Council, it seemed proper to give way, *first*, because, as my Lord has observed, the decision is undoubtedly authority to guide us; *secondly*, because, although I still hope to receive, at some future day, an exposition of the doctrines of Hindoo Law on this subject which shall be more thoroughly satisfactory to my understanding, yet the rule stated is clear and intelligible, and easy to follow; and, *thirdly*, I confess, because the decision of this case which results from it is consonant to my notions of natural justice.

I therefore concur, as I have said, in the judgment delivered; and I have only thought it due to the parties to state what has been passing in my mind, because I am sensible that, but for His Lordship's most courteous indulgence of my scruples, judgment would have been pronounced in this case long ago.

The 17th May 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Stamp-duty—Cross-objection of Respondent.

Case No. 88 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 31st July 1866, affirming a decision passed by the Moonsiff of Khoolneah, dated the 29th July 1864.

Anund Mohun Chatterjee (one of the Defendants), *Appellant,*

versus

Sutto Ram Muzoomdar and another (Plaintiffs), and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Motee Lall Mookerjee* for Appellant.

Baboo Bungshee Dhur Sein for Respondents.

When the appeal of an appellant is against the whole of the decision of the Lower Court, and upon the full value of the original suit, no additional stamp-duty is required in respect of the respondent's objection under Section 348, Act VIII. of 1859.

Norman, J.—* * * * * * * * * * *

It is objected in cross-appeal by the respondent's vakeel that this declaration ought not to stand. A preliminary objection was taken to the hearing of the cross-appeal, because it was not put in on a stamp, and a stamp was required by Act XXVI. of 1867. However, there is nothing in this objection, because we find that the appeal of the special appellant presented to this Court is an appeal against the *whole* of the decision of the Lower Court upon the full value of the original suit, and therefore the case does not fall within the provisions of Section 6, Schedule B, Note (e). When an additional stamp-duty is required, the stamp-duty under that Clause is imposed in the following terms:—

"When any appeal shall be presented to a "Civil Court, not against the whole of "a decision, but only against so much there-"of as relates to a part or parts of the

"subject-matter of the suit, and on the "hearing of such appeal the respondent "shall take, under Section 348 of the Code "of Civil Procedure, an objection to any "part of the said decision other than the "part appealed against, the Court shall not "hear such objection until the respondent "shall have paid the additional stamp-duty "which would have been payable had the "appeal comprised the part of the decision "so objected to."

Now, in this case, the stamp-duty paid covers the entire value of the suit, and, therefore, as the Government has received the stamp-duty on the fullest possible valuation, no additional stamp-duty can be paid. * * * * * * * * * *

The 1st July 1867.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice.*

Estoppel.

Application for review of judgment passed by the Hon'ble Sir Barnes Peacock, Kt, Chief Justice, and the Hon'ble J. P. Norman, Judge, on the 29th November 1865, in Special Appeal No. 2082 of 1865.

Mr. J. Tweedie, Defendant (Appellant),

Petitioner,

versus

Poorno Chunder Gangooly and others, Plaintiffs (Respondents), *Opposite Party.*

Baboo Oomesh Chunder Gangooly for Petitioner.

No one for Opposite Party.

Estoppels must be made out clearly.

It appears to me that there is no ground whatever for reviewing this judgment.

Plaintiff sued originally for rent at Rupees 7-8 a year, stating that the defendant held at a variable rate of rent. But it was immaterial to allege that the rate was variable, for the plaintiff did not seek to enhance. He gave no notice of enhancement. He merely sought to recover rent at that rate, because that was the rate at which he alleged that he was receiving rent; and he produced *jumma-wasil-bakee* papers to prove that that was the rate at which rent was paid to him before.

The defendant stated that he did not owe so much, and that he held under a mourosee pottah.

Plaintiff having failed to prove that he held at Rupees 7-8, the Deputy Collector held that the plaintiff had failed to prove his case, but he gave a decree for the rent which the defendant had admitted he was holding. But the Deputy Collector did not enter into the question whether the mourosee pottah was valid or not. There was no proof that it was valid, because no witnesses had been called to prove it. The mooktear, who was called by defendant, said that the defendant did not owe as much as was claimed, but only so much. There was, therefore, no proof by the mooktear or any body else that the mourosee pottah was a valid and genuine document.

This suit was then brought for enhanced rent, and it became necessary to ascertain whether defendant held under a mourosee pottah. It is said that the Deputy Collector was bound to find whether the mourosee pottah was genuine or not, because it had not been found to be genuine in the former suit, and consequently there was no estoppel as between these parties as to whether the mourosee pottah was genuine or not. Therefore, the Deputy Collector had a right to decide whether it was a genuine pottah or not, and he held that it was not genuine.

The Judge also held that it was not genuine. Speaking of this mourosee pottah, the Judge says: "It has cer- "tainly been filed in two cases, one "under Act IV. of 1840, and one under Act "X.; but in neither of these cases was its "validity enquired into, and there is no "proof whatever of its having been given "in 1237 by Bishto Chunder Deb Rae to "Shamasoonderee, and I cannot accept "it as a proof of the defendant's right to "hold at a fixed rate." The Judge went into the question, and found that it was not a genuine pottah.

It is said that the Judge was wrong, because the parties were estopped by what had taken place in the previous suit. If a particular issue had been tried in the former suit, and that issue was material, and it had been found that the pottah was genuine, then it might have amounted to

an estoppel. But estoppels must be made out clearly, because, although they prevent litigation from being continued, still they prevent the Court from entering into the real truth of the question. There is no evidence in this case to show that the Judge was wrong. I think the Judge was not wrong in point of law in holding that there was no estoppel; and, as to the question of fact whether the mourosee pottah was genuine or not, that is not a matter for determination in special appeal.

With reference to the case cited, which was decided by Mr. Justice Trevor and Mr. Justice Macpherson (2 Weekly Reporter, Act X. Rulings, p. 57), it appears to me that that is a very different case. There it was held that the plaintiff could not sue to recover back a sum of money under a decree of Court which had been given against him, and under which the money had been paid. The plaintiff, on proving certain facts which had been constituted a bar to the original action, sought to recover back the amount which had been recovered against him under that decree. There it was clear that a decree had been made; that the decree had been satisfied; and that the decree had never been set aside. If, in the face of that decree, the plaintiff could have recovered back what he had paid, there would be no end of litigation.

The application for review is refused.

The 2nd July 1867.

Present:

The Hon'ble G. Loch and H. V. Bayley, *Judges.*

Limitation—Act XXVII. of 1860.

Case No. 277 of 1867.

Special Appeal from a decision passed by Mr. J. M. Lowis, Officiating Judge of Hooghly, dated the 3rd December 1866, affirming a decision passed by Baboo Koonjo Lal Banerjee, Principal Sudder Ameen of that District, dated the 12th May 1866.

Kalee Prosunno Mookerjee (Defendant), *Appellant,*

versus

Sreemutty Kylash Monee Debia (Plaintiff), *Respondent.*

Baboo Boykuntnath Paul for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

A suit to set aside a summary order passed under Act XXVII. of 1860 may be brought within a year from the date of the order. But such order is no bar to a suit upon title, though brought after the year.

Loch, J.—THE plaintiff and defendant in this case both applied to the Judge for certificate to collect debts under the provisions of Act XXVII. of 1860. Each party claimed the right under separate wills alleged to have been made by the deceased. Summary investigation was made by the Judge as to the validity of the wills, when that produced by plaintiff was considered spurious, while that held by the defendant was considered genuine, and the certificate was given to the defendant.

The plaintiff, who is the daughter-in-law of the deceased, now seeks to recover possession of the property covered by those wills, on the allegation that she is entitled to it under her father-in-law's will, and that she has been ejected by the defendant under cover of this certificate. The Lower Courts rejected a plea of limitation raised by the defendant, and, considering the will propounded by the plaintiff to be proved, and that exhibited by the defendant to be spurious, gave a decree for the plaintiff.

The contention before us in special appeal is on the question of *limitation.* It is alleged by defendant, special appellant, that, as the suit to set aside the summary order of the Judge was not brought within a year, it is barred by limitation under the provisions of Clause 5, Section 1, Act XIV. of 1859, and it has been urged that plaintiff has purposely omitted all mention of the summary order with the view of evading the plea of limitation, but that the object of the suit is, in fact, to set aside that summary order.

The respondent urged that she did not seek to set aside the summary order of the Judge under Act XXVII. of 1860, but to establish her right to the property on proof of the validity of the will, and that the summary order in question was no bar to the suit; nor could limitation be pleaded.

In the course of the argument, reference was made to certain reported cases, *viz.*, 1 Weekly Reporter, page 39, Civil Rulings, 2 Hay's Reports, page 633, and to a Full Bench Judgment in 6 Weekly Reporter, page

199, Civil Rulings. These cases referred more particularly to orders passed under Act XIX. of 1841, but the judgments are equally applicable to the present case, and others of a similar character. The rule apparently laid down in those judgments is that, if a party seek to *set aside a summary order* passed by a Civil Court, he must bring his action within a year, but that such order is no bar to a suit *upon title*, though brought after the year. In a case under Act XIX. of 1841, the Judge has to enquire into the right to possession, and the party whose claim has been rejected, if he wish to set aside that order and to get possession, must bring his suit within a year from the date of the Judge's order; but, if he prefer to leave that order alone, he is not barred from bringing a suit for possession upon *proof of his title* within the period allowed by law for the institution of suits *for landed property, viz.*, 12 years. So in a case under Act XXVII. of 1860, the Judge has to try summarily the right of the parties to hold a certificate. Under that certificate, the party is enabled to collect debts due to the estate of the deceased, and his receipts for money recovered while he holds the certificate are a complete protection to the debtors. If the party, who fails to get the certificate, seeks to *set the order aside*, he must bring his suit within *one* year from the date of that order, and the effect of the decree in his favor would be to make the previous holder of the certificate accountable to him for monies collected; but, if the party do not care to disturb that order, a suit brought by him to obtain possession of the property of the deceased upon proof of his title is not barred, because it is not brought within one year from the date of the order. We think the judgment of the Lower Courts on the point of limitation to be correct; and, as no other question arises in the special appeal, we dismiss it with costs.

The 2nd July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Ejectment—Right of occupancy—Holding by ryot and his father for many years.

Case No. 3162 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 14th September 1866, reversing a decision passed by the Moonsiff of Hathhazaree, dated the 28th December 1865.

Nim Chand Borooah (one of the Defendants), *Appellant,*

versus

Mooraree Mundul (Plaintiff) and others (Defendants), *Respondents.*

Baboo Gopeenath Mookerjee for Appellant.

Moulvie Syud Murhumut Hossein for Respondents.

A holding by a ryot and his father for many years creates a right of occupancy which will prevent the zemindar from ousting the ryot except by due course of law.

Glover, J.—This was a suit by a ryot against his zemindar, and another claiming an intermediate right in the land through him, to recover possession of his holding, from which he alleged himself to have been dispossessed by the third party, and to have damages for the pulling down of his house.

The first Court held that the plaintiff had not proved his mourosee right, and dismissed his claim.

But the Principal Sudder Ameen, finding that the plaintiff and his father before him had held this land as their jote for very many years, decided that the zemindar could not dispossess him by giving his land to a third party; and restored him the possession he sought.

In special appeal it is urged that, as the plaintiff had not proved the mourosee nature of his tenure, the zemindar was justified in bestowing the land on another.

We see no ground for this objection. The Principal Sudder Ameen has found distinctly on evidence, both oral and documentary, that the special respondent had been in possession of the land in question for very many years *as his jote*, and that the zemindar defendant's allegation that it was in *his* khas pos-

session when he gave a pottah to defendant No. 2 is altogether unsupported.

It mattered not, therefore, whether the term jote included (as it does in some districts) mourosee rights; for, as the plaintiff and his father had together held the land for many years, a right of occupancy had been created, which would have prevented the zemindar from ousting his tenant, except by due course of law.

The question of mourosee was not, we think, decided by the Principal Sudder Ameen; but, as it was decided by the first Court, whose decision the second Court reversed *in toto*, it may possibly be held that the Principal Sudder Ameen upheld the special respondent's right to the holding as a mourosee one. And we, therefore, to avoid future misunderstanding, declare that this order, confirming the order of the Lower Court, has no reference to the special respondent's mourosee rights, but confirms him in possession only on the ground of long anterior possession, leaving the question of his special title to any future adjustment the parties may think advisable.

The appeal is dismissed with costs.

The 2nd July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Rent—Assignment—Bond.

Case No. 2904 of 1866.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 24th July 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 29th November 1865.

Shaikh Ali Mahomed (Plaintiff), *Appellant,*

versus

Kenaram Ghose (Defendant), *Respondent.*

Baboo Nil Monee Sein for Appellant.

Baboo Anund Chunder Ghosal for Respondent.

A lent money to *B* on bonds, payment of which was secured by assignment of the rents of *B*'s estate. *A*, instead of liquidating the bonds from the collections of the estate assigned, brought a suit on the bonds, and obtained a decree. *B* now sues for a refund of the collections made, and not appropriated to the payment of the bonds. HELD that such a suit was not one for rent, and must be tried in the Civil Court.

Kemp, J.—THE only point for decision is whether this suit is cognizable by the Civil Courts or by the Revenue authorities.

Had the appellant been a lessee in the ordinary sense of the term, paying rent to the respondent, then there can be no question but that the suit would be cognizable by the Revenue authorities alone. But the appellant sues for the recovery of certain monies collected by the respondent under the following allegations. The respondent and his father lent money to the appellant on bonds, payment of which was secured by assignment of the rents of the appellant's estate.

The respondents, instead of liquidating their bonds according to the terms of the assignment from the collections of the estate assigned, brought a suit on the bonds, and obtained a decree. The plaintiff, special appellant, sues for a refund of the collections made, and which have not been appropriated to the payment of the bond-debts. Such a suit is not a suit for rent, and must be tried by the Civil Court.

Appeal decreed, and suit remanded for trial by the Civil Court.

The 4th July 1867.

Present:

The Hon'ble G. Loch and H. V. Bayley, *Judges.*

Partition—Shikmee tenure.

Case No. 234 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 30th November 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 23rd January 1865.

Oomesh Chunder Shaha and others (Defendants), *Appellants,*

versus

Manick Chunder Bonick and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboos Onookool Chunder Mookerjee and *Romesh Chunder Mitter* for Appellants.

Mr. J. S. Rochfort and *Baboo Dwarkanath Mitter* for Respondents.

The Lower Appellate Court's order for the partition of a shikmee tenure was upheld on the ground that it did not affect the rights of Government, of the zemindar, or of the plaintiff's co-shikmeedars.

Loch, J.—THE objection taken in special appeal is that the order passed by the Lower Appellate Court for the partition of the plaintiff's shikmee tenure cannot, under the circumstances, be carried out. The circumstances are these: The plaintiff's shikmee tenure is within the estate No. 24 of the Collector's register, and is composed of an 11-annas and 3-gundahs share in certain villages, the remaining share of which, *viz.*, 4 annas 1 gundah, was formerly a jagheer belonging to the special appellants, which has been resumed and settled with the special appellants, and brought into the Collector's register under No. 21, so that the villages in question form parts of two revenue-paying estates in the joint possession of proprietors not having a common interest in the land, but who make collections from the tenants according to their respective interests. It has been ruled by this Court on several occasions (and a judgment in 7 Weekly Reporter, page 51, Civil Rulings, is the last on the subject) that, where lands are in this predicament, a partition cannot be made even by the Revenue authorities; and, if this be so, a partition cannot be made by the Civil Court, for such partition might endanger the Government revenue, and it could not, under any circumstances, take place without the consent of all parties interested in the property; and further, if the proprietors of talook No. 24 are not entitled to ask for a partition, it is clear that those who hold under them have no right.

On the other hand, it is urged that what is now asked to be done will neither affect the rights of Government, nor prove in any way injurious to the defendants, special appellants, nor affect their rights. Plaintiffs and certain defendants, as representatives of the zemindars from whom they hold, have a right to collect 11 annas 3 gundahs of the rent due by the ryots within their shikmee tenure, and the special appellants, as proprietors of talook No. 21, have a right to collect from the same ryots 4 annas 1 gundah of the rent. What plaintiff asks for is not that the special appellants should not be allowed to collect as hitherto his proportion of the rent from the ryots. That he will continue to do undisturbed, but plaintiff asks the Court to make a partition as between him and his co-shikmeedar, so that neither party may interfere with the other. He asks, for example, that, where there is a chuck, a line may be drawn from north to south, and that plaintiff may be allowed to collect from the ryots on the one side of the line, and his co-sharer from those on the other; but the special appellants would still collect from all the ryots, whether to the right or left of the line, or the Court may specify the names of the ryots from whom plaintiff is to collect, and those from whom his co-shikmeedar is to collect; but such an arrangement would not interfere with the special appellant's right to collect his share of rent from all the ryots, nor would it in any way affect the rights of Government, or alter the position of the proprietors of talooks Nos. 21 and 24 with respect to Government.

We think the precedent quoted is not applicable to the present case. We see no objection to a partition being made in the mode suggested by the respondent, as it does not affect either the rights of Government, nor of the zemindar, nor of the special appellants. Under this view of the case, we dismiss the special appeal with costs.

The 4th July 1867.

Present:

The Hon'ble G. Loch and H. V. Bayley, *Judges.*

Presumption under Section 4, Act X. of 1859.

Case No. 378 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Hooghly, dated the 5th December 1866, affirming a decision passed by the Deputy Collector of Serampore, dated the 30th July 1866.

Sheikh Jainooddeen (Defendant), *Appellant,*

versus

Poorno Chunder Roy and others (Plaintiffs), *Respondents.*

Baboo Gopeenath Mookerjee for Appellant.

Baboo Kalee Kishen Sein for Respondents.

In the absence of documentary evidence to show that a pottah of 1239 was merely confirmatory of a previous holding, the possession of a ryot claiming under that pottah will commence from the date of his pottah, and he is not entitled to the benefit of the presumption under Section 4, Act X. of 1859.

Loch, J.—WE think that the petitioner has no ground for special appeal. The suit was for enhancement. The defendant pleaded uniform payment of rent for twenty years, and that his rent was not liable to enhancement. The plaintiff pointed out to the Court that the defendant in a former suit

had admitted that he held under a pottah of a date subsequent to the permanent settlement, so that his plea of payment of rent at the same rate for 20 years did not raise the presumption under Section 4, Act X. of 1859. The record was sent for; and, though the lease itself was not with the record, yet the plaint disclosed the date of that instrument to be 1239. It is urged before us that this pottah was merely confirmatory of a previous holding. It was for the defendant to show this. The plaint referred to does not indicate this, and the special appellant has given no proof in support of his allegation, but asserts that the payment of a uniform rate of rent for 20 years is a sufficient ground for concluding that his rent cannot be enhanced. The receipts which he files, even if genuine, are for a period subsequent to 1239. Had he produced any of a date previous to that year, there would have been some ground for believing that the pottah of 1239 was merely confirmatory of a previous holding. In the absence of any such documentary evidence, we can only conclude that the special appellant's possession dates from the date of his pottah, and that he is not entitled to have the benefit of the presumption referred to in Section 4, Act X. of 1859. We dismiss the appeal with costs.

The 4th July 1867.

Present:

The Hon'ble G. Loch and H. V. Bayley, *Judges.*

Section 260, Act VIII. of 1859.

Case No. 3117 of 1866.

Special Appeal from a decision passed by Mr. J. R. Muspratt, Judge of Purneah, dated the 28th August 1866, affirming a decision passed by Mr. W. DaCosta, Principal Sudder Ameen of that District, dated the 29th March 1866.

Mirza Khyrat Ali and others (Plaintiffs), *Appellants,*

versus

Mirza Syfoollah Khan and others (Defendants), *Respondents.*

Messrs. R. T. Allan and *C. Gregory* for Appellants.

Mr. R. E. Twidale and *Baboo Sreenath Doss* and *Moonshee Ameer Ali* for Respondents.

Suit for possession by purchaser from certified purchaser at an execution-sale. Defendant in possession not only denied plaintiff's title, but that of his vendor whose purchase was clearly fraudulent, being made in collusion with the judgment-debtor to defraud creditors. HELD that Section 260, Act VIII. of 1859, did not prohibit a defendant under such circumstances from questioning the plaintiff's title; that it provided for the dismissal of a suit brought to question the title of the certified purchaser, but did not prohibit a defendant from questioning that title when the auction-purchaser sought to oust him.

Bayley, J.—IN this case plaintiff sued for possession and declaration of title as to certain putnee lands and for the reversal of an order passed in execution of decree regarding plaintiff's claim to the lands in question.

The suit was brought on the allegation that the plaintiff had purchased the property from one Belia, without any notice and for valuable consideration.

Defendant's (Syfoollah's) plea was that Belia was merely the maid-servant of the judgment-debtor Hyder Ali; that the property was really the judgment-debtor's, and not Belia's; that the purchase by Belia was a fictitious one in fraud of creditors by Hyder Ali; and that, consequently, plaintiff's suit should be dismissed.

The first Court found that there was a collusive *ex-parte* decree obtained by one Busunt Lall, the tehsildar, or collecting servant of the judgment-debtor Hyder; that the debtor was himself the auction-purchaser; that the sale was made by him, the judgment-debtor, to his own maid-servant Belia, and to defeat defendant Syfoollah's decree against Hyder, which was of 21st August 1864, the sale in execution being on the 3rd September. The first Court held that Section 260, Act XIII. of 1859, could not be applied to uphold such a fraud against creditors as the case showed; and that plaintiff had full knowledge of the fraud, both from the relative position of Busunt Lall and Belia with the judgment-debtor, and from the proceedings in the execution-case when plaintiff dealt with Hyder Ali as the real owner, and not with Belia, and nothing was adduced to show that Belia was the real purchaser, while it was clear also that plaintiff was not in possession.

The Lower Appellate Court, going very much on the same view, held that the sale under which plaintiff's claim arose was the result of a fraud against creditors; that the

knowledge of plaintiff was shown by the condition in the deed providing for compensation if the sale were cancelled; and the Lower Appellate Court remarked that Section 260 did not apply to give a title to an alleged purchaser, who was one acting with a knowledge of fraud as here.

The grounds taken in special appeal are:—

1. That the Lower Appellate Court has not specifically found that the purchase by Mussamut Belia was a fictitious one.

2. That the stipulation in the deed for the possible cancellation of the sale was no sufficient evidence of fraud as the Lower Appellate Court had treated it to be.

3. That there is no evidence to plaintiff's knowledge of any fraud.

4. That Section 260 applies to this case, as one between a certified purchaser and the beneficial owner.

We do not think any of these pleas valid. It was not, in our opinion, necessary that there should be any specific and separate finding by the Lower Appellate Court of Belia's purchase being fictitious, for there is substantially a clear finding by the Lower Appellate Court that the whole transaction, of which Belia's purchase was but a part, was *all* in fraud of creditors. We think with the Lower Appellate Court that the proviso in the deed for compensation in case of the cancellation of the sale indicated some knowledge of such a contingency, and from the facts of the case it is evident that that consequence could only arise from the fictitious and fraudulent character of the transactions. Further, it is nowhere shown to us that the Lower Court have found wrongly that, in the execution-proceedings, plaintiff dealt with Hyder Ali, and not with Belia as the real owner. Looking further to Busunt Lall's position, the additional traces of fraud are distinct.

Lastly, as to Section 260, Act VIII. of 1859, it is true that that Section provides for a valid title as between the certified purchaser and the beneficial owner, but that is on the legal presumption that there is a real sale and a real transaction which all the fraud apparent in this case directly contradicts. Neither that law, nor any other enacting legal rules and provision for real transactions of sale, can be said to have been intended by the Legislature to apply to transactions which were not real transactions at all.

In this view I would dismiss this present appeal with costs.

Loch, J.—I concur in the order dismissing the appeal. Section 260 is not applicable to the case. The defendant is in possession. The purchaser from a certified purchaser at an execution-sale seeks to obtain possession. The defendant denies, not only plaintiff's title, but that of his vendor, whose purchase was clearly fraudulent, being made in collusion with the judgment-debtor to defraud creditors. Section 260 does not prohibit a defendant, under such circumstances, from questioning the plaintiff's title. It provides for the dismissal of a suit brought to question the title of the certified purchaser, but does not prohibit a defendant questioning that title when the auction-purchaser seeks to oust him.

The 4th July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Possession—Dispute between Mokurrureedar and Dur-putneedar.

Case No. 122 of 1867.

Application for review of judgment passed by the Hon'ble Justices Kemp and Markby, on the 21st February 1867, in Special Appeal No. 2161 of 1866.

Shero Koomaree Debee (Appellant), *Petitioner,*

versus

Keshub Chunder Bose and others (Respondents), *Opposite Party.*

Mr. A. T. T. Peterson and *Baboos Juggodanund Mookerjee* and *Romesh Chunder Mitter* for Petitioner.

Baboos Kishen Succa Mookerjee and *Nil Madhub Sein* for Opposite Party.

In a dispute between a mokurrureedar and dur-putneedar, it was held that the khas possession of the dur-putneedar, having been established by a decree under Section 230, Act VIII. of 1859, could not be disturbed except by a regular suit by the mokurrureedar for confirmation of his title as mokurrureedar and for direct possession.

Kemp, J.—This is an application to review the judgment of this Court, dated the 21st February 1867.

The applicant is the mokurrureedar, the opposite party the dur-putneedar.

The mokurrureedar, having in a regular suit succeeded in getting rid of a dur-

mokurruree holding which was prejudicial to his title, took out execution of his decree, and was placed in possession by the Civil Court by the usual process of sticking up a bamboo on the estate. His possession was opposed by the dur-putneedar, who alleged that he was in khas possession, and had been so for many years, and that the mokurruree of the applicant for review had no real existence. The dur-putneedar applied to the Civil Court under the provisions of Section 230, Act VIII. of 1859, and the application was treated as a suit, the dur-putneedar being the plaintiff, and the mokurrureedar the defendant. The Judge held that the dur-putneedar had been in long and undisturbed khas possession of the property in dispute, and that the mokurruree had no real existence. The dur-putneedar's suit was decreed.

In special appeal, present Kemp and L. S. Jackson, JJ., the suit was remanded with directions to the Judge to try whether the interests of the dur-putneedar were identical with those of the dur-mokurrureedar, whose tenure had been extinguished. The Judge has found that the two interests are not identical. He adheres to his former opinion that the mokurruree has no real existence.

The suit came again before this Court in special appeal, present Kemp and Markby, JJ.

It was contended on that occasion, *1st*, that the Judge had no jurisdiction, inasmuch as the valuation of the suit was sufficiently high to admit of an appeal direct to this Court; *2nd*, that the Judge ought, on the evidence, to have found that the mokurruree existed. The Court held that the *first* point could not be raised, as it was then taken for the first time. The learned Counsel, Mr. Paul, who appeared for the special appellant, did not press the point. On the *second* point, the Court were of opinion that the Judge had substantially complied with the remand order. They, however, observed that it was quite unnecessary in a suit under Section 230 to go into the question of title, and expressed no opinion on the question of the existence of the mokurruree. The special appeal was dismissed.

Mr. Peterson, who appears for the applicant for review, contends that, as his client, the mokurrureedar, has obtained a decree extinguishing the dur-mokurruree tenure, he is entitled to khas possession, paying the rent of his mokurruree to the dur-putneedar.

We think that this contention is wrong. The mokurruree of the applicant is not admitted by the dur-putneedar, and it has not been pronounced to be valid in a suit to which the dur-putneedar was a party. The dur-putneedar has been found to be in khas possession—a possession which he has held for a lengthened period. He cannot be ousted; and the mokurrureedar, if he wishes to obtain khas possession, must sue for confirmation of his title as mokurrureedar and for direct possession. The mokurruree and dur-putnee may well co-exist, the former being a tenure of a superior grade; but the possession of the dur-putneedar, which has been established by the decree under Section 230, cannot be disturbed, except by a regular suit in which the existence and validity of the mokurruree and the right of the mokurrureedar to khas possession will be the issues to be tried.

The application is rejected with costs and interest.

The 4th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Joint-decree—Ejectment—Mesne-profits—Custom.

Case No. 232 of 1867.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Purneah, dated the 13th February 1867.

Jugurnath Singh (Judgment-debtor), *Appellant,*

versus

Shaikh Ahmedoollah (Decree-holder), *Respondent.*

Mr. W. A. Montriou and *Baboo Mohesh Chunder Chowdhry* for Appellant.

Mr. C. Gregory for Respondent.

When once a joint-decree has been given, that decree ever after remains a joint-decree, any act or conduct of the decree-holder notwithstanding.

Where one party illegally dispossesses another, and lets his estate in farm, the amount of the rent which the party wrongfully ousted might have ordinarily received had he been in possession, and not the amount of the farm rents received during the wrongful possessor's incumbency, will, unless any special custom be proved, be the measure of mesne-profits to be awarded.

Jackson, J.—On the first point which arises in this case, I am of opinion that the plaintiff, by the petitions presented on the 20th January 1866, absolved Gunesh Lal and the other parties named in respect of the wassilat of the 1-anna 4-gundahs share, and that, in doing so, he unquestionably also absolved the other defendants in respect of that same share. It does not appear to me (nor, I think, to my brother Hobhouse) that he gave up his claim to wassilat from one set of defendants or the other in respect of the 2-annas 8-gundahs share.

Mr. Montriou contended that to interpret the so-called compromise in this sense would be an act of injustice towards Gunesh Lal and those who entered into it, chiefly because Gunesh Lal, in consideration of that compromise, agreed to forego his right of appeal to the Privy Council. Now, considering that Gunesh Lal was at the most only interested to the extent of one-half in the suit, and considering that the other parties, who were equally interested with him, had allowed the decision against them to become final, and that Gunesh Lal had against him the carefully considered opinion and order of the High Court, I should be inclined to think that that right of appeal was not a right of a very valuable description.

Then, upon the other point, I confess that, as far as I have been able to consider it, I have no doubt at all. The question, it appears to me, is not a question of penalty as against the judgment-debtor, but the question is whether the plaintiff is not to be indemnified for the loss which he has sustained by the wrongful act of the defendants. Now, he alleges that wrongful act to be a dispossession whereby he incurred a loss of the whole rent which he would have collected if he had remained in possession. Ordinarily, a man, I think, must be presumed to have been in immediate possession of his own estate. The defendants, however, say that he was not in khas possession; that he had granted a farm, and that they themselves—for they dispossessed him—had no khas possession, but simply took rent from the farmer. It seems to me very clear that, upon that allegation, if neither party offers any proof, the Court would be bound to decide that the plaintiff had been in possession of the estate, and that he had collected his own rents, and that the measure of his loss, therefore, is the amount of rent that would have been collected directly from the ryots.

Upon neither of these grounds, therefore, does it appear to me that there is any reason for reversing the decision of the Principal Sudder Ameen.

Mr. Justice Hobhouse has gone very fully into the case, and I think it needless to record my opinion at greater length, but I concur with him in dismissing the appeal with costs.

Hobhouse, J.—As I understand the material facts of this case, they are these, *viz.*, that the decree-holder, special respondent, got a decree for mesne-profits of 4 annas of a certain property jointly and severally against the judgment-debtor, special appellant, and other judgment-debtors not before this Court; that, in the first instance, joint execution against all the judgment-debtors was taken out; that then the decree-holder received a certain sum of money from certain of the judgment-debtors in satisfaction of what he called a 1-anna 4-pies share of the mesne-profits; and that he then sought to take out execution of the balance-share, *viz.*, 2 annas 8 pies of his decree against the remaining judgment-debtors, including special appellant, but excluding those of the judgment-debtors who had paid the sum above alluded to.

These being the facts of the case, the learned Counsel for special appellant contends that the decree-holder, special respondent, has, by his act releasing certain of the judgment-debtors, either virtually put an end to the decree altogether, or has at least so far altered the terms of the decree that he is now only entitled to execute it against his (the learned Counsel's) client to the extent of that client's share in the property of which wassilat is claimed.

The learned Counsel has not been able to show us any authority in support of his first proposition, and it is in my judgment a proposition which has no foundation either in law or in equity.

In support of his second proposition, the learned Counsel refers us to the following

judgments of Division Benches of this Court, *viz.*:—

Hay's Reports of 1863, page 297.

Weekly Reporter, Volume VI., page 113.

Weekly Reporter, Miscellaneous, Volume II., page 52.

The second case cited is not, it appears to me, in point, for it was a judgment not in execution of a decree already passed such as this is, but in regular appeal in determination of what a decree should be, and in such a judgment the Court was not employed in simply executing but in making a decree.

The opinion of the learned Judges in the last case cited is, in my judgment, rather adverse to than in favor of the learned Counsel's argument; and, though the finding of the Judges is somewhat in conflict with their opinion, yet that, no doubt, is attributable, as the pleader for the special respondent, who was in the case, points out, to special circumstances which are not made to appear in the face of the judgment.

The first case cited is undoubtedly in point, and there the learned Judges would seem to have held that, where a decree-holder of a joint and several decree proceeded against one of several judgment-debtors as for a separate share, and released him from the balance of the decree, the decree became converted into a separate decree, and could only be executed against the rest of the judgment-debtors according to their respective shares of the debt.

I observe, however, that this judgment was avowedly based upon the peculiar circumstances of the case, circumstances that are not before us; that it has not been followed by other Division Benches; and that one of the learned Judges who delivered it has himself, in another case, adopted a different principle; and I think, therefore, that we are not bound to follow the judgment unless it be consonant to equity and practice.

And, on the other hand, I think that Mr. Gregory, pleader for special respondents, has clearly shown us, by the following rulings, *viz.*, Miscellaneous, Weekly Reporter, Volume VI., page 40, Volume V., page 9, and Volume II., page 49, that the well-understood practice of the Courts is that, when once a joint-decree has been given, that decree remains, as a rule, ever after a joint-decree, any act or conduct of the decree-holder notwithstanding.

And this practice seems to me to be quite in accordance with the law and with equity.

The law under which we are hearing this special appeal is Section 11, Act XXIII. of 1861, and that law enables us to determine any questions arising between the parties to the suit in which the decree was passed, and relating to the execution thereof.

Now, this must mean any questions between the contending parties, the plaintiff on the one hand, and the defendant on the other; and, to apply the law to this case, all that we have to see is whether or not the special appellant is jointly or only separately liable for the decree.

Now, the decree declares distinctly a joint liability; and if, in execution of that decree, we were to rule that the liability was separate, we should not only be going beyond the terms of the decree, but beyond the plain letter of the law, for we should have to determine what the decree has not determined, *viz.*, what the separate liability was; and so we should be determining a question not between contending parties, but between non-contending parties in the suit—a question, not even the subject of the suit, much less determined by the decree—a question in this case which is evidently the subject-matter for a separate suit for contribution between the special appellant and his co-judgment-debtors.

And the equity of the case is equally clear to me. Supposing *A* to hold a decree against *B* and *C* jointly for Rs. 900, and supposing *A* to take 300 from *B* as his share of the debt, to release *B* from further liability, and to proceed against *C* for the balance of Rupees 600, *C* was originally liable for the whole 900 rupees, and it is plain to demonstration that *C* is not prejudiced by having his liability reduced to Rupees 600. Any agreement between *A* and *B* is not binding upon him. He is made liable for a less sum; and if he has still paid more than his share of the joint debt, he has still his action against *B*.

On these grounds, I would affirm the judgment of the Court below, holding this decree to be still a joint-decree against the special appellant.

Mr. Montriou then objects that the wassilat has not been properly arrived at by the Court below. He states that, during the time of special respondent's dispossession, his client, the special appellant, had let the estate in farm; and he contends, therefore,

that the farm-rents received during his client's incumbency are the proper measure of the wassilat to be awarded, and not the rents paid by the ryots, as actually awarded by the Court below.

I think the proper definition of wassilat, as repeatedly ruled by this Court, is not only any profits that the wrongful possessor did receive, but also any that the party wrongfully ousted might have ordinarily received had he been in possession of the property on which wassilat is awarded.

Now, ordinarily, it must be conceded that a landlord in this country receives his rents direct from the ryots; and it must, therefore, be presumed that the decree-holder in this case would, had he been in possession, so have received his rents.

If, in the particular part of the country from which this case comes, it is the custom for landlords to let their estates in farm, then that custom should, as a special custom, have been proved.

It has not been so proved, nor even attempted to be proved; and I think it must, therefore, be presumed that, had the decree-holder been in possession, he would have taken the rents direct from the ryots, and I hold, therefore, that the amount of those rents was rightly declared by the Court below to be the measure of the wassilat to be awarded.

I would observe, too, that the learned Counsel would scarcely be right in contending, under any circumstances, that the farm-rents received would be the sole measure of the wassilat to be awarded, for I presume the usual consideration and perhaps salamee were paid by the farmer.

I would affirm the judgment of the Court below, and dismiss this special appeal with costs.

The 5th July 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Limitation—Lease—Reversioner.

Case No. 467 of 1866.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 25th November 1865, affirming a decision passed by the Principal Sudder Ameen of Magoorah, dated the 31st March 1863.

Huronath Rai and others (some of the Defendants), *Appellants,*

versus

Rajah Indoo Bhoosun Deb Rai (Plaintiff) and another (Defendant), *Respondents.*

Baboos Bungsee Dhur Sein and *Sreenath Dass* for Appellants.

Mr. R. V. Doyne and *Baboo Issur Chunder Chuckerbutty* for Respondents.

A reversioner's cause of action against his ancestor's lessee does not accrue until the expiration of the lease, unless the reversioner is evicted or deprived of his rent, or rent is received adversely to him by a stranger from the lessee.

Norman, J.—The plaintiff, in the month of July 1862, sued for the possession of lands in Khedaparrah, Tailkoopee, and Baropakea as appertaining to a 6-annas 8-gundahs share of Pergunnah Mahomed Shahye, with mesne-profits from the 1st of Bysack 1261, *i. e.*, April 1854, the date of the expiration of the lease of Mr. Kenny, the late ijaradar.

In a former judgment, this Court dismissed the suit as barred by limitation, on the ground that the plaintiff's cause of action arose from the date of the eviction of Mr. Kenny in 1848.

Mr. Paul, with whom was Baboo Issur Chunder Chuckerbutty, applied for a review. No cause being shown to the contrary, the review was granted, and the case restored to the file.

We have now re-heard the case on this point, and are of opinion that the former decision was erroneous, and must be reversed.

The plaintiff does not claim under Mr. Kenny, nor can it be said that he took the estate which Mr. Kenny possessed. An heir takes the estate of his ancestor, and must take it with all its incidents and infirmities. Possession adverse to the ancestor is adverse to his heir, and, if it is sufficient to bar the right of the ancestor, is a bar to the heir. (*a*.) But the reversioner expectant on a lease comes in by title paramount. His estate is a new estate wholly distinct from that of the lessee. Ordinarily speaking, such a person cannot be bound by the acts or defaults of the lessee. (*b*.) As a general rule, adverse possession, so as to bar a reversioner, does not commence until the expiration of the term. It would be otherwise if the reversioner during the time were deprived of his rent, or if rent was received adversely to him by a stranger—as, for instance, if a stranger obtained a decree against him on an intervention under Section 77 of Act X. of 1859.

(*a*.) As to a Hindoo widow, *see* Doe *dem.* Goluck Monee Debee *versus* Degambur Dey, 2 Boulnois 198. Katama Natchiar *versus* the Raja of Shibagunga, 9 Moore's Indian Appeals 604.

(*b*.) Compare Derritt *versus* North, 11 East 372; Barker *versus* Richardson, 4 Barnewall and Anderson 579.

Here it is not shown that the plaintiff suffered any actual wrong or had any right of action during the continuance of Mr. Kenny's lease. It is not shown that he was evicted or deprived of his rent, or that rent was received from Mr. Kenny adversely to him, while Mr. Kenny's lease continued. He did not join with Mr. Kenny in his suit against the now defendant, as he clearly might have done to protect his own interest as reversioner. He was not allowed by the Court to carry on the appeal in Mr. Kenny's suit after Mr. Kenny's interest had ceased. We need express no opinion as to whether or not it was competent to the Court, under Act VIII., to have permitted him to do so. Be that as it may, Mr. Kenny had the right of possession during the continuance of his lease. The plaintiff's right to actual possession, and, consequently, his right to maintain the *present suit*, accrued for the first time when Mr. Kenny's lease came to an end in 1854.

The present suit, having been brought within eight years from that date, was clearly in time. No other point has been raised before us, nor was any other taken by the appellant at the former hearing.

We, therefore, reverse the former decision, and dismiss the appeal with costs and interest.

Seton-Karr, J.—I concur in thinking that the appeal should be dismissed, and that the plaintiff should be entitled to retain his decree. I was not one of the Divisional Bench which ruled that the suit should have been dismissed as barred by limitation; and I quite concur in the conclusion that the suit is not barred, for the reason that there was no possession adverse to the plaintiff, so long as Mr. Kenny's lease lasted.

The 5th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Section 11, Act XXIII. of 1861—Appeal.

Case No. 145 of 1867.

Miscellaneous Appeal from an order passed by the Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of Tirhoot, dated the 28th December 1866.

Greejanund Oopadhya (Decree holder), *Appellant,*

versus

Ruttee Ramun Oopadhya and another (Judgment-debtors), *Respondents.*

Baboo Kalee Kishen Sein for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

Section 11, Act XXIII. of 1861, does not allow an appeal in matters already specifically provided for in the different Sections of the Procedure Code (*e.g.*, Sections 243 and 364).

Jackson, J.—It appears to me quite clear that there is no appeal in this case.

It would be manifestly inconvenient that there should be an appeal in such cases, and the Section itself provides no appeal. Section

364 of Act VIII. of 1859 declares that "no "appeal shall lie from any order passed after "decree, and relating to the executiont here- "of, except as is hereinbefore expressly "provided." But Baboo Kalee Kishen Sein, notwithstanding, thinks that Section 11, Act XXIII. of 1861, allows an appeal. I am of opinion that it does not allow any such appeal. By that Section it is enacted that, in certain matters not already provided for under the provisions of the Procedure Code, the Court is to decide questions arising after decree relating to execution thereof between the parties to the suit, and upon such decision it is declared that there shall be an appeal. But that Section neither supersedes, nor in any respect touches upon, matters already specifically provided for in the different Sections of the Procedure Code. They continue to be liable to be dealt with and considered under the several Sections which refer to them. This matter is one provided for by Section 243 and Section 364, and therefore I am of opinion that no appeal lies.

The appeal will be dismissed with costs.

Hobhouse, J.—I concur.

The 5th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Limitation—Section 11, Act XIV. of 1859—Execution.

Case No. 224 of 1867.

Miscellaneous Appeal from an order passed by the Additional Judge of Hooghly, dated the 31st January 1867, reversing an order passed by the Sudder Ameen of that District, dated the 6th October 1866.

Tarucknath Mookerjee (Decree-holder), *Appellant,*

versus

Poorno Chunder Chatterjee and others (Judgment-debtors), *Respondents.*

Baboo Kalee Kishen Sein for Appellant.

Baboo Luckhee Churn Bose for Respondents.

Section 11, Act XIV. of 1859, does not apply to execution of decrees.

Jackson, J.—I HAVE no doubt that the plea of minority will not avail the decree-holder. In the particular case before us, it would be a very inequitable and unreasonable plea, because the person seeking to avail herself of it is the very person on whom it devolved during the minority of the deceased decree-holder to have carried it out, she being guardian during that period.

But upon the general principle I have no doubt. It has been held in the case at the 10th page of 5 Weekly Reporter, and in a subsequent case at page 37 of 6 Weekly Reporter, that Section 11 of Act XIV. of 1859 does not apply to execution of decrees—a consideration which appears to me to be perfectly plain, both under the terms of Section 11 and Sections 20 and 21 of that Act. There is an earlier decision which appears to be to a contrary effect in the IVth Volume of the Weekly Reporter. I do not find that that decision has since been followed, and therefore there is no existing conflict of opinion upon the point; and I do not think it is necessary to refer the point to a Full Bench.

The judgment of the Court below is affirmed with costs.

Hobhouse, J.—I concur with my learned colleague. I think the terms of Section 21 and Section 11 of Act XIV. of 1859 are quite clear. Section 20 says that no process shall issue unless a proceeding shall have been taken. Section 11 is exceptional only in regard to actions brought, and not in regard to anything done in execution of a decree after the termination of the action.

The 10th May 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Section 4, Act VI. of 1862 B. C.—Transfer of Tenures—Registration—Section 78, Act X. of 1859—Cancelment of Lease.

Case No. 416 of 1866 under Act X. of 1859.

Regular Appeal from a decision, passed by the Deputy Collector of Patna, dated the 13th September 1866.

Dulli Chand and others (Plaintiffs), *Appellants,*

versus

Meher Chand Sahoo and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Dwarkanath Mitter* for Appellants.

Mr. C. Gregory and *Baboo Juggodanund Mookerjee* for Respondents.

Suit laid at Rupees 11,356-5-3.

Section 4, Act VI. of 1862 B. C., applies only to under-tenants and ryots of whose possession there can be no doubt. The transferee of a tenure not in possession, instead of depositing the rents in Court under this Section, should take steps, under Section 27, Act X. of 1859, to register his transfer in the sheristah of the zemindar, and to apply to the Collector in case of the refusal of the zemindar to do so.

A landlord, who has waived his right to sue for the cancelment of a lease on the ryot's failure to pay six successive instalments, is not barred by limitation from suing for cancelment on further breaches of the covenant.

A tenant, who has not wilfully broken any of the essential stipulations of his covenant, or has not injured his lessor's property, may be entitled to the benefit of Section 78, Act X. of 1859, and allowed to bar forfeiture of his tenure by paying in the amount of arrears decreed against him within 15 days of the date of the decree.

Seton-Karr, J.—The plaintiffs in this case sued to recover the rents of three mouzahs let out to the defendants on a mokurrureee lease for the years 1272 and 1273 Fuslee, and also to cancel the mokurrureee lease itself, according to a stipulation therein contained to the effect that the plaintiffs might cancel the lease, and re-enter if the defendants failed to pay six instalments in succession.

The defendants pleaded payment of the rents sued for, and produced receipts for the same.

Mussamut Bodhoo appeared as an intervenor under Section 77 of Act X. of 1859, and stated that she had acquired a right to the property under a mortgage which had been foreclosed, and for which she had obtained a decree.

The Deputy Collector took the evidence, and considered the case with reference to three points: *1st*, the payment of the rents, as urged by the defendants; *2ndly*, as to the rights and position of the intervenor; and, *3rdly*, as to the power of the plaintiffs to cancel the lease and re-enter. The Deputy Collector considered the receipts to be inadmissible and spurious, and the rents not to have been paid, and the intervenor never to have been recognized by the plaintiffs; and then, with regard to the third point, the Deputy Collector held that the cause of action for cancelment and re-entry arose as far back as Chait 1272, when the defendants had defaulted for 6 successive kists, and that, consequently, the plaintiffs were barred, on this part of the action, for not having sued within one year from the above date, although they could succeed as far as the claim for rents was concerned.

On this finding, three appeals have been brought before us. The plaintiffs appeal against the finding on limitation; the defendants against the finding as to non-payments of the rents; and the intervenor as to the refusal to recognize her position.

We may at once dispose of the claim of the intervenor. It seems that this appellant deposited in Court the money claimed as rents, which the plaintiffs would not receive from her, under Act VI. of 1862, Bengal Council, Section 4. Her case was that she had obtained a decree against the defendants on a mortgage in Assin 1273, or the commencement of the second year for which the claim was brought. The appellant also shows that, on the 11th of July 1866, she applied to have her witnesses summoned, but the only order passed on her petition was that it "should be filed with the record." Such an order was one object-

less and unmeaning, and the High Court has repeatedly condemned the same. But the intervenor has not pursued the proper course for one situated as she represents herself to be. Section 4 of Act VI. of 1862 applies to under-tenants and ryots of whose possession there can be no doubt, and the appellant, instead of depositing the rents under this Section, should have taken steps under Section 27 of Act X. of 1859, to register her transfer "in the serishtah of the zemindar," and the appellant is unable to show, and does not even pretend, that she resorted to this course, and applied to the Collector in consequence of the refusal of the zemindar to register her transfer. The Deputy Collector further finds on the evidence of the plaintiffs, which the appellant had an opportunity of hearing and cross-examining, that the defendants are still in possession. He doubts the *bona fides* of the alleged mortgage and of the foreclosure-proceedings, and finding as a fact, on evidence in the cause, that the defendants are not only the tenants whose names stand in the zemindaree serishtah, but that they are actually still in possession, he disallows the intervenor's request to be treated as if she was in possession and made a defendant. In this, we think, he was quite right. We are quite satisfied that no injustice has been done to the intervenor, and that, if she has any claim as of right, she may be left, if so advised, to prosecute the same as plaintiff in a civil suit.

We now come to the plea of the defendants that rents have been paid and receipts granted. We have heard the evidence as to the payment adduced by the defendant, which is that of the witnesses Luleet Singh, Radha Singh, Sowjun Singh, Ruttoo Singh, and Tribhwari, and a good deal of that adduced by the plaintiff to rebut the same. But we see nothing to lead us to suppose that the estimate of the Deputy Collector as to its value was erroneous. One of the receipts is said to have been granted by Giridhur, who is a minor; others are from Dullee Chand, who, at the time the receipts were granted, is shown to have been incapable of attending to business; and another receipt is said to have been granted by Tekaram who is dead. Not to say that the evidence for payment is unsatisfactory, we consider it completely rebutted by the denial of Giridhur and by the evidence of the plaintiff's witness, Indra Koll. Nor is its value weakened by any documents, being decrees or vakalutnamahs, in which Tekaram is stated to have acted alone.

The plaintiff has produced two witnesses to show that the defendants are still in possession; and we think that, against this, we cannot assume that possession had passed to the intervenors under the operation of the decree on the mortgage gained by them.

On the whole, we are satisfied that the decision of the Deputy Collector making the defendants liable for the rents claimed by the plaintiff is one substantially just, and that it ought not to be altered or disturbed in this respect.

There remains, then, the appeal of the plaintiffs in regard to limitation, and here, we think the Deputy Collector wrong in holding that the plaintiff was bound to sue within one year after the defendants had failed to pay six successive instalments; and that, not having so sued, they cannot enforce the penalty of cancelment provided for such default. There was no reason why the plaintiffs might not waive their right of forfeiture after a default of six instalments; such waivor would not prevent them from insisting on a fresh right accruing when the defendants made fresh defaults, as the case shows them to have done, extending to more than six instalments. The right to cancel the tenure would revive or might be exercised whenever the defendants should allow six consecutive instalments to be in arrears. We have referred to the English Law and to the principles which it has sanctioned, and adopted in similar matters; and we find from Bacon's Abridgment, Title Leases, T. Volume IV., page 888, Doe *versus* Bliss, 4 Taunt. 775, that a lessor, who has a right of re-entry on a breach of covenant not to under-let, does not, by waiving his entry on *one* under-letting, waive his right to re-enter on a subsequent under-letting, nor, under a covenant for repairs, does he, by a waivor on one breach, bar himself of his right of re-entry on a subsequent breach.

There is no reason why we should not apply the above principle, which seems founded on equity and justice, and which has the sanction of the highest authorities in England, to the case before us. And, according to it, the plaintiffs cannot be permitted to suffer, because they did not exercise their unquestioned rights at the earliest time warranted by the conduct of the defendant. They are, therefore, in time in suing as they have done for the cancelment of the tenure on further breaches of the covenant.

So far, then, we should be inclined to give judgment at once on this point in favor of the plaintiff. But, at this point, Mr. Gregory comes in and claims the benefit of Section 78 of Act X. of 1859, the latter part of which specifies that, in "all cases of suits for the ejectment of a "ryot, or the cancelment of a lease, the "decree shall specify the amount of the "arrear; and if such amount, together with "interest and costs of suit, be paid into "Court within 15 days from the date of "the decree, execution shall be stayed." Mr. Allan, on the other hand, for the plaintiffs, urges that he has brought his suit under Clause 5, Section 23 of the Act, *viz.*, to cancel a lease on account of non-payment of arrears of rent, or on account of a breach of the conditions of a contract, and that he is entitled to insist on the forfeiture.

But it is remarkable that the words in this latter Clause "on account of a breach of the conditions of any contract" do not occur in Section 78 at all, and we think that we are bound to treat Section 78 as if it applied, and was intended to apply, to cases such as the one now before us. We think we should read the latter part of the Section, on which Mr. Gregory relies, as if the words ran "in all such cases," *viz.*, the cases contemplated by the earlier part of the Section which refers to persons desirous of ejecting a ryot, or of *cancelling a lease on account* of non-payment of arrears of rent.

We are by no means inclined to lay down a general rule or to say that, in all cases of suits of cancelment, the latter part of Section 78 is to operate invariably in the defendant's favor as a bar to forfeiture, provided he pays in the amount of the arrears within 15 days of the date of the decree. It is quite possible to conceive a number of cases in which the application of such a doctrine would be productive of the greatest injustice. In cases where a tenant had covenanted to plant trees, or to keep up plantations, or embankments, or to drain, or to dig reservoirs, it would be unreasonable and unjust to permit a tenant who had wilfully broken such essential stipulations, and had injured the lessor's property, to bar forfeiture by merely paying in the amount of the arrears decreed against him. But the present case involves and supposes none of these contingencies. And we are confirmed in our opinion by reference to two cases decided by Divisional Benches of our Court, one reported at Volume VI., Weekly Reporter, pages 64-65, Act X. Rulings, and the other lately decided by our brothers L. S. Jackson and Markby, JJ., on the 11th of April 1867, Special Appeal No. 139 of 1867.* We do not go quite to the length of the opinion recorded in the first case, but the second case seems exactly in point. The plaintiff there sued to cancel a lease on failure of a special stipulation, and the ryot, out of the tenderness which the law has showed for his interests, was allowed, under the Section quoted, to come in within 15 days, and pay the sum decreed, and so stay execution. It would seem that the same doctrine has been recognized in Courts of Equity in England. See Story's Equity Jurisprudence, Chapter 34, Section 1315, where it is said that a person who has broken a covenant may be relieved of the penalty on payment of compensation, and in spite of his own default.

Looking, therefore, to the cases already decided, to the language of Section 78 of Act X., and to the principles of Equity acted on and applied by the highest Courts elsewhere, we think we ought to allow the defendants the benefit of the Section relied on now.

In this view the appeal of the plaintiffs in No. 416 will be decreed with costs, subject to the above proviso in the defendant's favor.

The separate appeals of the defendants and of the intervenor in Nos. 422 and 429 will be dismissed with costs.

*See Vol. 7, p. 374.

The 8th July 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp and F. A. Glover, *Judges*.

Appeal (Rejection of—at the hearing after admission).

Case No. 774 of 1864.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 17th of November 1863, rejecting an appeal from a decision of the Deputy Collector of that District, dated the 20th June 1863.

Bharutt Chunder Roy and others (Defendants), *Appellants*,

versus

Issur Chunder Sircar and others (Plaintiffs), *Respondents*.

Baboo Mohinee Mohun Roy for Appellants.

Mr. A. F. Lingham for Respondents.

HELD by the majority of the Court (Glover, J., dissenting) that an Appellate Court, after admitting and registering an appeal, and serving notice on the opposite party, has no power, at the hearing, to reject the appeal, upon the ground that it was not preferred within the prescribed period.

Kemp, J.—THIS was a suit for rent; the amount claimed was Rupees 2,931-12. The Deputy Collector of the Sunderbuns passed a decree for Rupees 1,473-1-4, interest 81-11-1, and damages at 25 per cent., 572-14-8; total Rupees 2,137-11-4.

This decision was passed on the 20th June 1864. The special appellant, defendant, appealed to the Judge of the 24-Pergunnahs, on the 17th November, on a stamp of 100 rupees. There is an endorsement in the Vernacular on the back of the petition of appeal that it had been filed in due time, and on a sufficient stamp. The appeal was registered, *vide* Section 343, and notice thereof given to the Lower Court. The parties were summoned, and a day fixed for a hearing. Both parties put in vakalutnamahs; and the appeal, which, I may observe, involved some nice points of law and fact, was ready for trial. On the case coming up for hearing, the Judge dismisses the appeal as beyond time. I am of opinion that the Judge was wrong in doing so; and, moreover, that the appeal, according to our rules of practice, is not beyond time. The endorsement of the Amlah of the Deputy Collector, which is signed, shows that the copy of the decree of the Court of first instance was not delivered to the attorney of the appellant until the 14th of October. The 14th of November was a close holiday, and the Court did not open until the 17th November, when the appeal was filed.

Note.—This endorsement is not signed; but it appears to me that it is sufficient under the provisions of Section 341 of the Code of Procedure.

Note.—Several proceedings signed by the Judge, calling for the records of other cases, are with the file.

The Judge, if he was of opinion that the Amlah of his Court or of the Court below had been guilty of any fraud, should have made an enquiry into the matter, and not have summarily deprived the appellant of his remedy.

I observe that the appellant lodged his stamp for copy of the decree immediately, and that he did bring to the attention of the Court of first instance the delay in obtaining a copy of the decree. It may be that the opposite party, by feeing the Amlah, was able to get a copy of the decree at an earlier date; but that is no reason why the appellant should be deprived of his right of appeal. I would remand the case for trial.

Glover, J.—The only point for consideration in this special appeal is whether the Judge, after registering the appeal and serving notice on the opposite party, had power, at the hearing, to throw the case out, on the ground that the appeal had been preferred beyond time.

That his appeal was long beyond time can scarcely, I think, be questioned. The original case was disposed of on the 20th of June 1863. The appellant took a copy of the decision on the 14th of October following, and that it was his own laches that prevented his getting a copy sooner is proved by the fact that the respondent obtained one on the 17th of the previous September, or nearly a month before. The appeal was lodged in the Judge's Court on the 17th of November; but, as this was the first open Court-day after the 13th, the appellant was in time if he be allowed to count from the 14th of October.

It is argued for the special appellant that the Judge, by admitting the appeal to registry, and by serving notices on the other side, practically exercised his discretionary powers, and allowed his time to be extended in accordance with Section 333 of the Civil Code; that the fact of his taking action in the case showed that he knew the circumstances, and that he was not entitled afterwards, when the case came on for hearing to nullify orders previously given. I am of opinion that he was justified. I admit fully that his responsibility, as regards the rubookarees, sending for the nuthee of the case, and ordering notices to be issued, cannot be got rid of, on the plea that these orders were given as a matter of course; and that he had no personal knowledge of the matter which was, as usual, in charge of an officer of his Court. But, in this case, there was no *primâ-facie* reason for supposing the appeal to be beyond time. The copy of the first Court's order was taken on the 14th of October, and the appeal was lodged within time from that date. There was nothing on the record, as it then stood, to show that the intending appellant had neglected to take his copy for nearly four months after the original decision was passed; and, had that even been deducible from the records, there was nothing to show that the delay had not been caused by the negligence of the Moonsiff's Amlah. The Act says that the limit of appeal shall be 30 days "exclusive of such time as may be requisite for obtaining a copy of the decree appealed against;" and, until the case *came up* for hearing, the Judge could not tell whether this requisite time had been exceeded or not. That the petition was filed within 30 days (excluding the days in which the Court was closed, *viz.*, the 14th, 15th, and 16th of the month) of obtaining the copy is undoubted; and, until cause was shown to the contrary, the petitioner could not be deprived of his right. But, even admitting for the sake of argument that the petition was on the face of it out of time, that more than 30 days had elapsed, that is from the date of obtaining the copy, I do not think that the Judge should be prevented from applying the law when the case came before him. Such prevention would be, in my judgment, to encourage fraud, and open a door to irregularities of all descriptions. *Practically, it is impossible for a Judge himself to look* into all the various petitions of appeal presented to him. He must trust the work to one of his subordinates, and, if that subordinate chooses to act dishonestly, and receive petitions of appeal long after the time has expired, and to have the usual documents issued in the Judge's name, it cannot be right that the Judge is absolutely bound by the fraud of his officer, or prevented from applying a remedy to a palpable wrong.

I think that the Judge was justified in what he did, and would dismiss this appeal with costs.

Peacock, C. J.—The question in this case upon which the two learned Judges have differed is, whether the Judge of the 24-Pergunnahs was right in rejecting the regular appeal after it had been admitted. It was rejected with costs upon the hearing, upon the ground that it was not preferred within the prescribed period.

Mr. Justice Glover is for affirming the decision of the Judge of the 24-Pergunnahs, and Mr. Justice Kemp is for remanding the case for trial. I am of opinion that Mr. Justice Kemp's view is correct.

It appears that the appellant, who had judgment pronounced against him on the 20th June 1863, filed a stamp on the 24th June 1863. What that stamp was filed for does not appear. The Judge treats it as having been filed for a copy of the decree. It appears that he did not get his copy of the decree until the 14th October 1863. Whether there was any delay on the part of the officer of the Court in furnishing the copy of the decree we cannot tell, because the officers have not complied with the orders, either of this Court or of the Board of Revenue, by endorsing the date on which it was ready for delivery. But the Judge presumes that the appellant might have obtained his copy as early as the 17th September, because the respondent obtained his copy on that day. I do not think that any reasonable presumption of that kind can be drawn, especially after the appeal had been registered; but, assuming that the copy decree was ready on the 17th September, was the appellant to go every day from the date on which he filed his stamp until the 17th September, to ascertain if the copy was ready upon pain of having every day counted against him from the day on which it was ready for delivery with reference to the time for appealing?

But, even if the appeal was not presented within 30 days exclusive of the time requisite for obtaining a copy of the decree,

the question is whether the Judge was right in rejecting the appeal with costs when it came on in due course to be heard. Mr. Justice Glover says: "I do not think that "the Judge should be prevented from apply- "ing the law when the case came on before "him. Such prevention would be, in my "judgment, to encourage fraud and open "a door to irregularities of all descriptions. "Practically, it is impossible for a Judge "himself to look into all the various peti- "tions of appeal presented to him." But, although it may be practically impossible for the Judge to do so, the appellant ought not to be injured by his neglect.

Let us see what ought to have been done. Section 333 says:—

"Appeals shall be made in the form of a "memorandum which shall be presented in "the Appellate Court within the period "hereinafter specified, unless the appel- "lant shall show sufficient cause to the "satisfaction of the Appellate Court for "not having presented it within such limit- "ed period, that is to say, within 30 days "if the appeal be to a District Court. The "days shall be reckoned from and exclusive "of the day on which judgment was pro- "nounced, and also exclusive of such time "as may be requisite for obtaining a copy "of the decree appealed against."

Section 335 says:—

"The memorandum of appeal shall be "in the following form or to the following "effect, and shall be accompanied by a copy "of the decree appealed against."

And Section 336, which has not been referred to in the course of the argument, points out what the Judge ought to do. It says:—

"If the memorandum be not drawn up "in the manner hereinbefore prescribed, "the Court may reject it or may return it "to the party for the purpose of being cor- "rected. If the memorandum be not pre- "sented within the prescribed period, *and* "*no sufficient cause be shown for the delay,* "*the appeal shall be rejected.*"

Section 341 says: "When a memorandum "of appeal is presented in the prescribed "form and within the time allowed, the "Appellate Court or the proper officer of "that Court shall endorse thereon the date "of presentment, and shall register the "appeal in a book to be kept for that "purpose, and called the Register of Ap- "peals."

The proper time for rejecting an appeal seems to be before it is registered. If the Judge entrusts the duty of registering the appeal to an officer of the Court instead of doing so himself (and I say this without imputing any blame to the Judge, for there are many duties which the Judge cannot personally perform), and the memorandum of appeal is not drawn up in form, or is presented after the proper time, the officer ought to refer the matter to the Judge.

Section 343 says: "When the memo- "randum of appeal has been registered, the "Appellate Court shall send intimation "thereof to the Lower Court;" and Section "344: "A day shall be fixed by the "Appellate Court for the hearing of the "appeal. The day shall be so fixed, with "reference to the place of residence of the "respondent and the time necessary for the "service of the notice of appeal, as to "allow the respondent a sufficient time to "enable him to appear in person or by a "pleader on such day."

Section 345 provides for the service of notice on the respondent. Before that notice can be served, the appellant must deposit the tullubana. If the appeal can be subsequently rejected for want of form, or because it was not presented in proper time, those costs will have been incurred unnecessarily.

Section 346 says:—

"If on the day fixed for hearing the "appeal, or any other day subsequent thereto "to which the hearing of the appeal may "be adjourned, the appellant shall not appear "in person or by a pleader, the appeal shall "be dismissed for default. If the appellant "shall appear in person or by a pleader, and "the respondent shall not appear in person "or by a pleader, the appeal shall be heard "*ex parte* in his absence."

Then Section 349 enacts:—

"The Appellate Court, after hearing the "appeal, shall proceed to give its judgment "in the manner hereinbefore prescribed for "giving judgment in Courts of original "jurisdiction."

Then Section 350 says:—

"The judgment may be for confirming, or "reversing, or modifying the decree of the

"Lower Court. But no decree shall be "reversed or modified, nor shall any case be "remanded to the Lower Court, on account "of any error, defect, or irregularity, either "in the decision or in any interlocutory "order passed in the suit not affecting the "merits of the case or the jurisdiction of the "Court."

There is no enactment that the appeal may be rejected at the hearing upon the ground that it was not presented within the prescribed time. The only judgment that the Judge can pass when the case comes on for hearing is for confirming, reversing, or modifying the decree, not for rejecting the appeal.

It would be a serious injustice to the appellant if the Judge, by admitting and registering the appeal when presented after the prescribed time, should put the appellant to the expense of serving notice on the respondent, and ultimately reject the appeal upon the ground of its having been presented too late, and compel the appellant to pay the costs of the respondent's appearing by pleader, which, if the appeal had been rejected at the first, would not have been incurred at all. It appears to me that the Legislature intended that the appeal, if presented too late, should be rejected before, but not after, the admission and registration of it.

It is contended that the time of hearing the appeal is the first opportunity the respondent has of pointing out that the appeal is too late. It may be so. But, looking at Section 350, I do not think that the Legislature intended that an appeal should be rejected at the hearing upon the ground that it was not presented in proper time. Great injustice might be done if at that time an appeal could be rejected upon the ground that it was presented too late, unless the appellant were allowed to prove at that stage that the delay was caused by his inability to obtain a copy of the decree, or that there was other sufficient cause for not presenting the appeal within the prescribed time.

In this case, however, the appeal was registered, and it ought to have been presumed that it was presented in proper time, having regard to all the provisions of Section 333, until the contrary was proved, and such presumption surely could not be rebutted by presuming that the appellant's copy of the decree was ready for delivery to him on the 17th September, because the respondent obtained his copy on that day. It does not even appear that the appellant was allowed the opportunity of proving that the decree was not ready before the 14th October, the day on which he obtained it.

Great inconvenience and expense would be caused by holding that, whenever an appeal is presented after the expiration of 30 days, the appellant must come prepared to prove, if necessary, that there was sufficient cause for the delay, even though the appeal ought to have been rejected at an earlier stage, if the Judge had not been satisfied upon that point before the appeal was registered.

I, therefore, concur with Mr. Justice Kemp in thinking that the case must be remanded to the Judge of the 24-Pergunnahs, to hear and determine the regular appeal upon the merits. The costs of this appeal to abide the final result of the case.

The 8th July 1867.*

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, W. S. Seton-Karr, L. S. Jackson, and J. B. Phear, *Judges*.

Appeal to Privy Council—Execution of Decree — Section 4, Regulation XVI., 1797.

Privy Council Appeal.

Joynarain Pattur, *Appellant to England*,

versus

Russeek Mohun Bannerjee, *Respondent to England*.

Mr. R. T. Allan and *Baboos Kishen Kishore Ghose* and *Oomesh Chunder Banerjee* for Appellant.

Messrs. R. V. Doyne, W. E. Peacock, and *C. Gregory*, and *Baboo Mohinee Mohun Roy* for Respondent.

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* This judgment was delivered on the 17th April 1866.

After execution has once gone out under a decree of the High Court subsequently appealed to Her Majesty in Council, it is beyond the power of the High Court, and not within the scope of Section 4, Regulation XXI., 1797, to set aside the execution.

This case originated with a Petition from the Appellant, which was as follows :—

"THAT your petitioner preferred an appeal. No. 333 of 1860, against the respondents Russeek Mohun Banerjee and others resident in Buredhally, laying the same at Rs. 10,000, which was dismissed on the 13th August 1864. From that order your petitioner filed an appeal to Her Gracious Majesty in Privy Council, and the same was admitted on the 5th September 1865 by Mr. Justice Loch, and an order for translation of the record was made. But, before the institution of the appeal by your petitioner, the respondents took possession of the lands in dispute, and realized the entire costs in both the Courts; and, on their cutting open the bund of the disputed Burtollah Khal, the disputed and undisputed lands have been covered with water, and your petitioner has sustained a heavy loss. Under these circumstances, the respondents cannot be allowed to hold possession without furnishing a security. Therefore, your petitioner begs to present this application, and prays that the respondents be called upon to furnish security as usual."

The opposite party was called upon, and appeared to show cause why he should not give security, and the case was then referred to a Full Bench by Louis Jackson, J., under the following order :—

Referring Order.—Baboo Mohinee Mohun Roy appears to show cause, and relies on a ruling by Kemp and Glover, JJ.,* to the effect that, after execution has gone under a decree of the High Court, the party in possession cannot be called upon to give security under Regulation XIV. of 1797, and he refers to another case, unreported, in which Shumbhoonath Pundit, J., ruled the same thing.

* 5 Weekly Reporter, Miscellaneous Rulings, page 13. Hurro Soonduree Debea versus Stevenson.

It appears to me that the provisions of the Regulation cited, enabling the Sudder Court either to take security from the party executing the decree or to stay execution on security being given by the appellant to England, apply to cases in which the party holding the decree of the High Court has got the start of the appellant to England by obtaining possession in execution, as well as to cases where the appeal has been first lodged.

But, as a Bench of this Court has ruled the other way, it is necessary to refer the matter to a Full Bench.

The judgments of the Full Bench were delivered as follows :—

Peacock, C. J.—We should have been very glad, if we could, to assist the appellant in this case. But his application comes too late.

Section 4, Regulation XVI. of 1797, enacts: "In cases of appeal to His Majesty in "Council, the Court of Sudder Dewanny "Adawlut may either order the judgment "passed by them to be carried into execution, "taking sufficient security from the party in "whose favor the same may be passed for "the due performance of such order or "decree as His Majesty, his heirs, or successors shall think fit to make on the appeal, "or suspend the execution of their judgment "during the appeal, taking the like security "in the latter case from the party left in "possession of the property adjudged against "him ; but in all cases security is to be given "by appellants, to the satisfaction of the Sudder Dewanny Adawlut, for the payment of "all such costs as the said Court may think "likely to be incurred by the appeal, as well "as for the performance of such order or "judgment as His Majesty, his heirs, or successors may think fit to give thereupon ; "and, after receiving such security, the "Court of Sudder Dewanny Adawlut are to "declare the appeal admitted, and to give "notice thereof to the appellant and respondent respectively, that they may take measures, the one to prosecute, the other to "defend the cause in appeal before His Majesty in Privy Council, according to the established mode of proceeding in similar "cases."

Now, in this case, before the appeal was preferred, and before any application was made to this Court to order execution to be suspended upon the appellant's giving security, or requiring the plaintiff to give security for the execution, execution was issued, and the land was given over to the plaintiff in execution of his decree, so that nothing

remained to be done under the execution. If we were to make an order in this case, we could not order the execution to be suspended, because it has been executed. All that we could do would be to order the execution to be set aside, or to award restitution. That appears to us to be doing more than we are authorized to do. Therefore, it is too late to grant the application now made.

Suppose the appeal in this case had not been from a decree relating to land, but had been against a decree awarding a lac of rupees to be paid to the plaintiff, and that, under an execution, property had been seized and sold, and the amount levied and paid over to the plaintiff in the suit, and the plaintiff had laid out the money in an investment upon a mortgage for five years. What could the Court do? Could we order the plaintiff to bring back the money? Clearly not.

Suppose the Court should order the plaintiff in such a case to give security or to bring back the money, and he could not do so, could we attach him for a contempt, and put him into prison? In such a case the Court could not enforce its order.

It is said that, in all cases, if the Court cannot act after execution has been executed, the plaintiff succeeding will be able to get execution before the defendant can stop him by putting in an appeal, because it is urged that Section 4 does not require the Court to take the alternative pointed out until the appeal has been admitted. But we are not sure that that is the true construction of the Section. We rather think it is not. That question, however, is not before us now; it will have to be finally settled when it shall arise.

Security for costs in appeal and for the performance of such order as Her Majesty may think fit to give is to be given "in all cases of appeal" to Her Majesty in Council. Now, the words "in all cases of appeal" cannot mean cases of admitted appeal, because the Court are to require security "for the "payment of all such costs as well as for "the performance of such order or judgment "as His Majesty, his heirs, or successors "may think fit to give thereupon; and, "*after receiving such security*," "are to "declare the appeal admitted." So that, in cases of appeal, something, at any rate, is to be done before the appeal is to be admitted, namely, security is to be given for the costs to be incurred in the Privy Council. Therefore, the words "in cases of appeal" may mean cases of appeals preferred, and do not necessarily mean "in cases of appeals admitted."

If the party should fail to get his appeal ultimately admitted, the order for security will go, because it is only an order conditional on his appeal being admitted. If the appellant fails to give security, the case will stand as if there had been no appeal, and the execution will go upon the appeal's being rejected for want of the security being properly tendered.

This application will be refused with costs.

Jackson, J.—After hearing the further argument which has taken place on this point, I am not disposed to dissent from the judgment delivered by the Chief Justice, and which is the judgment of the Court on the point, that is, which has been submitted to the Full Bench, namely, that, after execution has once gone out, it is beyond the power of this Court, and not within the scope of Section 4, Regulation XVI. of 1797, to set aside the execution.

On the other point which has been thrown out by the Chief Justice, I wish to be understood as reserving my judgment. It is not before us to-day, and I have considerable doubt as to the construction of the words "in cases of appeal" and as to the meaning to be put on the latter part of the Section. It appears to me quite possible that the words "But in all cases" should there mean "Be it understood, however, that the appellant must, before the appeal is admitted, take such and such steps." If that be the true construction, considerable hardship, no doubt, will arise to persons who have lost their appeals in this Court. I think it will be almost always in the power of persons who have been successful in this Court to defeat the persons who are desirous of appealing to England, and of availing themselves of the provisions of Section 4, Regulation XVI. of 1797, by taking out execution before the losing party can move in the appeal to England. I wish, therefore, to have it understood that I reserve my opinion on this particular point. Otherwise I agree in the judgment of the Chief Justice.

The 8th July 1867.*

Present.

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, W. S. Seton-Karr, L. S. Jackson, and J. B. Phear, *Judges*.

Appeal to Privy Council—Miscellaneous Orders in execution of decree.

Privy Council Appeal No. 853 of 1865.

Mussamut Velaety Begum, *Appellant to England,*

versus

Rugghoonath Pershad, *Respondent to England.*

Mr. C. Gregory for Appellant.

Baboos Onoocool Chunder Mookerjee and *Tarucknath Sein* for Respondent.

An appeal will lie from an order passed by the High Court in the Miscellaneous Department in a case of execution of decree in which the amount or value involved exceeds 10,000 Rs., as well as in any other case in which the Court shall admit an appeal when the amount or value is below 10,000 Rs.

This case was referred to a Full Bench by Louis Jackson, J., under the following order:—

Referring Order.—THIS is an application for leave to appeal to Her Majesty in Council against an order of this Court, passed in a case of execution of a decree in which the amount involved considerably exceeds Rupees 10,000.

I was about to grant leave when it was brought to my notice that a Divisional Court (present Loch and Glover, JJ.) had refused a similar application, on the ground that such an appeal was not allowable under the 39th Section of the Letters Patent by which this Court is constituted.

Sevestre's Reports, Vol. VIII., Part 3, page 471.

The learned Judges appear to have come to this conclusion, mainly because the despatch from the Secretary of State, which accompanied and purported to explain the Letters Patent, did not specifically name the admission of this kind of appeals among the changes introduced by the Charter in respect of appeals to the Privy Council.

The learned Judges also refer to the Regulation of 1797, to a Construction No. 1102 of the late Sudder Court, and to the Order in Council of 1838.

It appears to me that, in regard to the admission of appeals at present, we must look only to the Letters Patent themselves, with any further rules or orders made since their issue, and any construction thereof by the Judicial Committee of the Privy Council.

The words of the Charter, Section 39, are: "Any person may appeal to us in our Privy Council, *in any matter* not being of Criminal Jurisdiction, from *any final* judgment, decree, *or order* of the said High Court made on appeal."

These words appear to me not merely large enough to let in appeals against orders made in execution, but purposely intended to include such appeals. At least, if it had been designed to employ a form of words which should take in appeals in miscellaneous cases, I do not know what wider terms could have been used.

If it be right to use the despatch of the Secretary of State as a help to the Judicial interpretation of the Charter, I may observe that he refers to *one or two* additions made to the previously existing rules, and cites, *for instance*, the rule admitting appeals from interlocutory judgments. (The Charter says preliminary or interlocutory judgment, decree, order, or sentence.)

Plainly, therefore, that was not the only addition or alteration; and the despatch could not be conclusive one way or the other.

It certainly is not for us to refuse a right which the Letters Patent appear to confer; and, as I myself entertain no doubt on the subject, I think it proper to refer to a Full Bench the question whether, under the words cited, parties are or are not at liberty to appeal to Her Majesty in Council against orders of this Court passed in matters relat-

*This judgment was delivered orally on the 17th April 1866.

ing to execution of decrees, and in other matters called miscellaneous not being of Criminal Jurisdiction.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—The question is, whether an appeal lies to Her Majesty in Council against an order of this Court passed in a case of execution of decree in which the amount involved exceeds 10,000 rupees. We are of opinion that an appeal does lie.

Section 39 of the Letters Patent of the High Court gives an appeal "in any matter "not being of criminal jurisdiction from "any final judgment, decree, or order" of the High Court made on appeal, provided that the sum or matter at issue is above the amount or value of 10,000 rupees.

There is an additional Clause (Section 40) which gives an appeal from interlocutory judgments, decrees, or orders.

There are many things done in execution of a decree which may raise very important questions relating to property of the value of 10,000 rupees and upwards. If the sum or matter at issue is not above that amount, the order would not be appealable to Her Majesty in Council unless when the Court for other reasons may think proper to admit an appeal.

By Section 283, Act VIII. of 1859, it was enacted that "all questions regarding the "amount of any profits which, by the terms "of the decree, may have been reserved for "adjustment in the execution of the decree, "or of any mesne-profits or interest which "may be payable, in respect of the subject-"matter of a suit, between the date of the "institution of the suit and execution of "the decree, as well as questions relating to "sums alleged to have been paid in dis-"charge or satisfaction of the decree, or "the like, shall be determined by order of the "Court executing the decree, and not by "separate suit, and the order passed by the "Court shall be open to appeal."

That Section was repealed by Section 1, Act XXIII. of 1861, and it was re-enacted by Section 11, which was as follows:—

"All questions regarding the amount of any "mesne-profits which, by the terms of the "decree, may have been reserved for adjust-"ment in the execution of the decree, or "of any mesne-profits or interest which "may be payable, in respect of a subject-"matter of a suit, between the date of in-"stitution of the suit and execution of the "decree, as well as questions relating to "sums alleged to have been paid in dis-"charge or satisfaction of the decree, or "the like, and any other questions arising "between the parties to the suit in which "the decree was passed and relating to the "execution of the decree, shall be deter-"mined by order of the Court executing "the decree, and not by separate suit; and "the order passed by the Court shall be "open to appeal: Provided that, if, upon a "perusal of the petition of appeal, and of "the order against which the appeal is "made, the Court shall see no reason to "alter the order, it may reject the appeal; "and it shall not be necessary in such case "to issue a notice to the respondent before "the order of rejection is passed."

Questions of the greatest importance may arise under that Section, and the order of the Court would be substantially a new decree in reference to such matters. Act VIII. of 1859 was clearly before the Government when the Charter of the High Court was passed, inasmuch as the procedure of that Act is directed by the Charter to be followed.

Therefore, whether they had Section 11, Act XXIII. of 1861, or Section 283, Act VIII. of 1859, in view, they must have seen that, by the Code of Civil Procedure, several questions might arise for determination in the execution of a decree, which might involve matters of considerable importance and considerable value; and, having that Code before them, they allowed an appeal "from any final judgment, decree, or order," leaving out the word "decretal," which was used in connection with the word "order" in the Rules of 1838 relating to appeals to Her Majesty in Council.

Under these circumstances, there is no doubt that an appeal will lie from an order made by this Court in a case in the Miscellaneous Department relating to the execution of a decree, provided the amount or matter in issue exceeds 10,000 rupees as well as, as has already been stated, in any other case in which the Court shall, for any other reasons, admit an appeal when the amount or value is less than 10,000 rupees.

It does not matter whether we refer to the old Charter or to the present one, because on this point there is no substantial difference between the Sections of the old and new Charters.

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The 8th July 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch and W. S. Seton-Karr, *Judges*.

Section 9, Act VI. of 1862 B. C.—Right of Measurement.

Case No. 402 of 1864.

Regular Appeal from a decision passed by Mr. J. Anderson, Assistant Collector of Sarun, dated the 2nd September 1864.

Baboo Run Bahadoor Singh and others (Defendants), *Appellants*,

versus

Muloorum Tewaree and others (Defendants), *Respondents*.

Mr. R. T. Allan and *Baboo Onookool Chunder Mookerjee* for Appellants.

Moonshee Ameer Ali and *Baboo Unnoda Pershad Banerjee* for Respondents.

HELD by the majority of the Court (Seton-Karr, J., *dubitante*) that a proprietor of an estate is entitled, under Section 9, Act VI. of 1862 B. C., to measure the lands of *any* subordinate tenure within the limits of his estate, whatever the character or size of the tenure, or the amount of rent paid in respect of it.

Loch, J.—IN both these cases, we have only a simple law-point to decide, *viz.*, whether, under the provisions of Section 9, Act VI. of 1862, Bengal Legislature, a zemindar is entitled to measure the lands of any subordinate tenure within the limits of his estate, whether such tenure be a putnee, or mokurruree, or known by any other name.

In the first case, the defendants allege that, at the time of the Permanent Settlement, they held twenty-four villages as *Bhikh-barat* which was settled with them by Government in 1197; that in 1803 the plaintiff's ancestors brought an action against them in the Civil Court, claiming the estate as a dependant talook; that a compromise was entered into, under which it was agreed that the defendants should pay the Government revenue through the zemindar, who should receive in addition 10 per cent. as malikana thereon; that in 1848, after the villages comprised within the *Bhikh-barat* talook had been separately surveyed, disputes again arose, which were again settled by compromise, defendants giving up to the plaintiffs three out of the twenty-four villages, the other terms of the former arrangement remaining the same; that plaintiffs, in contravention of their agreement, now seek to measure the lands of the *Bhikh-barat* property with a view to enhancing the rent which the defendants contend the plaintiff is not entitled to do, because, *1st*, the tenure is of a character which precludes measurement; and, *2nd*, the plaintiff is precluded by his own acts from making the measurement.

The Assistant Collector, in his proceeding of 2nd September 1864, held that, as the tenure of the defendant came under the designation of an under-tenure, the plaintiff was entitled to make a measurement under the provisions of Section 9, Act VI. of 1862, Bengal Legislature.

In appeal the *first* point is admitted to be the real question at issue between the parties. It is urged for the appellants that, though the provisions of Section 9, Act VI. of 1862, Bengal Legislature, give greatly enhanced powers to the zemindar, yet, reading the whole Section together, it is evident that the permission given by its provisions to the zemindar to measure any lands of his estate relates to the measurement of lands held by cultivators, and not by middlemen; that the law never intended a zemindar to annoy and harass a putneedar whose rent he could not, under any circumstances, increase by measuring the lands of each village comprised in the putnee; that the tenure of the appellants was of a similar character. It had been settled with the appellants at the Permanent Settlement as a separate estate with a fixed jumma payable to Government; and it was only under the decree of the Civil Court in 1803 that the talook was made subordinate to the zemindar who now sought to make the measurement as a preliminary step to enhancement.

I have carefully studied the wording of the law, and find the words giving permission to the zemindar under the provisions of Section 9, Act VI. of 1862, to measure the lands of his estate, are so wide that I am unable to restrict their operation to lands in the occupancy of mere ryots. No doubt, a putneedar, whose rent cannot be enhanced, would feel very much the annoyance of having the lands in his tenure measured; but still circumstances might arise which might render such a proceeding necessary, and the law here clearly and unmistakeably declares the zemindar's right to measure any land comprised within his estate, a tenure or any part thereof, unless restrained from doing so by express engagement with the occupants of the lands. Nor do I think that the subsequent words of the Section, which relate to parties who oppose or anywise hinder the

measurement in any way, restrict this power. And, indeed, if we read Sections 9 and 10 together, we learn from the provisions of the latter Section what the Collector is required to do at the instance of the zemindar, *viz.*, to ascertain, determine, and record the tenures and under-tenures, the rates of rent payable in respect of such lands, and the persons by whom respectively the rents are payable, as well as to measure the land, and to ascertain and record the names of the persons in occupation of the same. The power, therefore, of the zemindar to measure any lands of any kind within his estate appears to me, under the provisions of Section 9, Act VI. of 1862, Bengal Legislature, to be unrestricted.

On the *second* point, I do not think that the plaintiff is precluded from making a measurement in this case on account of the compromises he has entered into at different times with the defendants. They may have the effect of barring his right to enhance, but on that point I do not express any opinion, as it is not before us; but these acts cannot, I think, bar his exercising a right now distinctly declared by the law to belong to him, unless he be prevented by the terms of any contract; and as this is not shown to us to be the case in the present instance, I would dismiss the appeal with costs.

The same order is applicable to appeal No. 435 of 1864.

Seton-Karr, J.—I have felt considerable difficulty in this case, and have referred to the Report of the Select Committee which sat on this Law (Act VI. of 1862, Bengal Council) as well as to the speech of the mover of the Bill, in order to discover the object of the amendment of Act X. of 1859, to which the law in question was directed.

The Law, Act VI., was evidently intended at first further to facilitate the measurement of their lands by the zemindar; and to provide for those cases in which ryots absented themselves, and would not identify their lands.

When the draft of Act VI. came to be revised by the Select Committee, with reference to the amendment of Section 26 of the old law, they wrote as follows: "In Section 9 we have very considerably "modified, and we trust improved, Section "26 of Act X. of 1859. We think that in "Section 9, as it now stands, we have defined "with more precision and distinctness than "are to be found in Section 26 of Act X. of "1859, *who the persons are who have the "right of surveying and measuring lands.* "In other respects, Section 9 is a mere re-"*enactment* of Section 26, except in the "concluding Clause, which enacts that, if a "ryot after due notice does not attend and "point out the land, he shall not be permit-"ted to contest the measurement made in "his absence, or any of the proceedings "therewith connected."

I do not, therefore, gather from the above that the new law of 1862 enlarged the classes or tenures to which Section 26 of the old law was to be applicable. The intent of the Select Committee clearly was that the persons who had the right of measurement should be more clearly defined, and that (Section 10) the power of measurement, when exercised by the Collector, should be made more stringent and more favorable to the zemindar. I am not prepared to say whether, under either the old or the new law (Section 26 of Act X. being expressly repealed by Act VI. of 1862), the zemindar would have the power to measure the lands of a putneedar. But this is a question which I need not decide, for it is not actually raised in the present suit. It would, however, be an example of the right of measurement pushed to its extreme limit, for no under-tenure can be more absolute or complete than a putnee. For the purposes of this suit, however, I hold that the *Bhikh-barat* mouzahs in dispute do constitute a *separate dependant* talook or estate; and I have doubts whether the law intended that the lands of such dependant talooks should be liable to measurement by the superior holder, such as the zemindar in this instance. I am not clear that the law intended to confer on him such powers of interference with defined subordinate under-tenures of such extent and character. I am inclined to think that the law intended to give zemindars the power to measure all lands or under-tenures forming part of their estates, but not lands which constituted separate and distinct, though dependant, talooks or estates held *within other larger estates.*

In the present instance, the tenure, the lands of which the zemindar is anxious to measure, dates as far back as 1197, or 1790, and comprises no less than 21 mouzahs. It is practically one complete estate within another and a larger one.

Moreover, it does not appear why the zemindar should measure, if he cannot enhance the rents, and I do not see that en-

hancement is an object avowedly aimed at in the present suit.

I can still, however, conceive cases in which a zemindar might have an object in making a measurement, quite apart from any enhancement of rents, if the law permitted him to measure lands. I observe, further, that the object of Section 10 of Act VI. is to help zemindars who *cannot ascertain* who are the persons liable to pay rents for the lands. But no such difficulty is pleaded or experienced in this instance; for the persons are well known, are in possession of their mouzahs, and are willing to pay rents.

On the whole, then, I feel so much uncertainty and doubt in the matter that I should wish the case to be argued before a third Judge; and I, consequently, cannot, at present, give my assent to the decision proposed by my colleague, and I feel disposed to admit the appeal.

Peacock, C. J.—If Act VI. of 1862 (B. C.) had stated that every landlord should be entitled to measure the estate of his tenants, it would have been necessary to consider whether the relation of landlord and tenant existed between the parties in this case. But the words of the Act are not to that effect. They are that "every "proprietor of an estate or tenure, or other "person in receipt of the rents of an estate "or tenure, has a right of making a general "survey and measurement of the lands "comprised in such estate or tenure or any "part thereof, unless restrained from doing "so by express engagement with the occu-"pants of the lands."

The first question to be considered is, whether the plaintiff in this case is the proprietor of an estate or tenure, or a person in receipt of the rents of an estate or tenure. I think it is quite clear that he is. Section 2, Regulation XLVIII. of 1793, provides as follows:—

"*First.*—Every five years, the Collectors "of the land-revenue in the several zillahs "are to prepare a register of all the estates "in their respective zillahs, of whatever "denomination or description, the proprie-"tors of which pay the public jumma or "revenue assessed upon their estates imme-"diately to Government.

"*Second.*—By the term 'estate' is to be "understood any land being malgoozaree, "or subject to the payment of public revenue, "for the discharge of which a separate en-"gagement has been or may be entered into "with Government."

There is a distinct definition there of what is meant by an estate. The plaintiff in this case is a proprietor of an estate, because he pays revenue directly to Government. The defendant is not a proprietor within that definition. He is entitled to hold the land at a fixed rent. That does not prevent the plaintiff from having the right to measure it. It is true that the plaintiff has a very large estate. But that does not affect the case. The law is not affected by the size or dimension of what is held. Regulation VIII. of 1793 declares who are the persons who shall be assessed with public revenue. Section 4 enacts that "the set-"tlement, under certain restrictions and ex-"ceptions hereafter specified, shall be con-"cluded with the actual proprietors of the "soil, of whatever denomination, whether "zemindar, talookdars, or chowdries."

The Regulation then lays down rules for the purpose of ascertaining who are the proprietors of the soil. The plaintiff in this case is a proprietor of an estate or tenure. He is in the receipt of the rents payable for this estate, although it is very large, and although the rents amount to a large sum. If the plaintiff would be entitled to measure any other lands held of him by prescription at a fixed rate, the size of the estate and the amount of rent payable cannot at all affect the plaintiff's right to measure. If he has the right given to him by law, he has a right to enforce that right without being bound to state his reasons for enforcing it. If the defendant holds at a fixed rent, the plaintiff has a right to measure the land. If the rent is liable to be enhanced, the plaintiff has still a right to measure. What I now decide is that the plaintiff is a proprietor of an estate, and that the size of it, or the amount of rent paid in respect of it, does not prevent him from having the right to measure it under Section 9, Act VI. of 1862, Bengal Council. I, therefore, agree with Mr. Justice Loch, and affirm the decision of the Lower Court with the costs of this appeal.

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The 8th July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,

Judges.

Parol Evidence (to explain Deed)—Putnee Lease.

Case No. 20 of 1867.

Regular Appeal from a decision passed by Mr. W. DaCosta, Principal Sudder Ameen of Purneah, dated the 29th September 1866.

Baboo Dhunput Singh Doogur Roy Bahadoor (Plaintiff), *Appellant,*

versus

Sheikh Jowahur Ali (Defendant), *Respondent.*

Messrs. R. V. Doyne and *R. T. Allan*, and *Baboos Onookool Chunder Mookerjee* and *Bungshee Buddun Miller* for Appellant.

Messrs. I. T. Woodroffe and *C. Gregory* for Respondent.

Parol evidence was held admissible to explain a deed —*e.g.*, to prove that a village not included in a putnee lease was intended by the parties to be included in it.

Kemp, J.—THE plaintiff is the zemindar, the defendant the putneedar. The object of the suit is to recover possession of Mouzah Abdoollah-nuggur, on the allegation that this mouzah is not included in the putnee of the defendant.

The suit is valued at Rupees 86,906-7-9, which includes a claim for mesne-profits amounting to Rupees 57,554-7-9.

The defendant's putnee pottah is dated the 9th Bysack 1262 Moolkee. It is recited in the plaint that the pottah demised the Mouzahs Chandee and Kutwa; that, under color of the lease and in collusion with the zemindaree amlah of the plaintiff, the defendant had taken possession of the contiguous mouzah of Abdoollah-nuggur; that the plaintiff discovered this fraud on the 10th of June 1865. The pleader for the plaintiff in his examination stated that the plaintiff and his father before him resided at Moorshedabad, and were consequently not aware of the fraud practised upon them.

The defendant, in his written statement, urges that the plaintiff had knowledge of the alleged fraud prior to the 18th of June 1865; that he, the defendant, was not acting in collusion with the plaintiff's amlah, and that the disputed mouzah is comprised in the putnee granted to the defendant.

The Principal Sudder Ameen laid down the following issues:—

1st.—Whether any portion of the claim for wassilat is barred by limitation, and what portion?

2nd.—Was Mouzah Abdoollah-nuggur with dependencies included in the defendant's putnee?

3rd.—What is the quantity of mâl land in the village?

4th.—What is the sum accruing annually as wassilat?

5th.—Whether interest prior to action can be allowed?

The Principal Sudder Ameen, remarking that the second issue ought to be decided first, observes that, with reference to the evidence, the claim of the plaintiff utterly fails; that the putnee of Chandee Kutwa comprised in it the village of Abdoollah-nuggur, is proved beyond a doubt for the following reasons:—

1st.—The writer of the putnee pottah had deposed that the defendant having got the putnee of the properties held by the farmer, Rohumutoollah, objected at the time of the execution of the pottah that no express mention had been made in it of Abdoollah-nuggur; that Shomaree Chand, who was acting on the plaintiff's behalf in the matter of the putnee, satisfied the defendant's scruples by declaring that the villages held in farm by Rohumutoollah were given in putnee to him, the defendant. The oral evidence for the prosecution the Principal Sudder Ameen considered to be tutored, and, when weighed with the documentary evidence, was proved to be utterly false.

2nd.—The rent payable by the farmer for the unexpired portion of his lease, including the rent on Abdoollah-nuggur, was made payable to the defendant from the date of the putnee, a fact that corroborates the oral evidence for the defendant that all the villages in farm to Rohumutoollah were included in the putnee of the defendant.

3rd.—That the documents filed by the defendant, which have been taken from the plaintiff's zemindaree serishtah, show that the plaintiff has acknowledged that the defendant is the putneedar of Chandee Kutwa and Abdoollah-nuggur.

4th.—That, if Abdoollah-nuggur had not been included in the defendant's putnee, the plaintiff would not have suffered the defendant to hold wrongful possession of that mouzah for nearly 12 years; that no satisfactory reason for plaintiff's long silence had been given.

The suit was dismissed with costs, and without trying the other issues.

In appeal it is contended—

1st.—That the pottah of the defendant does not contain any mention of Mouzah Abdoollah-nuggur, and the defendant is not entitled to any properties, except those expressly leased to him under the pottah.

2nd.—That parol evidence should not have been admitted to alter, vary, or add to the contents of the pottah.

3rd.—That the reasons of the Principal Sudder Ameen for holding that Abdoollah-nuggur was included in the putnee are insufficient.

4th.—That the plaintiff had not admitted that the defendant was the putneedar of Abdoollah-nuggur.

5th.—That the defendant, who was a servant of the plaintiff, had colluded with the amlah of the plaintiff, and caused certain papers to be written admitting that the defendant was the putneedar of Abdoollah-nuggur; that such papers were not binding upon the plaintiff in the absence of any proof that they were written with the plaintiff's knowledge and consent.

6th.—That Abdoollah-nuggur is an aslee or main village, and not a dakhilee or dependency of the other villages leased in putnee. No extraneous evidence can have the effect of adding a village which is not comprised within the four corners of the pottah.

7th.—That under the circumstances of the case, and looking to this fact that the defendant was the head mooktear of the plaintiff and to the proofs adduced by the plaintiff, the judgment of the Principal Sudder Ameen ought to be reversed.

We have heard Mr. Doyne for the appellant, and Mr. Woodroffe for the respondent, at great length.

In this case everything turns upon the question whether it was the intention of the parties that the mouzah of Abdoollah-nuggur should be comprised in the defendant's putnee lease or not. It may be at once admitted that the mouzah is not included *eo-nomine* in the lease; and if the mere omission were conclusive, and intentions and conduct cannot be looked to or proved *aliunde*, then the question we have to decide would lie within very narrow limits; but evidence of every material fact, which will enable the Court to ascertain the nature and extent of the subject-matter of the pottah, or, in other words, to identify the things to which that instrument refers, is in our opinion admissible. The acts of the parties also may be explained by parol evidence. *See* page 68, Civil Rulings, Weekly Reporter, Volume V., in the Full Bench case of Kasheenath Chatterjee, appellant, *versus* Chundee Churn Banerjee, respondent.

It is conceded that the defendant has been in possession of the disputed mouzah for nearly 12 years, during the lifetime of the father of the plaintiff, and for some years after the plaintiff attained majority. It is alleged that the plaintiff did not become aware of the fraud that had been practised upon him until in June 1865, and he attempts to excuse this ignorance by stating that he resides at Moorshedabad, the disputed property being situated in Purneah and managed by Mofussil amlah, who colluded with the defendant, who was also in the service of the plaintiff.

There is, we may observe, no proof whatever on the record that the defendant was the mooktear of the plaintiff, or that the mofussil amlah of the plaintiff colluded with the defendant. Such a state of things appears to us to be very improbable, the defendant being represented to be a Mahomedan zillah mooktear and the amlah being Hindoos.

As to the period when the plaintiff discovered the fraud, a very important feature in the case, we hold that it is not true that he first became aware of it in June 1865, for we find that, in a suit in June 1864, to which he was a party *sui-juris*, the defendant's putnee was described in the pleadings as comprising Chandee Kutwa and Abdoollah-nuggur; and although in that suit the defendant in his written statement vaguely hinted that it was doubtful whether such was the case, he took no active steps to expose the alleged fraud until in December 1865, when the period of limitation was on the point of running out.

Again, it is admitted that Abdoollah-nuggur was comprised in the farming lease granted to Rohumutoollah, the term of which lease had still three years to run when the putnee was given to the defendant. Now, the villages of Chandee Kutwa and Abdoollah-nuggur are not registered with separate jummas, and the plaintiff has filed no zemindar's papers to show that the jummas are distinct. The villages including Abdoollah-nuggur were leased with a

lump jumma to Rohumutoollah. The defendant paid a bonus, and agreed to an advance of 50 rupees over and above the jumma payable by the lessee, which may be fairly held to have represented the full assets of the demised properties. In the putnee pottah, although Abdoollah-nuggur is not mentioned "*eo-nomine*," it is distinctly recited that the putneedar was not to eject the lessee within the term of his lease which had then three years to run, but was to receive the rent from him according to the terms of that lease. At the time the putnee was taken, the defendant objected to the omission of the mouzah of Abdoollah-nuggur by name, and was told by the amlah of the plaintiff, who granted the lease, and whose authority to do so has not been questioned, that, as he took what the lessee took, the omission was immaterial. Now, it is clear that, if it had not been the intention of the grantor that Abdoollah-nuggur was to form part of the putnee, the jumma payable by the lessee "*pro rata*" for that mouzah would not have been made payable to the grantee of the putnee, the defendant, but to the lessor, the zemindar.

The defendant has filed the following documents, which prove that he has all along been recognized as putneedar of the disputed mouzah, *viz.*, an amulnamah addressed to the ryots which makes mention of Abdoollah-nuggur.

Petitions under Regulation VIII. of 1819, the putnee law, praying for the sale of the putnee for default in paying the rent, in which petitions Abdoollah-nuggur is mentioned as one of the mouzahs comprising the putnee.

Several letters addressed to the defendant on the occasion of the Poonia.

Itlanamahs and istahars, some signed by the plaintiff.

Jumma-wassil-bakees of former zemindars.

The amulnamah is a copy, but the original is in the record of the suit referred to above, to which plaintiff was a party. No objection was taken to the reception of this document in the Court below. The copy was taken from this Court, where the record of that case is deposited. The amulnamah was signed by Mr. Cave, the surburakar of the pergunnah, and it is a document which would be within the scope of the authority of a surburakar to issue. The petitions under Regulation VIII. of 1819, and for the correctness of which the zemindar, the plaintiff, is under that Regulation primarily responsible, show that for a series of years the defendant was treated as putneedar of Abdoollah-nuggur. In the face of all this, we are asked to believe that for eleven years and eight months the defendant was permitted to enjoy a wrongful possession of this valuable mouzah, simply because the plaintiff, being an absentee zemindar, was not aware of the fraud practised upon him by his mofussil amlah. We cannot believe that the plaintiff was ignorant of the fact, and at all events it is clear that he was silent for eighteen months after he had, beyond doubt, become fully aware of the fact that the defendant was in possession of the mouzah. This conduct is not consistent with the assumed ignorance of facts which the plaintiff sets up.

It is not for this Court to presume fraud, and the plaintiff has entirely failed to prove any fraud or collusion on the part of the defendant. In this view of the case, being clearly of opinion that it was the intention of the parties that the disputed village of Abdoollah-nuggur was to be included in the putnee, also taking into consideration *first*, that the defendant has been in long and undisturbed possession of the mouzah; *secondly*, that he paid an advance on the farming jumma which, we must assume, in the absence of any evidence to the contrary, represented the full assets of the properties leased, and a valuable consideration for the putnee; and, *lastly*, that his conduct is not tainted with fraud or concealment of facts, we confirm the decision of the Principal Sudder Ameen, and dismiss this appeal with costs and interest payable by the respondent.

The 8th July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hindoo Law—Alienations by Hindoo widow—Suit by Reversioners — Adoption (Kritima form)—Succession.

Special Appeals from a decision passed by Mr. H. R. Madocks, Judge of Bhaugulpore, dated the 6th August 1866, affirming a decision passed by Baboo Nurottum Mullick, Principal Sudder Ameen of that District, dated the 26th August 1865.

Case No. 2488 of 1866.

Mussamut Shiboo Koeree and others (Defendants), *Appellants,*

versus

Joogun Singh and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboos Debendro Narain Bose and *Kalee Prosuno Dutt* for Appellants.

Baboo Onookool Chunder Mookerjee for Respondents.

Case No. 2822 of 1866.

Boolee Singh and others (Plaintiffs), *Appellants,*

versus

Mussamut Bussunt Koeree and others (Defendants), *Respondents.*

Baboo Chunder Madhub Ghose for Appellants.

Baboos Onookool Chunder Mookerjee, Kishen Succa Mookerjee, and *Romanath Bose* for Respondents.

Declarations of title may be granted to reversioners and alienations by a Hindoo widow set aside during the widow's lifetime, although possession of the estate itself will not ordinarily be given.

A widow in the Mithila province is capable of adopting in the *kritima* form without her husband's consent.

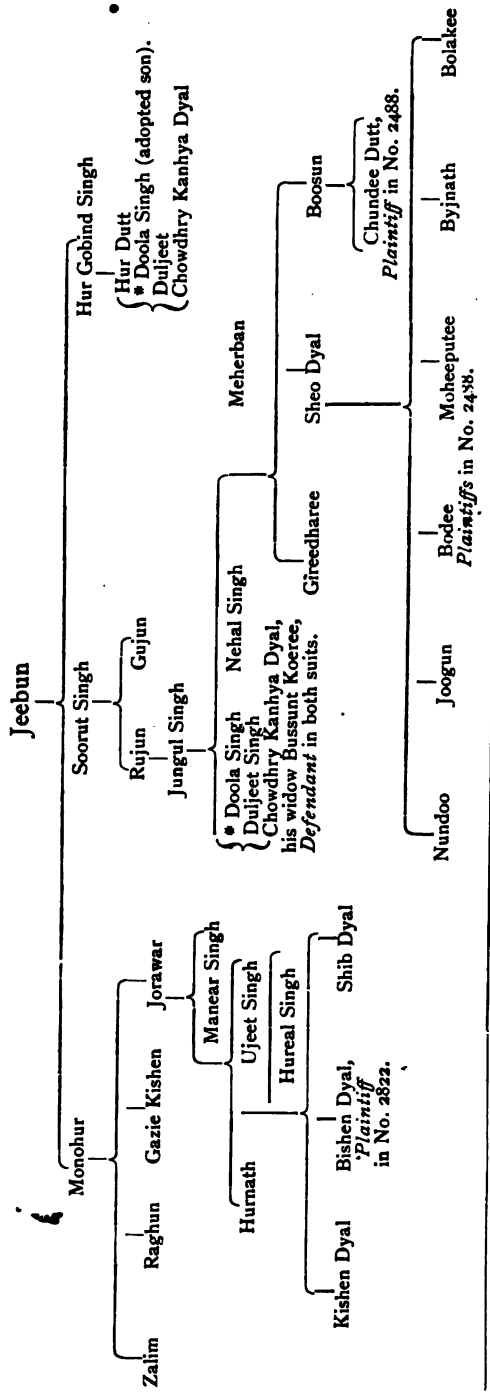
A son adopted in the *kritima* form in the Mithila province does not become a member of the adopting family so far as collateral heirship is concerned, the relation of *kritima* for the purposes of inheritance extending to the contracting parties only.

A *kritima* adopted son, when adopted by a widow with or without the authority of her husband, cannot in any case succeed to more than his adoptive mother's property, and has no claim to that of collaterals.

Glover, J.—THESE suits, together with a third which has not been appealed, were brought by certain reversionary heirs of one Kanhya Dyal Singh, for a declaration of their right to succeed to the property of their deceased relative, and to have cancelled a mokurruree lease executed by the widow Bussunt Koeree, and a tumleeknamah by which she had made over the entire property of her husband to an adopted son Gunga Pershad, their allegations being that, as a Hindoo widow, she had no right to grant the mokurruree, there being no necessity for the alienation, and that the tumleeknamah was invalid, Bussunt Koeree having no authority from her husband to adopt.

To understand the nature of the plaintiff's relationship to Kanhya Dyal Singh, on which the decision of one of these appeals will eventually have to turn, it will be

necessary to consult the accompanying genealogical tree, the correctness of which is admitted by both parties.



But, before going into the claims of the different reversioners, it will be as well to dispose of the case of the widow Bussunt Koeree, the special appellant in suit No. 2488.

Both the Lower Courts found that the plaintiffs, that is, those claiming through Sheo Dyal, were the nearest reversioners, and entitled to sue; that no permission to Bussunt Koeree to adopt was proved; that, in any case, a son adopted after the "kritima" form had no right to succeed to Kunhya Dyal's property; that the mokurruree had not been granted for any legal necessity, and that the tumleeknamah was void.

The widow appeals specially, urging—

(1.) That the Judge ought to have decided between the different sets of reversioners, and have at least given her her costs against those who had not succeeded in making out a title; that she had been unnecessarily harassed by three different suits for the same common object, and ought not to have been made to pay three different sets of costs.

(2.) That the suit is premature, the widow being still alive.

(3.) That the Judge should have given reasons for disbelieving the adoption of Gunga Pershad instead of merely endorsing the first Court's opinion.

(4.) That special appellants applied to the Principal Sudder Ameen to have evidence called for in support of the necessity to grant the mokurruree; that the Principal Sudder Ameen refused the application, and that, although the point was pressed on appeal, the Judge took no notice of it.

And, *lastly*, that one of the properties included in the tumleeknamah was special appellant's own streedhun property, and could not be claimed as belonging to Kanhya Dyal.

None of these objections appear to us of any force. The three sets of plaintiffs were all undoubtedly relatives, more or less remote, of the special appellant's husband, and all had a distinct interest in setting aside her alienation of the property. They could not have sued altogether, inasmuch as their own interests in the property were antagonistic; their common object was, no doubt, to cancel the alienations, and to disprove the adoption, but their separate object was to get themselves declared heirs to the estate to the exclusion of the others.

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As to the suit being premature, it has been frequently ruled by this Court that declarations of title can be granted to reversioners, and alienations set aside during the lifetime of the widow, although possession of the estate itself will not ordinarily be given. And, so far as the special appellant is concerned, the plaintiffs had an undoubted right to sue; whether, as amongst themselves, the question of preferential heirship be or be not premature, is a different matter which may be discussed, if necessary, hereafter.

With regard to the third objection, we find that the Judge did give his opinion as to the validity of the adoption, and his decision, that no valid adoption in the Duttaka form was proved, is a finding of fact with which there is no interference in special appeal.

We can find no mention in the record of the special appellant's having petitioned the Court of first instance to summon any particular witnesses, nor can the special appellant's vakeel show us that any such petition was ever made.

And, *lastly*, we find that the special appellant in the tumleeknamah distinctly stated that mouzah Rugoonundunpore, which she now claims as her "streedhun," was part of her late husband's property.

This was an admission against her own interest, and, if not actually concluding her, was, at all events, a very strong piece of evidence against her present contention.

Both the Lower Courts took that view of it, and there is no ground for our interfering with their decision.

Special appeal No. 2488, therefore, is dismissed with costs.

We now come to the appeal preferred by the plaintiffs, Bishen Dyal and others (No. 2822).

And as between these parties and those claiming through Sheo Dyal, we have had some doubt as to whether their suit should not be considered premature, the widow being yet alive, with the power which all widows have of alienating her husband's estate for a proved legal necessity. Such a necessity might arise; there might be various contingencies which would dispose of these conflicting claims before the widow's death, and so render a decision useless. As, however, the objection has never been before raised, and is not now taken in the petition of special appeal; as, moreover, the case has been very fully argued on the principal question involved, and as the contending parties desire to have judgment on the issue of propinquity, we consider it advisable to decide the case without reference to what may or may not be hereafter.

Now, the special appellants claim through Doola Singh. Doola Singh (*vide* genealogical tree) was the natural son of Jungul Singh, but was, it is alleged, adopted into the family of Hur Dutt Singh, a descendant of the third son of Jeebun Singh, the common ancestor, the adoption being made by Hur Dutt's widow after the death of her husband. And if Doola Singh did, by this adoption, become a member of his adoptive mother's husband's family, the special appellants are undoubtedly eleventh in degree from Chowdhry Kanhya Dyal, and are one step nearer of kin to him than the special respondents, who claim through Jungal Singh.

Note.—The word "natural" is used in the Mitakshara sense.

The whole question, therefore, turns on the nature of Doola's adoption.

That Doola Singh was adopted by Hur Dutt's widow, after the "kritima" form of adoption, is not denied by the special respondents. But it is urged that the adoption was not sanctioned by Hur Dutt, no permission to adopt having been given, and that, even if the adoption had been permitted, a son adopted in the "kritima" form does not become a member of the adopting family, and cannot succeed as heir to collaterals.

There is no proof on the record of Hur Dutt's permission to adopt; the point was never raised nor tried. Baboo Onookool Mookerjee, for the special respondents, contends that the special appellants never alleged that Hur Dutt ever gave such permission, and that, therefore, his clients were not bound to deny the validity, so far, of the adoption. It is true that no mention is made in the plaint that Hur Dutt gave his wife leave to adopt, but Doola is mentioned, in the genealogical tree filed by the plaintiffs, as Hur Dutt's adopted son. And we think that the plaintiff's case sufficiently disclosed this ground of action, and that the defendants, if they denied the fact of such permission, were bound distinctly to traverse the plea. Besides which, it has been held by many authorities that a widow in Mithila is capable of adopting in the "kritima" form without her husband's consent.

Our decision, however, on the distinctness or otherwise of the plaint is comparatively unimportant, as we are of opinion, for the following reasons, that a son adopted in the "kritima" form in the Mithila province does not become a member of the adopting family so far as collateral heirship is concerned, the relation of "kritima" for the purposes of inheritance extending to the contracting parties only.

We will assume, for the reasons above given, that Doola Singh consented to the adoption, and also that that adoption by Hur Dutt's widow took place in the usual form. No particular ceremonies would appear to be necessary to such an adoption, nor would any particular age be fixed.

Now, Macnaghten, in his work on Hindoo Law (Chapter VI. on Adoption, Wilson's Edition, page 79), says: "In Mithila, where "the 'kritima' form of adoption prevails, "there is no sort of restriction except as to "tribe; but he (*i. e.*, the adopted son), as "well as his issue, continues, after the adop- "tion, to be considered a member of his na- "tural family, and takes the inheritance both "of his own family and of his adopting "father" (*vide* also 3 Select Reports 307). Again: "Another peculiarity of this species "(*i. e.*, the 'kritima') of adoption by a widow "is that the person so adopted does not be- "come the adopted son of the husband, even "though the adoption should have been per- "mitted by him." And again: "The rela- "tion of 'kritima' son extends to the con- "tracting parties only: the son so adopted "will not be considered the grandson of the "adopting father's father, nor will the son "of the adopted be considered the grandson "of his adopting father. He does not in- "herit collaterally."

In Sutherland's Synopsis of the Duttaka Mimangsha and Duttaka Chundrika, the standard Hindoo text-books on adoption, we find as a gloss on Section VI. 67, Section II. 18-19 of those works, the following: "The "'Duttaka' adopted son ceases to have any "claim on the family or estate. This rule "would not apply to the 'kritima' adopted "son, who would necessarily be the son of "two fathers." Again: "The adopted son "(Duttaka that is) inherits, not only of his "adoptive father, but likewise lineally and "collaterally of the near and distant kins- "men of that person. This rule would not "apply to the 'kritima' son as usually "adopted in the Mithila country."

And again (Note 18, page 228): "The "'kritima' son, as usually affiliated in the "Mithila country, would indeed take the "estate of his adoptive father, but continues "a member of the family of his natural "father, and is not regarded as prolonging "the line of his adopter."

And again (Note 21, page 229): "In the "Ovaita Nirnaya, Veshpati Misra declares "that no relation obtains between the kritima "adopted-son and the father of the adopter, "from which it is inferred that such adopted "son could not inherit of that person and *à "fortiori* from the collateral kinsman of the "adopter. The same inference, in fact, re- "sults from the kritima son in question not "being considered a member of his adopter's "family."

In Colebrooke's translation of the Mitakshara, we find the following note (*see* Mitakshara, page 355): "The son adopted in the form adopted in this Section, *i. e.*, the kritima, does not lose his claim to his own family, or take the surname of his adoptive father."

And this view of the case was taken by the Sudder Court in the case of Sree Narain Roy, 27th July 1812, 2 Select Reports 27, where it was ruled that the person adopted by the wife as her son does not become the adopted son of her husband, or succeed to his property, though the adoption should have been permitted by the husband; but, as her son, he will succeed to her property.

And the High Court, in the case of the Collector of Tirhoot *versus* Huns Pershad Mohunt, 6 Weekly Reporter 500, ruled that, under the Hindoo Law current in Mithila, a son adopted by a widow in the kritima form would not, by virtue of such adoption, lose his position in his own family, nor would he succeed to property left by the husband of his adoptive mother, but would be considered her son, and entitled to succeed to her only.

In Strange's Hindoo Law, Volume II., page 283, a "kritima" adoption is spoken of in the following terms: "Kritima, the "son made. In point of ceremonial, it is the "same with that of the Duttaka, omitting "the sacrifice or burnt offering, which is not "performed at it. Succeeding partially to "the adoptive rights, his connection with "his natural family, by which he has never, "in fact, been more than tacitly relinquished, "remains to the son made in full force.

"And this amongst other things distin-"guishes him from the son given. Initi-"ation into the family of the adopter is "not practised where alone this form of "adoption is at this day, generally speaking, "in use, namely, in the Mithila country, "whatever might be its effect if performed "in assimilating it more to that of the son "given, especially in the event of its not "having previously taken place in the "natural family of the adopted. In Mithila, "also, the widow is, as of right, at liberty "to adopt without special authority for the "purpose, the adopted in this case succeed-"ing to her exclusive property only, not "to that of her deceased husband, to whom "he is not considered in any way related."

There is, then, a strong current of authority for the dictum that a kritima adopted son, when adopted by a widow with or without the authority of her husband, cannot in any case succeed to more than his adoptive mother's property, and has no claim to that of collaterals.

Isolated quotations from the Mitakshara have undoubtedly been shown to us by the pleader for the appellants, which appear to controvert this rule, and to place the kritima in the same position as a Duttaka adopted son; but the weight of authority is undoubtedly the other way, and we should not be justified in departing from it merely on the ground of certain obscure Sanscrit passages which may be interpreted either way.

Special appellants admit that, if Doola Singh be not in all respects a member of Hur Dun's family, the link in their pedigree is wanting, and that they are not so near of kin to Kanhya Dyal as the special respondents.

And as, for the reasons above given, we consider that Doola was never dissociated from his natural family, it follows that this special appeal must be dismissed with costs.

The 8th July 1867.

Present:

The Hon'ble G. Loch and H. V. Bayley, *Judges.*

Limitation—Suit against sureties of deceased agent.

Case No. 403 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by Mr. J. M. Louis, Officiating Judge of Hooghly, dated the 10th December 1866, affirming a decision passed by Moulvie Abdoor Ruhman, Deputy Collector of Jehanabad, dated the 30th July 1866.

Sreemutty Puree Soonduree Debia (Plaintiff), *Appellant,*

versus

Bholanath Roodro and others (Defendants), *Respondents.*

Baboo Romanath Bose for Appellant.

Baboo Nil Madhub Sein for Respondents.

Section 30, and not Section 33, Act X. of 1859, is applicable to the case of sureties of a deceased agent, against whom a claim is made for moneys appropriated by him; and the cause of action accrues from the time when the plaintiff had means of knowing what was the amount due to him from the deceased agent, *i. e.*, from the date on which his accounts were put in by his sureties, and not from the date of his death.

Loch, J.—This was a suit against the sureties of an agent to recover from them certain sums of money alleged to have been appropriated by the deceased agent.

The Lower Courts dismissed the suit, holding that it was barred by limitation, it not having been brought as required by Section 33, Act X. of 1859, within one year from the determination of the agency arising from the death of the agent.

In special appeal it is contended before us that Section 33 is not applicable to the case, but Section 30, as ruled in a judgment of this Court reported at page 510 of 2 Hay's Reports, and that the suit was brought within one year from the date of cause of action, that cause of action being the putting in by the sureties of the accounts of the deceased, from an examination of which plaintiff was able to ascertain what was due to him from the agent; and a decision of a Division Bench reported in 3 Weekly Reporter, page

121, Act X. Rulings, is quoted to show that the cause of action accrues from the time that a party has means of knowledge afforded to him either by the submission of accounts or other means.

It is contended on the other side that the defendant never filed any accounts, and that this has been found to be the case by the first Court, whose finding has been adopted by the Judge; and it is urged that, where no accounts are filed, the plaintiff is bound to proceed against the sureties within one year from the determination of the agency.

We think it is clear from the precedents quoted, in which we concur, that Section 30, and not Section 33, is applicable to the case of sureties, against whom a claim for moneys appropriated by their principal is made, and we further think that the cause of action arises from the time when the plaintiff had means of knowing what was the amount due to him from his deceased agent, *i. e.*, from the date on which his accounts were put in by the sureties, and not from the date of his death. The sureties deny that the accounts in this case were put in by them or by their authority, and we observe that the Judge has come to no finding on this point, but has disposed of the case on the interpretation he has put upon Section 33. He must determine whether those accounts were, as alleged by the plaintiff, prepared by a party appointed by the defendants, and put in by their authorities. If this be proved, then this suit is clearly within time, having been instituted within two months from the date on which the accounts were put in. We remand the case accordingly.

The 8th July 1867.

Present:

The Hon'ble G. Loch and H. V. Bayley,

Judges.

Suit to recover possession—Lakheraj.

Case No. 272 of 1867.

Special Appeal from a decision passed by Baboo Dinonath Chatterjee, 2nd Principal Sudder Ameen of Hooghly, dated the 6th October 1866, affirming a decision passed by Baboo Kishen Mohun Mookerjee, Moonsiff of Pandooah, dated the 4th February 1865.

Joy Kishen Mookerjee (Defendant), *Appellant,*

versus

Pearee Mohun Dutt (Plaintiff) and others (Defendants), *Respondents.*

Baboos Mohendro Lal Shome and *Pearee Mohun Mookerjee* for Appellant.

Baboo Umbica Churn Banerjee for Respondents.

In a suit to recover possession of lakheraj land on the allegation that the plaintiff had been wrongfully evicted, the plaintiff is entitled to succeed if he proves that he previously held possession of the land as lakheraj.

Loch, J.—THE plaintiff in this case, as purchaser of the land in dispute, which he alleged to be lakheraj, situated in Mouzah Ramnagore with the defendant's zemindaree, sought to recover possession on the allegation that he had been wrongfully evicted by the defendant under color of an Act X. suit, in which the defendant had intervened, and the plaintiff's claim for rent had in consequence been thrown out.

The defendant states that the lands are part of his zemindaree, situated in Mouzah Ramnagore, and that they are not lakheraj.

The Lower Courts have found that the plaintiff is entitled to recover possession, as it is satisfactorily proven that plaintiff did previously hold possession as lakheraj.

We think the judgment come to by the Lower Appellate Court is quite correct, and is supported by precedents of this Court, *see* pages 174, 175, Special Number, Weekly Reporter; 5 Weekly Reporter, page 269, Civil Rulings; 6 Weekly Reporter, page 190, Ditto. We, therefore, dismiss the special appeal with costs.

The 9th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Section 203, Act VIII. of 1859—Liability of representative—Execution.

Case No. 209 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 18th January 1867, affirming an order passed by the Sudder Ameen of that District, dated the 15th August 1866.

Syud Jafur Hossein and others (Judgment-debtors), *Appellants*,

versus

Hingun Jan and others (Decree-holders), *Respondents*.

Baboo Khetter Mohun Mookerjee for Appellants.

Mr. R. E. Twidale and *Baboo Romanath Bose* for Respondents.

Section 203, Act VIII. of 1859, although it primarily refers to a party who has been substituted before decree for the original debtor, is equally applicable to a person who has become representative of the original debtor in execution-proceedings, his liability being limited to the extent of the property of the original debtor which may have come into his hands.

Jackson, J.—THERE are two points raised in this appeal.

The first is that the Judge has not sufficiently determined the objection of the appellant, which was to the effect that the rights of the judgment-creditor, Thakoor Deen Tewaree, ostensibly sold to one Hingun, had really been sold to the co-debtor, appellant's brother, whereby the liability under the decree had become extinguished. On this point it appears to me that the Judge has really found. This was an objection which the appellant was bound to prove clearly to the satisfaction of the Court. He appears to have offered evidence on the point, and the Judge gives fully enough the reasons which evidently have led him to disbelieve that evidence. If the appellant failed to prove affirmatively the fact of purchase by the co-debtor, his objection would fail, and the ostensible purchaser would be allowed to execute the decree. I think, therefore, there is nothing in the objection.

The second objection is one which appears to have more in it. It is this. The Sudder Ameen, finding the appellant to have sold a certain property which came to his hands from his father, has declared that his own peculiar property shall be liable to be sold in satisfaction of the decree. It must be borne in mind that the present appellant has only a transmitted liability, which was originally that of his brother. The brother dying was represented by his father, and the father in turn dying is now represented by the other two sons. According to the terms of Section 203 of the Civil Procedure Code, when the decree is "against a party as the "representative of a deceased person, and "such decree be for money to be paid out "of the property of the deceased person, "it may be executed by the attachment and "sale of any such property, or, if no such "property can be found, and the defendant "fail to satisfy the Court that he has duly "applied such property of the deceased as "shall be proved to have come into his "possession, the decree may be executed "against the defendant to the extent of the "property not duly applied by him in the "same manner as if the decree had been "against the defendant personally." Now, that Section primarily refers to a party who has been substituted before decree for the original debtor, and against him consequently the decree has been passed as representative of such debtor. But it may, I think, be held equally applicable to a person who has become representative of the original debtor in execution-proceedings, but even in such cases the liability of the party against whom execution is sought is limited to the extent of the property which may have come into his hands; and, if it shall be found that property has come into his hands which ought to have been applied to the satisfaction of the debt, and if he fail to account to the Court for his having so applied it to the satisfaction of the deceased person's debts, in such case he will be liable, and may have the decree executed against him to the extent of the property not duly applied by him; the execution can go no farther. It appears that the objection upon this point was raised in the Lower Appellate Court, and has not been adverted to by the Judge.

We are, therefore, bound, I think, to modify the Sudder Ameen's order in the sense of the words which I have just quoted from the 203rd Section, and to that extent to modify the order of the Judge.

The result of this, of course, is that, if the Court should ascertain that any property of the deceased debtor came into the hands of the appellant, it will then lie upon the appellant to show that he has duly applied such property, and, if he fail to show this, then he will be liable to the extent of such property as he has not so applied. Each party will pay his own costs.

Hobhouse, J.—I concur.

The 9th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Issues (Framing of).

Case No. 205 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 9th January 1867, reversing an order passed by the Moonsiff of Naraingunge, dated the 18th July 1866.

Mussamut Kowsullya Dossee (Decree-holder), *Appellant,*

versus

Ram Juggurnath Dey Sircar and others (Judgment-debtors), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Gopal Lall Mitter for Respondents.

The issues are to be framed from all questions of law or fact upon which the parties may be at issue, and are to be collected, not merely from the plaint, nor from the written statements, but may also be taken from the oral statements of their pleaders.

Jackson, J.—I HAVE no doubt that the plaintiff is entitled to possession of this land. He got a decree for land in the occupancy of the defendant; and, under the terms of Section 223 of the Civil Procedure Code, the Court is required to "order delivery "thereof to be made by putting the party," that is, the plaintiff, "in possession thereof, "and, if need be, by removing any person "who may refuse to vacate the same." There was nothing stated in the proceedings in the suit as to any under-tenure or title of the defendant to occupy the land other than the right which he contested with the plaintiff, that is, "who was the malik." It is true that an issue had been framed as to whether the plaintiff would be entitled to khas possession of the land in dispute or not, and that the Court of first instance, which decided the suit, observed that, as the plaint did not expressly ask for khas possession, it was unnecessary to try that issue. That was a mistake, because the issues are to be framed from all questions of law or fact upon which the parties may be at issue, and are to be collected, not merely from the plaint, nor from the written statements, but may also be taken from the oral statements of their pleaders.

In this it would appear that the parties were at issue upon that question, and the Court ought certainly to have tried the issue. But I am of opinion that the decree clearly gave him the right to enter upon the land which was adjudged to him. It is not stated that there were other ryots in possession of the land. Had it been so, the case would have fallen under Section 224.

I think, therefore, the decision of the Judge must be reversed, and that of the first Court restored with costs.

Hobhouse, J.—I concur.

The 9th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Decree—Interest—Unauthenticated records.

Case No. 228 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Rungpore, dated the 2nd February 1867, reversing an order passed by the Principal Sudder Ameen of that District, dated the 25th August 1866.

Rossool Mahomed and others (Judgment-debtors), *Appellants,*

versus

Bassoo Bewah and others (Decree-holders), *Respondents.*

Moulvie Syud Murhumut Hossein and *Baboo Bykunt Nauth Paul* for Appellants.

Baboo Bhuggobutty Churn Ghose for Respondents.

Where the Lower Court gave a decree for 911 rupees with interest, and the Sudder Court modified that decree by giving 1,353 rupees—HELD that the Sudder Court must have meant to give that sum with interest also.

The Court declined to accept, as authenticated papers of the record, papers which bore no signature, no seal, and no other mark of authenticity.

Jackson, J.—UPON the first point mooted before us, I think that the decision of the Judge is right.

This was not a case in which the Court below decreed a sum certain with interest, and that decision being appealed to the Sudder Court, the Sudder Court decreed another certain sum without interest. The plaintiffs sued for a sum of money with interest, and the Court below gave them a decree for that sum with interest, but deducting certain payments which, it was alleged, the defendants had made, and for which they claimed credit. Plaintiffs, being dissatisfied with that part of the decision, appealed specially to the Sudder Court against the deductions. The Sudder Court, thinking the Court below to have been wrong upon that point, reversed the decision on that specific point, and otherwise upheld it. The consequence of that, it seems to me, was that the Sudder Court substituted the larger for the smaller sum of principal money in the decree, and that interest ran on the larger as on the smaller. This case, therefore, I think, does not come within the principle of the Full Bench decision in the VIth Weekly Reporter, page 109. That was a case on which the decree was silent as to interest. Here the decree of the Sudder Court would have to be read for the purposes of execution, together with the decree of the Court below. For it is manifest that the decree of the Sudder Court, if taken by itself, could not have been executed at all.

Then, as to the second point, it is contended that the Principal Sudder Ameen in 1864, once for all, determined this point, namely, that interest was to run upon 911 rupees instead of 1,353 rupees. In support of this contention, we are shown something which purports to be a proceeding of the Principal Sudder Ameen, dated 4th June 1864. That proceeding is not signed by any Principal Sudder Ameen, and has, therefore, nothing whatever to authenticate it as an act of the Court. Moulvie Murhumut Hossein for the special appellant before us contended that that order is authenticated by a subsequent recital in a later proceeding of the same Court, dated 30th June. Now, that later proceeding does refer to an order in which something had been determined as to the amount upon which interest was to run, but it does not say what the amount was, and therefore there is no reason whatever for supposing that this particular paper now before us is the order referred to in the proceeding of the 30th June. This matter appears to have been brought to the notice of the present Principal Sudder Ameen. Upon the argument on this point, I am very much surprised to find the Principal Sudder Ameen saying: "It cannot be considered "that the said order is secured collusively, "because the order of the said 4th June is "incorporated in the order of the subse-"quent date bearing the signature of the "deciding officer." Now, it is not so incorporated, but refers merely to some order as having been made. He goes on: "Such "papers, without signature, are constantly "to be met with in this serishtah which is "only attributable to the negligence of the "amlahs of this Court, and it has in a "manner become a habit with them." That appears to me a very surprising statement for the Principal Sudder Ameen to make. If that doctrine is acted upon to any extent in that Court, it appears to me that the interests of no one are safe, because an order alleged to have been an order of

any Judge of that Court at any time may be produced unsigned and not authenticated, and then the custom of the Court will be referred to as showing that the orders of the Principal Sudder Ameen were habitually left unsigned. I must, therefore, wholly refuse to recognize that so-called proceeding of the 4th June as a proceeding of the Principal Sudder Ameen's Court.

Finding, therefore, no previous decision upon the point, the point is open to decision now. I think, therefore, the Judge was right in holding that interest had to run upon 1,353 rupees as allowed by the Sudder Court.

The decision will be affirmed with costs.

I think that the Judge should enquire into the state of the Office of the Principal Sudder Ameen, and report to what extent the irregularities alluded to by that officer have been allowed to prevail. It seems to me that the interests of suitors will be extremely unsafe if such proceedings are unchecked.

Hobhouse, J.—I concur with my learned colleague.

The decree of the Court of first instance gave a sum of 911 rupees with interest. Then the Sudder Court amended that decree, and, instead of giving a sum of 911 rupees, gave a sum of 1,353 rupees. In the decree of the Sudder Court, no sum of money was expressed at all; therefore, in executing that decree, we must, as best we can, interpret it by the judgment, and by what that judgment actually meant to be done. When, therefore, the Lower Court gave 911 rupees with interest, and the Sudder Court modified that, and gave 1,353 rupees, the plain inference is that it meant to give that with interest also.

On the second point, it seems to me that, had the order of the 30th June said in so many words "that there was a previous order "of the 4th June, and that order was so and "so," then undoubtedly that second order would have been something clear and manifest. But, when it said nothing at all, it did not say what the order of the 4th June was, then that order of 30th June was of no sort of effect at all, for it expressed nothing.

And I entirely concur with my learned colleague that, if we were to accept papers as authenticated papers of the record, which had no sort of marks of authenticity about them, no signature, no seal, and so on, we should be opening a way to fraud of a most gigantic kind.

For these reasons, I concur with my learned colleague.

The 10th July 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Alluvial Lands—Re-formations on two old sites—Possession—Title.

Case No. 3150 of 1866.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 18th of September 1866, reversing a decision of the Principal Sudder Ameen of that District, dated the 30th January 1866.

Muthooranath Muzoomdar and others (Defendants), *Appellants*,

versus

Tarinee Churn Singh (Plaintiff), *Respondent*.

Baboos Mohinee Mohun Roy and *Greeja Sunker Muzoomdar* for Appellants.

Baboo Issur Chunder Chuckerbutty for Respondents.

When land is gradually re-formed on two old sites, identity of site can give no title to the former owners of the two old sites to the land re-formed in such old sites respectively; nor can identity of site give any title to land gradually re-formed, when it is formed by gradual accession partly to one estate and partly to another.

A person in possession of land is *primâ facie* entitled to it, and to all increments to it.

Peacock, C. J.—I do not thoroughly understand all that is said in the Full Bench case reported in the 3rd Weekly Reporter, p. 51, with regard to time and means of identity. But I take it that the meaning of that case substantially is that, when once land has been washed away, the fact of re-formation by gradual accretion on the old site does not vest the newly-formed land in the owner of the old site, but that the newly-formed land belongs, according to the Regulations, to the owner of the land to which it is annexed.

Applying that principle to this case, although the land belonging to Bolorampore was washed away only 5 years ago, and regained by the gradual receding of the river, still the land, having reformed on the old site, did not become the property of the former owner of that site.

Assuming the construction which I have put on the Full Bench case is a correct one, the mere re-formation on the site of Bolorampore did not give a right to the former owner of Bolorampore to the land which was newly formed. But the Judge says: "The Principal Sudder Ameen seems to "have overlooked the one point, *viz.*, that "accretions may form laterally as well as "front ways, which was the case in the "present instance. As the Ganges receded, "land was thrown up which attached itself "to Chitolya on the north and to Bolorampore on the north-west, and there does "not seem to be any good reason under the "law for giving it to one proprietor more "than the other. I think, under these circumstances, as the land clearly occupies "the position of the diluviated land of "Bolorampore, and as the boundary-line of "Chitolya can be ascertained by means of "the Peepul trees, as explained in the "Ameen's report, the land should be disposed of in accordance with that report."

Now, if the law was clearly laid down in the Full Bench case, and we must assume that it was, that identity of site gives no title at all to land formed by gradual accretion when the land is re-formed on one old site only: it cannot, when the land is reformed on two old sites, give any title to the former owners of the two old sites to the land reformed in such old sites respectively; nor can identity of site give any title to land gradually reformed, when it is formed by gradual accession, partly to one estate, and partly to another.

It appears to me, therefore, that the Judge was wrong in saying that, because the land attached itself, partly to Chitolya, and partly to Bolorampore, the title to it was to be determined with reference to the sites of the diluviated lands upon which the reformation took place. It does not appear to have been disputed that the land was gained by gradual accession within the meaning of Section 4, Regulation XI. of 1825. The Judge finds that, as the Ganges receded, land was thrown up, and attached itself to Chitolya on the north, and to Bolorampore on the north-west.

It is clear that the plaintiff is not entitled to any portion of the land which was an increment to Chitolya, whether such increment was formed on the ancient site of Bolorampore or not; nor was he *primâ facie* entitled to recover that portion, if any, which attached itself to the land which was in the possession of the zemindar of Burraimpore. The plaintiff has alleged that the land in question was to the east of land in the wrongful possession of the zemindar of Burraimpore; but he did not prove that that land, which was in the possession of the zemindar of Burraimpore, did belong to the plaintiff. Although the plaintiff alleged that the land was to the east of the land in the wrongful possession of the zemindar of Burraimpore, he did not claim it as an increment to that land; nor did he intend to have it tried in this suit, whether the land alleged to be in the wrongful possession of the zemindar of Burraimpore was the plaintiff's land or not. He merely mentioned that land as the western boundary of the land in dispute. Unless that land did rightfully belong to the plaintiff, the land which, if any, became an increment to it, did not belong to the plaintiff, if the zemindar of Burraimpore was entitled to the land in his possession, he would also be entitled to any increment to it. The identity of site not conferring on the plaintiff a title to the accretion, he clearly could not recover that portion which was annexed by gradual accretion to the land in the possession of the zemindar of Burraimpore, without proving his title to that land. That question was not tried by the Judge.

I think, therefore, that the case must be remanded to the Judge to try upon the evidence in the case whether any and what portion of the land sought to be recovered in this case was annexed as a gradual accretion to land of which the plaintiff was in possession, or entitled to the possession. That will include two questions: *1st*, whether any and what portion of the land in dispute became annexed as a gradual accretion to that portion of the land said to be in the wrongful possession of the zemindar of Burraimpore; and, *2nd*, whether the plaintiff was entitled to that land or to any, and what part of it, or to any other land to which the land in dispute became annexed as an increment. The Judge must try whether that portion of Bolorampore, to which he says that a portion of the land in question attached itself on the north-west, did or did not belong to the plaintiff, and whether

the plaintiff was entitled to the possession of it, and, if so, to find specifically what portion of the land in dispute became attached to that land, or to any land belonging to the plaintiff, and to which he was entitled to the possession.

It may be a very difficult question to determine what portion of the land attached itself as an increment by gradual accretion to Chitolya, and what portion to lands in the possession of, or belonging to, the plaintiff; but the difficulty will not supersede the necessity. The plaintiff must recover upon the strength of the evidence adduced on his behalf; and, if there is no sufficient evidence to prove his case affirmatively, he must fail in his suit. The person in possession of land is *primâ facie* entitled to it, and to all increments to it. It will not be necessary for the Judge to find how much of the Chur gradually attached itself to any particular land unless such land be proved to belong to the plaintiff. The defendant has a good title to the land in his possession as against every body who cannot show a better title. A mere finding that the accretion does not belong to defendant would form no ground for decreeing possession of it to the plaintiff. In order to entitle himself to possession, the plaintiff must show that the accretion, or some part of it, belongs to him, or is an increment to land belonging to him. With these remarks the case is remanded to the Judge.

The costs of this appeal will be reserved until after the decision under the remand.

The 10th July 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Co-sharers—Contribution for Government Revenue.

Case No. 3154 of 1866.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 13th of July 1866, affirming a decision of the Principal Sudder Ameen of that District, dated the 29th November 1865.

Jugobundoo Roy and, after his death, Bhoobun Mohun Roy (Defendant), *Appellant*,

versus

Fyez Buksh Chowdhry (Plaintiff), *Respondent*.

Baboos Hem Chunder Bannerjee, Romesh Chunder Mitter, Kalee Mohun Doss, and *Nilmonee Sein* for Appellant.

Mr. R. E. Twidale and *Baboo Greeja Sunker Mozoomdar* for Respondent.

What was considered a fair principle in assessing a co-sharer's share of the Government revenue paid for the whole estate to save it from sale.

Peacock, C. J.—It appears to me that the defendant is equitably liable to pay a fair share of the revenue which has been paid for the whole zemindaree. He has got a portion of it, namely, 3 villages. The plaintiff has got the remainder of the zemindaree, and says: "I have paid the whole of the revenue, and the defendant has participated in the benefit of my payment in the proportion which his three villages bear to the whole."

It appears to me that the Principal Sudder Ameen has assessed the proportion according to the fairest principles. The defendant says that he ought not to have taken the butwara of 1848 in which the value of the whole estate was found to be 3,834 rupees. That value was admitted by the person who was the owner of the whole zemindaree. The defendant has purchased the three villages under an execution against him, the gross collections of which were fixed at 427 rupees. The Principal Sudder Ameen says that the defendant is fairly liable to pay in the proportion which 427 rupees bears to 3,834 rupees. I think the Principal Sudder Ameen was right in fixing the proportion upon that principle.

I think, also, that there is no ground in point of law for saying that the Principal Sudder Ameen was wrong in giving interest upon the amount which he assessed.

The decision of the Lower Appellate Court is affirmed with costs.

Loch, J.—I would only add that this judgment does not affect the Government right as to the allotment of the jumma, or in any other way; nor, in consequence of the share of the Government revenue payable by the defendant being fixed by this judgment, can the estate be considered a

divided estate. It continues, as before, an undivided estate liable to sale for arrears of Government revenue.

The 10th July 1867.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Evidence—Survey Papers.

Case No. 254 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 26th November 1866, affirming a decision passed by the Moonsiff of Radhanuggur, dated the 31st July 1866.

Gopeenath Singh (Defendant), *Appellant,*

versus

Anundmoyee Debia and others (Plaintiffs), *Respondents.*

Baboos Hem Chunder Banerjee and *Chunder Madhub Ghose* for Appellant.

Baboos Mohesh Chunder Chowdry and *Poorno Chunder Shome* for Respondents.

Certificated copies of survey-measurement chittas, field-books, and maps are admissible in evidence.

Markby, J.—In this case, the plaintiffs claimed certain lands by the names of Rungchar Shola and Nunder Poos Karneer Shola, as their ancestral family-property held by them for the benefit of a family-idol.

The parcel of land claimed was 7 beegahs situate within the limits of a village called Augurra, of the greater part of which the defendants were owners.

The question in this case appears to have reduced itself to one entirely of identity. The defendants admitted that the plaintiffs were possessed of lands bearing this name, but denied that there were any such lands within their village.

To prove the contrary, the plaintiffs filed certain documents: (1) certain measurement-chittas from the records in the Collector's Office, which appear to have been drawn up by an Utbundee Ameen in the year 1242; (2) the thakbust field-book relating to the village of Augurra from the same custody.

The evidence was objected to in the Court below; but the Judge, considering that there was no reason to suppose it had been fabricated, acted upon it, and gave a verdict to the plaintiffs.

The same objection to the evidence has been taken on special appeal, and this is the objection which we have to consider.

The inclination of my own opinion is strongly in favor of the receipt of such evidence. I am informed by my brother Bayley, who has had great experience in these matters, that it has been the general practice to receive such evidence in the Courts of this country for what it is worth, and he considers that weight may fairly be attached to it.

But there is a recent decision on the law of evidence by the Full Bench, which strongly bears on this point. It is reported in the 7th Volume of Sutherland's Weekly Reporter, Civil Rulings, page 338. There one Kanye Lal, as heir of Ramnarain Singh, sued for a declaration of his right of heirship, and for possession of certain lands with mesne-profits. The suit was defended by one Radha Churn, and the short question was whether Ramnarain obtained the property in suit by gift from Jhoomuck Lal, or as Jhoomuck Lal's heir by adoption. In the former case Kanya Lal, in the latter case Radha Churn, would succeed.

As evidence of the adoption, Radha Churn relied on a decree which he had obtained in a suit against the widow to set aside certain alienations made by her. In that case the widow had defended the suit on the same ground as that taken in this case, namely, that her husband Ramnarain took by gift from Jhoomuck, and not as heir by adoption, and that Radha Churn, therefore, was not the person entitled to succeed after her death.

The Court in the suit against the widow found that Ramnarain was adopted by Jhoomuck Lal, and that Radha Churn was entitled to succeed after the widow's death. This decision was affirmed by this Court on appeal. It was contended on the part of

Radha Churn that this was a decree binding and conclusive as against all the world, on the point that Ramnarain was the heir by adoption of Jhoomuck, and not his donee.

The Division Bench, before whom Kanya Lal's case came, thought the decree was not binding and conclusive as against all the world on this point, but because another Division Bench in the case of Rajkisto Roy *versus* Kishoree Mohun Muzoomdar, reported in Volume III. of Sutherland's Weekly Reporter, page 14, which was similar, had held the contrary, they referred the question to a Full Bench.

But the Division Bench did not refer the simple question whether or no the former decree was binding and conclusive, and which, in no way, bears upon the case now under consideration. They also asked the Full Bench whether the judgment in the suit by Radha Churn against the widow *was admissible as evidence* against the plaintiff, and, if so, whether it was conclusive or merely *primâ-facie* evidence against him. This partly involves the same question in a different form, but it also raises another and a very different one; for it is obvious that totally different considerations arise when one comes to consider whether certain evidence is admissible, from those which arise when one considers whether it is conclusive. Indeed, not only are the considerations different, but the two questions do not even appear to me to be connected. The Full Bench, however, entertained the question in the form in which it was presented.

The question whether the decree on which Radha Churn relied was to be considered binding and conclusive as against all the world was very fully discussed, and ample reasons are given for its not being so considered. The rest of the question submitted, with which alone we are at present concerned, is thus noticed in the judgment. In *one* passage, the Court say: "The case has been "fully argued, and we are of opinion that the "judgment was not a judgment *in rem*, "and that it was not admissible in evidence "against the plaintiff." In *another* place, they say: "It is quite clear that there are "no judgments *in rem* in the mofussil "Courts, and that, as a general rule, decrees "in those Courts are not admissible as "against strangers, either as conclusive, or "even as *primâ-facie* evidence to prove the "truth of any matter directly or indirectly "determined by the judgment or by the "finding upon any issue raised in the suit "whether relating to the status, property, "or any other matter." In another place, it is said: "We have no hesitation in "answering both the questions in the negative, and in stating that the judgment of "the 26th September 1853 (that in the suit "against the widow) was not admissible "either as *primâ-facie* evidence or conclusive evidence against the plaintiff upon the "ground of adoption." And again—"There "is no ground upon which it could be held "that the *decree* in such a case would be "admissible merely as *primâ-facie* evidence. "It must either be conclusive as a judgment "*in rem*, or fall within the general rules, "and not be admissible at all upon the question of adoption. If it could be admitted "as even *primâ-facie* evidence, it might "work the greatest injustice by throwing "the burthen on to the defendants, and compelling them to prove a negative, *viz.*, that "the claimant had not been adopted, and "this probably after many years from the "time at which the adoption is alleged to "have been made."

From what I have stated, it appears to me that this is not a decision which is to be considered as a conclusive authority on the whole question determined by the Full Bench within the meaning of the rule of July 1865, but only on the point on which the two Division Benches differed. This rule, which was drawn up for the purpose of regulating the authority to be attached to Full Bench decisions only, relates to references made by a Division Court on points on which it differs from the decision of another Division Court. But the only difference of opinion referred to is on the point of conclusiveness, and it does not appear from the report that that question of admissibility was raised at any stage of the case, until it was sent up by the Division Court to the Full Bench for decision.

But, though I consider that I am, according to law, at liberty to question the propriety of this decision, still it remains as the deliberate expression of opinion of five Judges of this Court. And, although the Judges have not thought it necessary to express their reasons at any length, I cannot but conclude that a question of such vast importance received the fullest attention and consideration; and, though I admit that the reasons have not occurred to me upon which all decrees are excluded as evidence except in the few cases in which they are also conclusive (that is, when, strictly speaking, they

are not used as evidence at all, but as a bar to the suit), yet, after this decision, I have no doubt that these reasons exist, and I should, therefore, feel great hesitation in differing from the opinion expressed by the Full Bench in the case referred to.

And, if I adopt the principle of this decision of the Full Bench, the question of the admissibility of these Government chittas and this thakbust field-book seems hardly doubtful.

On instituting a comparison between the probative force of these documents and the decrees of a regular Court of Law on every point, the advantage seems to me in favor of the latter. Both are the results of enquiries to which the present suitors were not parties, or (as they are called) privies. But one (that which the Full Bench has excluded) is the result of a regular enquiry on which witnesses are examined on oath, which is conducted in public, which is subject to appeal, and which is presided over by an experienced officer acting under the direct superintendence of one or more Courts of Appeal; the others (the admissibility of which we are considering) are the results of enquiries conducted by inferior officers, according to no regular forms, where evidence is not taken on oath, where there is little comparative publicity, and no appeal. Whatever may be the reasons which exclude decrees, they would, I imagine, tell with tenfold force against such documents as these. It appears to me, therefore, that the logical consequence of the Full Bench decision (and, if I adopt the decision at all, I must carry it out to its logical consequences) is to exclude the documents tendered in this case.

On the other hand, I am strongly impressed with the opinion that to carry out the Full Bench decision to its full consequences would be little short of disastrous. Not only such documents as are now before us, but a vast number of papers which have been over and over again received in evidence, must be rejected. Take, for instance, the issumnovisee papers so frequently relied on in cases relating to Ghatwalee tenures, and which are nothing more than the return of a Police Darogah of the result of his enquiries. To a precisely similar category belong quinquennial papers and a variety of other documents, all of which, though inferior in authenticity, it must be confessed, to the decrees of a Court of Law, have yet been usually received in evidence in the Mofussil Courts of this country.

Indeed, it appears to me that in matters which may be called *ancient*, as to which oral testimony is unattainable, to shut out all such documents as those would be, in fact, to shut out every possible means of throwing light on questions which have daily to be investigated. Almost every man's title to land in Bengal ultimately depends on events which happened shortly before and after the Settlement of 1790. Unfortunately, of those events there is none but the most meagre record; none indeed but documents of the very kind which we are now considering; and how are such questions to be decided, if these documents are altogether withdrawn?

And, even with regard to matters of modern date, I think it was pertinently asked by my brother Bayley during the course of this argument—what, if all such documents are excluded, shall we have left but oral evidence? That this is not a desirable result, probably no one will deny; and in all discussions on the law of evidence it seems to me very desirable to consider how that result can be avoided.

That great care is necessary in the reception of such evidence, and that it requires to be carefully weighed and tested, is most undoubtedly true. But I entirely repudiate the notion that any argument in favor of the exclusion of evidence can be founded on the inability of Judicial Officers to perform the task of attributing to it its proper influence in the decision. Such a task, difficult and delicate as it may be, is no more so than many others which every Judge daily must perform; and to exclude this special evidence, because in some cases Judges might found upon it a wrong conclusion, would be utterly inconsistent with the assumption on which all rules of law are founded, that the constituted tribunals are fairly competent to carry them out.

I do not understand how it is possible that any special difficulties can attach to estimating the value of this kind of evidence. Like all other evidence the admissibility of which has been debated—the evidence of parties, of persons interested, of convicts, and a variety of others—the estimation in which it will be held will be derived, in this as in all other cases, from the prevalent opinion among persons of experience, and no other standard of value as applied to evidence is to my mind conceivable.

For these reasons, sensible as I am that I am acting upon a principle at variance with

that adopted by the Full Bench, and with all the diffidence I feel in differing from those able Judges, I concur in the opinion expressed by my brother Bayley that these documents were rightly admitted, and that the appeal ought to be rejected with costs.

Bayley, J.—Mr. Justice Markby has so fully gone into this case that I wish to add but a very few remarks.

The real point which we have to decide is whether certain copies of chittas, *i. e.*, measurement-papers and copy of a field-book of the survey department (these copies being certified by the Collector as taken from the records of his office) are to be received as evidence or not.

Mr. Justice Markby is of opinion that the Full Bench decision in page 338, Volume VII., Weekly Reporter, is adverse to their reception. That decision certainly to my mind lays down that a decree of Court recording a finding of a specific fact (as of adoption in the case cited) on the suit of *A versus B* is not evidence *of that fact* between *A* and *C*. Mr. Justice Markby adds that, if a decree, the result of a solemn adjudication by judicial tribunals, is no evidence of a fact, how can the measurement-papers of a native Ameen, or the field-book made up in a survey-office, be evidence?

I am, however, of opinion that these copies are evidence. In the *first* place, I think that they are admissible in the same way that Her Majesty's Privy Council admitted attested copies of somewhat similar records on the grounds stated in page 137, Moore's Indian Appeals, Volume 7. In the *second* place, I think that, as these papers are the primary records out of which a survey-map is made, they are originally component parts of the map, and that thus they are receivable under Sections 11 and 13, Act II. of 1855, as evidence of the fact of demarcation of lands and properties, measured and surveyed at or about the date of such map, and for the purposes of the records of the State and of litigated questions respectively.

Further, it may be noticed that, before these survey-measurements and survey field-book and survey-map are made, notices are issued, under Regulations VII. of 1822 and IX. of 1825, to parties who wish to be present, and watch that their interests are not prejudiced, so that these records cannot be said to be made in the absence of the parties, for legally they were present when they had the opportunity of being present.

Lastly, I think, under Section 56, Act II. of 1855, the records referred to are admissible, because public officers are not at liberty to give originals to parties; and certificated copies of such official records have always ordinarily been received in this Court as evidence, and acted upon in deciding cases. The whole current of decisions will show this up to that of the Full Bench, 7 Weekly Reporter, page 338.

I would, therefore, receive these survey measurement-papers and field-book, and I do not think the Full Bench decision as to *decrees* touches this case or these copies of chittas and field-book. Consequently, I think that the special appeal should be rejected with costs.

The 10th July 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Suit to convert rents in kind into rents in money—Enhancement.

Cases Nos. 440, 470, 574, and 575 of 1867 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Patna, dated the 13th December 1866, reversing a decision passed by the Deputy Collector of that District, dated the 28th August 1866.

Thakoor Pershad and others (Defendants), *Appellants,*

versus

Nowab Syud Mahomed Baker (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellants.

Mr. C. Gregory for Respondent.

A zemindar may sue to convert rents paid in kind into rents paid in money. The fact of the ryot having paid in kind for a number of years is no bar to enhancement.

Seton-Karr, J.—THREE points are pressed upon us by Mr. Twidale in these four cases on behalf of the defendant, special appellant.

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First, it is said that the notice issued to defendants under Section 13 of Act X. of 1859 was informal and illegal. But a perusal of that document leads us to think that the plaintiff expressed his intention of enhancing the rents which were paid in kind hitherto, because they were below the money-rates prevailing in the neighbourhood, and paid by other similar ryots. This notice, we think, sufficiently indicated on what grounds the plaintiff sought to enhance, and that he meant the defendants to understand that he must no longer pay in kind, but in money.

Next, it is urged that the plaintiff is not entitled to convert rents paid in kind into rents paid in money. But on this point we see no reason for not following the rule laid down by two out of three Judges in the case reported at page 23 of Act X. Rulings of Volume IV. of the Weekly Reporter, in which it is held that a zemindar can sue to convert the rents in this way, and that the fact of the defendant having paid in kind for a number of years was no bar to enhancement. This *second* point, then, we overrule also.

The *third* point is that the plaintiff should have sued, not to obtain enhanced rents under Clause 4 of Section 23, after notice issued under Section 13, but that he should have sued for a kubooleut under the 1st Clause of the above Section.

A suit under this latter Clause would, perhaps, have been more regular; but, as the main point at issue between the parties, *viz.*, the conversion of rents payable in kind into rents payable in money after the fashion of other ryots, was regularly tried, and as the defendant was not prejudiced in any way by the form the suit has taken, we cannot now attach weight to this third objection.

On the whole case we do not perceive any substantial error of law in the Judge's decision, and we dismiss the four appeals with costs.

The 10th July 1867.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Arbitration—Appeal.

Case No. 384 of 1866.

Regular Appeal from a decision passed by the 1st Principal Sudder Ameen of 24-Pergunnahs, dated the 18th August 1866.

Sreenath Ghose (Plaintiff), *Appellant,*

versus

Raj Chunder Paul and others (Defendants), *Respondents.*

Baboos Unnoda Pershad Banerjee and *Obhoy Churn Bose* for Appellant.

Baboos Anund Gopal Palit and *Sreenath Doss* for Respondents.

Suit laid at Rupees 14,999-13-2.

There is no appeal from a judgment given according to an award of arbitrators even if there has been corruption and misconduct on their part.

The neglect of some of the arbitrators to attend meetings of the arbitrators is misconduct within the meaning of Section 324 justifying the setting aside of the award by the Court which appointed the arbitrators, but not by a Court of Appeal.

Macpherson, J.—It appears to me that there is no right of appeal in this case.

The matters in dispute in this suit having been referred to arbitrators, they made an award. The Lower Court, after having heard the objections which the present appellant took to the award, did not "see cause to "remit the award or any of the matters re-"ferred to arbitration for reconsideration," and did not see fit to set aside the award. The Court, therefore, passed judgment according to the award. Section 325 of Act VIII. of 1859 provides that, "in every case "in which judgment shall be given accord-"ing to the award, the judgment shall be "final." These words are sufficiently clear; and due effect has been given to them by this Court, which has more than once held that there is no appeal even if there has been corruption and misconduct (7 Weekly Reporter 205; 2 Weekly Reporter 297).

The appellant contends that the appeal will lie, because there was, in fact, no award.

And two cases (2 Weekly Reporter 297; and 3 Weekly Reporter 168) were referred to as showing that an appeal will lie if judgment has been given *not* according to the award. The case in 2 Weekly Reporter 297 was also relied on as showing that an appeal will lie if the so-called award is, in truth, no award, but is a mere nullity. It is said in the present case, not merely that there were misconduct and irregularities on the part of the arbitrators, but that their award is an absolute nullity, and not an award in law at all: *firstly*, because, although nine arbitrators were appointed, the order appointing them did not provide for a difference of opinion among them, and the decision given was that of the majority only; and, *secondly*, because some of the arbitrators did not attend all the meetings held during the course of the reference, and one arbitrator never attended any meeting at all.

As regards the first objection, there is no doubt that the Court ought to have drawn up a proper order complying with the provisions of Section 316. And in the case of Futteh Singh *versus* Gango, 4 Weekly Reporter 4, this Court did, on appeal, set aside a judgment which had been given according to the decision of the majority of the arbitrators, no provision having been made that, in the event of a difference of opinion, the award of the majority was to prevail. But the circumstances in the present instance are very different. For, in a petition (of the 22nd March 1866) which the appellant presented to the Court, stating that the parties had agreed to refer their disputes to the nine arbitrators, it is expressly added that the parties had agreed among themselves that the decision was to be with the majority. Having given this intimation to the Court, and having allowed the reference to proceed without any objection on the score of no formal order having been drawn up under Section 316, the appellant cannot, after a decision has been given against him by a majority of 6 to 3, for the first time come forward, and be heard to argue that the whole proceedings are a mere nullity for want of the formal order. There may have been an irregularity, but that does not render the proceedings null and void.

In like manner the matters which are the subject of the second objection are, no doubt, grave irregularities; but they do not make the award a nullity. There is no question that it is the duty of all the arbitrators to attend every meeting which takes place; and that they ought all to act together in every stage of the proceedings. And I fully concur in the observations made by the learned Chief Justice in the case of Khelut Chunder Ghose *versus* Tara Churn Koondoo Chowdhry, and reported at page 272 of the 6th Volume of the Weekly Reporter. Such neglect of duty as is alleged to have occurred in the course of the arbitration in this suit would amount, in my opinion, to misconduct on the part of the arbitrators within the meaning of Section 324, and would be a very good ground for setting aside the award. But, nevertheless, the award must be set aside, as provided by Sections 324 and 325, *by the Court which appointed the arbitrators*, and not by this Court on appeal. The misconduct, though it may be a valid reason why the Court should set aside the award, does not make it a nullity. It is to be remarked also that the appellant never raised any objection as to the course of proceeding adopted by the arbitrators, until after the majority had given a decision unfavorable to him.

We have not enquired into the merits of this appeal, but simply decide that, assuming the facts to be such as are alleged by Baboo Unnoda Pershad Banerjee, the pleader for the appellant, the appeal will not lie. I express no opinion whatever as to the propriety or otherwise of the award, or of the judgment passed upon it by the Lower Court.

I think the appeal must be dismissed with costs.

Seton-Karr, J.—I concur in this judgment.

The 10th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Mesne-profits—Onus probandi—Civil Court Ameen (Charges against).

Case No. 234 of 1867.

Miscellaneous Appeal from an order passed by Mr. S. Wright, Principal Sudder Ameen of Dinagepore, dated the 5th April 1867.

Abdool Kureem Biswas and another (Decree-holders), *Appellants*,

versus

Mr. J. D. Campbell (Judgment-debtor), *Respondent*.

Baboos Dwarkanath Mitter and *Jugodanund Mookerjee* for Appellants.

Messrs. R. T. Allan and *J. S. Rochfort* for Respondent.

Where a defendant had, with apparent color of right, occupied newly-formed lands from which the plaintiff ejected him by establishing in a civil suit his superior title, the *onus* was held to be on the defendant to account to the plaintiff for those profits which the defendant had derived from the lands, and which the plaintiff, if he had been in possession, would himself have received.

Charges against a Civil Court Ameen (such as can be readily enquired into, and their truth either disproved or proved) ought to be fully enquired into.

Jackson, J.—In this case, although I cannot accept in full the contention of the appellant's vakeel, I am bound to say that the decision of the Court below is not satisfactory to my mind.

The plaintiff recovered a decree for possession with wassilat of certain lands which the defendant had occupied, maintaining that he was entitled to the use and occupation of them as accretions to his *jote*, or, as the learned Judges of this Court in their decision on the regular appeal say, his "yearly holding." The case is to be found in IV. Weekly Reporter, page 57. The High Court, in making a decree for the plaintiff, ordered that the extent of the area so decreed, and the amount of the wassilat arising from it, were to be determined in execution.

The defendants in this case were the owners of an extensive and important indigo-factory. In concerns of this description, detailed and careful accounts are notoriously kept, and I am bound to say that there is a certain guarantee in the respectability of the owners for the general correctness of such accounts. Therefore, in this case, when it became necessary to enquire into the amount of wassilat or profits derived from the land in dispute, it appears to me that the proper course would have been for the Court to call first upon the defendants to produce their accounts. It would still have been necessary to depute an Ameen to the spot, because the direction of the Court required that the extent of the land should be ascertained, and thus clearly would have to be got at by local measurement. It might also in case of dispute have been necessary to check the accounts filed by the defendants by such observations as an Ameen, on a local enquiry, should be enabled to record, because, without at all imputing want of faith to the accounts which might be filed, there might be facts not fully recorded, or there might be confusion; or, for one reason or another, it might be necessary to ascertain whether the defendant's papers related to the whole of the land in dispute. What the Court did, it seems, was simply to depute a Civil Court Ameen. That Ameen went to the spot, and it is alleged that the defendants there tendered their accounts, and that the Ameen refused to receive them. The Ameen proceeded with his enquiries and measurement, and in course of time made a report. Previous to the receipt of his report, however, the defendants had filed their accounts in the Court of the Principal Sudder Ameen. In these accounts it was made to appear that the wassilat of the land in dispute amounted to 694 rupees, while, upon the report of the Ameen presented three months later, these profits were represented to be over 17,000 rupees. The defendants very naturally presented a petition of objections to the Ameen's report. Now, it is too common to find parties in execution-cases preferring exceptions to the Ameen's report in which the conduct and motives of those officers are very strongly impugned. It is also undoubtedly too much the practice to allow imputations of that sort to be made, and not sufficiently disposed of either one way or the other. Now, the functions of a Civil Court Ameen are very little inferior in importance to those of a Judge. He constantly has committed to him investigations of a most important, most difficult, and most delicate nature, and it is absolutely necessary that the Court should be able to repose implicit confidence at least in his integrity, and, where charges are made of a distinct and tangible nature such as can be readily enquired into, and their truth disproved or proved, it is incumbent upon the Court to make enquiry and to determine positively whether the charges are borne out or not. If such charges are sustained most clearly, the Ameen ought not to be allowed to retain his office, and to go on making other enquiries in other suits to the detriment of the suitors and of the public; whereas, on the other hand, if the charges are not proved, the Ameen ought to be

distinctly acquitted, and proper notice taken of the false charge.

The defendants then in this case, making these charges, expressly asked the Court either to depute a second Ameen; or, if it were impossible or inconvenient to do so, then to determine the matter itself upon the evidence produced by the parties. The Court did neither of these things, for it deputed the same Ameen a second time to make the same enquiry over again. The result, as might have been expected, was that the Ameen put in a second report in which he fully adhered to what he had said on the first occasion. The Principal Sudder Ameen then takes the matter up again, and, without expressly disposing of the charges against the Ameen, he calls his report absurd; and then, observing that the accounts of the defendants had not been with any good reason impugned, makes a decision founded entirely upon these accounts. Now, if the discrepancy between the defendant's accounts and the Ameen's reports had not been so very startling, or if the amount of wassilat shown by the defendant's accounts had been one which to my mind was probable, I should have had little difficulty in affirming this judgment, because, as I have said, I think, in such a case as this, the basis of the wassilat ought to be defendant's accounts, unless they are shown to be falsified accounts. This was not a case in which the defendant had dispossessed the plaintiff. It was a case in which, with apparent color of right, he had occupied newly-formed lands from which the plaintiff ejected him by establishing in a civil suit his superior title. It was, therefore, I think, a case in which the defendant should have accounted to the plaintiff for those profits which the defendant had derived from the lands, and which the plaintiff, if he had been in possession, would himself have received. But I am bound to say that I am not at all satisfied that the amount stated in the defendant's accounts can really represent the true amount of profits derived from this land. I understand the period of wrongful possession to have extended over some five years and six months. The area of land, as stated in the Ameen's papers, amounts to 419 beegahs. Now, it does seem improbable that the Ameen, with an absolute certainty of detection if an enquiry followed, should have made a return to the Court so entirely false as to this area of land. The defendants state the same area as 226 beegahs, being little more than half the amount reported by the Ameen. It is quite clear that there must be something to enquire into, something to account for in this very large discrepancy; and, without imputing any fraud or want of good faith to the defendants, it is quite possible that there may be something in the accounts admitting of explanation, and that, on further probing, it may turn out that the plaintiff is entitled to more than the amount stated in these accounts.

The Principal Sudder Ameen has not distinctly laid down the principle upon which the defendant was to account; it does not appear whether he was to account for rents, or for profits, or for what. The land appears to have been chur-land which, at some uncertain time after its formation, was cultivated with indigo. It is not clear to me that it was cultivated by ryots receiving advances from the defendants, or by the defendants themselves at their own expense, or how.

It seems to me, therefore, that the case must go back to the Principal Sudder Ameen, that he should depute an efficient Civil Court Ameen, with definite instructions to measure the area, to take into consideration the accounts filed by the defendants, and to test the accuracy of those accounts. The Court must lay down, first, upon what principle the profits are to be accounted for, and he will require a report from the Ameen as to the mode in which the lands have been occupied; and, with these materials before him, the report of the measurement, the accounts of defendants, and the observations upon them of the Court Ameen and the other evidence that may be recorded, he will come to a final decision in this case.

At present, I think, we can say nothing as to costs, because this must depend upon the issue.

Hobhouse, J.—I wish to say that I concur in the order of remand that my brother has made. But I have had some considerable hesitation in doing so, because it seems to me that the accounts which were furnished by Mr. Campbell in this case were hardly disputed by the decree-holder, and, as far as I can make out, were the accounts of a large concern which would scarcely have been falsified in order to not paying a certain larger or smaller sum for a very small area of land.

But it does seem to me that in this case the Court below has not carried out the order of this Court in the decree which was originally given, so that we can, as the order now stands, affirm it. The Court was

directed to enquire into two matters: it was to enquire, *first*, what the area of land was; and, *secondly*, what was the amount of wassilat upon that area. Now, the Court has not satisfactorily stated what the area was; and, although it has stated what the wassilat was, yet, as my brother Jackson has observed, it has not told us how it has arrived at the amount of that wassilat.

Then, also, there were certain irregularities or rather omissions, I should say with reference to the investigation which was conducted by the Ameen. Undoubtedly, the result of that investigation is very different from the result of the Court's finding. By that investigation, a very large sum of wassilat is found; by the Court's finding a very small one, quite disproportionately small.

For these reasons I concur in the order of remand.

The 12th July 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Campbell and J. B. Phear, *Judges*.

Estoppel—Rent—Bond.

Case No. 374 of 1865.

Regular Appeal from a decision passed by the Judge of Behar, dated the 15th August 1865.

Mussamut Edun (Defendant), *Appellant*,

versus

Mussamut Bechun (Plaintiff), *Respondent*.

Messrs. W. E. Peacock, R. E. Twidale, and *C. Gregory* for Appellant.

Baboos Dwarkanath Mitter and *Chunder Madhub Ghose* for Respondent.

In a former suit for rent brought before the Collector by *A* against *B*, *B* set up a bond authorizing *B* to deduct a certain portion of his rent and apply it in reduction of the amount due to him on the bond. The Collector held that the bond was genuine. *B* now sues in the Civil Court under the bond. HELD by the majority of the Court (Campbell, J., dissenting) that the decision of the Collector was not conclusive, except upon the question relating to the rent, concurrency of jurisdiction being a necessary part of the rule creating an estoppel in such a case.

Campbell, J.—IN my opinion, the Court below was right in holding that the question, whether the disputed document was genuine or not, had been adjudicated between these parties in the previous suit for rent, and in refusing again to try an issue on that point.

It seems to be clear that the Collector's Court is to all intents and purposes a competent Court of Civil Jurisdiction. The matter stands thus: *A* sued *B* for rent upon an agreement for lease. In answer to that suit for rent, *B* set up another agreement (now called the bond) by which the terms of the original lease were varied, and under the provisions of which no rent was due. The Courts below at first refused to entertain this defence, considering it to involve a matter beyond the cognizance of the Collector. But the Bench of this Court, over which the Chief Justice presided, considering that the defence was a legitimate defence, remanded the case for re-trial on the simple issue whether the document was genuine or fabricated. The Judge then found the document to be genuine; and, on special appeal, another Bench of this Court, in concurrence with the former order of the Court, rejected the appeal. *B* now sues for certain monies due under the document above mentioned, and *A* sets up the defence that the document is fabricated.

No doubt, every fact in any way found in a judgment is not conclusively binding on the parties in every other suit. But I think that the exceptions to the general rule, which binds parties to the finality of decisions once passed between them, may be reduced to two:—

1. Where the Court is a Court of limited jurisdiction, and incidentally decides matters beyond its competence.

2. Where the matters decided are not directly in issue, and are only, as it were, incidentally stated in the judgment.

No doubt, the decision of a Small Cause Court on a question of title is not binding in another Court, nor is the finding of any Court binding on a point in evidence other than the actual issue tried. But it seems to me that the present matter does not come within either of these exceptions.

The issue sent down for trial by this Court in the previous suit was, solely and directly, did *A* make the disputed document or not? The Collector has full jurisdiction as to amount; and the disputed document, though

now called a bond, was, in fact, not a bond, but a document varying the original lease. It recited the lease over and over again, and provided that, instead of carrying out the terms originally stipulated, *B* should recoup himself for further moneys advanced by withholding the rent for a certain period. It was a direct answer to the suit for rent, and no collateral issue, as I think. That seems to have been the view taken of it by this Court in the former suit, and, adopting the expressions then used by the Court, I consider that the issue regarding the disputed document has been once fairly tried between the parties, and cannot be re-tried.

In my opinion, the rules of pleading in our Courts materially differ from those in an English Court. There the parties themselves take broad and general issues. Here the Court frames specific issues. I think that the question pre-adjudicated in the former suit is not the general issue which might have arisen in English pleadings—"Is rent due or not;" but the specific issue sent down by this Court, "Is the disputed document genuine or not"? Also, as in England, there is practically no appeal; there are a variety of modes by which a new trial on a question already adjudicated may be had. Here there is appeal; but, in my view, no suit to re-try in any shape a matter once fairly adjudicated between the parties should be allowed. As my learned colleague does not concur, the case must go before another Judge or Bench.

Phear, J.—This was a suit to recover Rupees 5,000, principal and interest, on account of an advance under a zur-i-peshgee lease which had been cancelled, and also to recover a further sum of Rupees 9,599-12-10, principal and interest, under a bond.

The main ground of defence is that the bond is false and fabricated. The Lower Court refused to enter into the merits of this defence, because "the genuineness of the "bond in suit has already been determined "in the affirmative by the decision of the "Collector of Behar, dated 23rd November "1861, confirmed by the superior Appellate "Courts, under dates 10th February and 21st "July 1864;" and it decreed to the plaintiff the full amount of 5,000 rupees in respect of his first head of claim, together with Rupees 7,926-13-8 in respect of the second, making in all a sum of Rupees 12,926-13-8.

If the bond be genuine and valid, I think that the amount due has been rightly found by the Lower Court. But I also think that Court ought to have tried the issue raised by the defendant as to the genuineness of the bond. It appears that the decision of the Collector in November 1861 was given in a suit for rent brought by the present defendant as lessor against the present plaintiff as lessee. Against the lessor's claim thus made, the lessee set up the bond now in question, by the terms of which the lessor, in consideration of a loan of 10,000 rupees, stipulated that the lessee should apply a certain portion of the annual rent to the reduction of the loan and the payment of the interest thereon. The lessor (present defendant) then, as he does now, alleged that the bond was false and fabricated. An issue was admittedly framed upon this, and decided by the Collector in favor of the genuineness of the bond, *viz.*, against the contention of the present defendant. It is urged before us that the defendant is concluded by that decision as against the present plaintiff, and cannot now be allowed to put the same matter again in issue. In other words, it is said that that decision constitutes a *res judicata* between the parties with regard to the genuineness of the bond for all purposes whatever. It seems to me a sufficient answer to this to remark that the Collector's Court could have had no jurisdiction even to enquire into the validity of the bond, except for the purpose of arriving at a conclusion as to how much of the rent due under the lease had been paid or satisfied. The cause of suit before the Collector was simply rent due and unpaid. That cause of suit has, no doubt, been finally determined between the parties. The issue on the bond was collateral to it, and while the decision of such an issue is, no doubt, final so far as regards the subject of decree in that suit (*see* Chunder Shekhur Deb Roy *vs.* Doorgendro Deb and others, 3 Weekly Reporter, Civil Rulings, page 39), still, I think, as is in the reported case suggested, that the same issue is capable of being raised in reference to any other cause of suit between the same parties.

The matter conclusively adjudicated upon in a suit *inter partes* is generally to be sought only by a comparison of the plaint with the judgment. And for this purpose the plaint is to be taken to be as large and comprehensive with regard to matter of suit as the plaintiff might have made it, except in cases where a separate substantive claim, such as set-off, can and has been pleaded by the defendant as a bar to the relief asked by

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the plaintiff. I believe that no issues other than those to be discovered by the comparison I have mentioned are finally decided between the parties by a decree in a civil suit, and, of course, such a counter-claim to be made at all must be one which the Court could entertain and decide, had it been made the subject of a plaint instead of being set up in defence.

In the instance before the Court, if the Collector's decision finally determined the genuineness of the bond as between the parties to this suit, he has, in fact, adjudicated on the most material part of the cause of action in this suit, and yet it is admitted that he would have no jurisdiction to entertain and adjudicate upon the whole of that cause of action. As I have already remarked, this consideration is in my mind conclusive. But, further, it appears to me that, if all the issues of fact framed and determined by the Court in its progress to its final conclusion are to be held to effect a *res judicata* between the parties for other purposes than the pending suit, we cannot well stop short of saying that every necessary link of the successful party's chain of evidence must be considered to have an adjudicated credibility attached to it for ever afterwards as against the other side, whenever it may be employed against him.

In my opinion, we ought, pursuant to the provisions of Section 354 of Act VIII. of 1859, to refer for trial to the Lower Court the issue whether or not the bond is false and fabricated, and direct that the Lower Court return its finding thereon, together with the evidence, to this Court.

Peacock, C. J.—This was a suit brought to recover Rupees 5,000 as principal and interest on account of a zur-i-peshgee, and also to recover Rupees 9,599-12-10, principal and interest, under a bond. The defendant set up that the bond was false and fabricated, and the issue for determination was, were the sums claimed by plaintiff legally due or not, and, if so, can they be recovered from defendant or not. The Judge of the Court below says that "the genuineness of the bond "in suit has already been determined in the "affirmative by the decision of the Collector "of Behar, dated 23rd November 1861, con-"firmed by the superior Appellate Courts "under dates 10th February and 21st July "1864, and the zur-i-peshgee transaction is "neither questioned nor denied."

The question, then, is whether the Judge was right in considering that the decision of the Collector, that this bond was a genuine one, was conclusive evidence in support of the genuineness of the bond, or whether he ought to have entered into the question whether the bond was or was not genuine.

The circumstances under which the Collector tried the issue as to the genuineness of the bond were these.

A suit was brought by the present defendant against the present plaintiff to recover rent, and in that suit the Collector alone had jurisdiction under Act X. of 1859, Section 23, which says that Collectors, and Collectors alone, shall try suits for rent. In answer to that suit for rent, this bond was set up by the plaintiff in this suit, who was then defendant, and the substance of the bond was this, that, instead of paying the rent, the defendant in the suit for rent, who is now the present plaintiff, should be at liberty to deduct a certain portion of his rent, and apply it in reduction of the amount due to him on the bond. If the bond was a genuine one, it appears that only Rupees 756 were due for the rent. If, on the other hand, the bond was not genuine, Rupees 3,500 were due; so that it was important, for the purpose of deciding how much rent was due, for the Collector to determine whether the bond was genuine or not.

The Collector thought that he had no jurisdiction to try the question as to the genuineness of the bond, and the case then came up to this Court. The Court decided that, as the Collector had jurisdiction to try the question of rent, he necessarily had jurisdiction to try the validity of any document which would be an answer to the payment of rent or any part of it; and this Court decided that the case should go back to the Collector to try whether the bond was genuine or not, and it was expressly added "for the purpose of ascertaining how much of the rent claimed was due."

The case went down, and the Collector upon the trial found that the bond was genuine. From this decision there was a special appeal to this Court, and the decision of the Lower Court was affirmed. The Court held that the Collector was right in adjudicating that only 756 rupees were due for rent instead of 3,500 rupees, and that the Collector had the power to enter into the question whether the bond was genuine or not.

After the decision of the Collector with regard to the rent, the present plaintiff brought this suit, and he seeks to recover Rupees 9,599-12-10, the balance of the principal due upon the bond, and interest thereon. This, then, is a suit which could not be tried by a Collector; it could be tried only by a Principal Sudder Ameen under the directions of the Judge, or tried by the Judge himself. But in either case a regular appeal would lie to this Court upon the merits, and not merely a special appeal.

It was contended that the Judge was bound to admit the judgment of the Collector as conclusive evidence that the bond was genuine. If the Judge was bound to do that, the question as to the genuineness of the bond never could be tried in this Court upon regular appeal upon the merits. If the decision of the Collector is conclusive upon the Lower Courts, it is conclusive upon this Court in appeal; and, however large the amount in dispute is, this Court would be precluded from trying the question, notwithstanding the correctness of the decision of the Collector could not have been brought before this Court in regular appeal. The suit in the Collector's Court was for 3,500 rupees only, and the decree awarded 756 rupees. If the parties had been dissatisfied with the Collector's decision, the regular appeal was to the Judge, with a special appeal to this Court. The decision of the Judge upon the question of fact, whether the bond was genuine or not, would have been final.

If it be held that the decision of the Collector was final, the whole course of procedure, with reference to appeals from the ordinary Courts of Civil Judicature, would be entirely changed. The decision of the Collector would be binding and conclusive upon the facts, however large the amount claimed upon the bond in the suit in the Civil Court, and however small the amount in dispute for rent was in the suit before the Collector, whose decision is now set up as conclusive by way of estoppel. An estoppel shuts out enquiry into the truth, and it is, therefore, very necessary to see whether such an estoppel was caused by the decision of the Collector.

The case which has been cited is the leading case in England upon the subject, *viz.*, the Duchess of Kingston's case. There the Lord Chief Justice of the Court of Common Pleas (Sir William de Grey, afterwards Lord Walsingham) laid down the rule very clearly in answer to certain questions put to the Judges by the House of Lords. He says: "From the variety of "cases relative to judgments being given "in evidence in civil suits, these two de- "ductions seem to follow as generally true: "*first*, that the judgment of a Court of "*concurrent* jurisdiction directly upon the "point is, as a plea, a bar, or as evidence "conclusive between the same parties, upon "the same matter, directly in question in "another Court; *secondly*, that the judg- "ment of a Court of *exclusive* jurisdiction, "directly upon the point, is, in like manner, "conclusive upon the same matter, between "the same parties, coming incidentally in "question in another Court, for a different "purpose."

It is important to observe here that he speaks of the judgment of a Court of concurrent jurisdiction or of a Court of exclusive jurisdiction. Now, the Collector's Court, by which the question as to the validity of the bond was tried, was not, as regards the trial of the validity of the bond, a Court of exclusive jurisdiction, nor was it a Court of jurisdiction concurrent with that of the Zillah Judge. It is clear that the Judge had no power, as a Court of original jurisdiction, to try the question whether the rent was due, or how much was due, because that jurisdiction was taken away from the ordinary Courts of Judicature by Act X. of 1859, and transferred to the Revenue Courts, namely, the Collector or Deputy Collector, and they were made the sole and exclusive Courts for the purpose of trying suits for rent.

On the other hand, the Collector had no jurisdiction whatever to pronounce a decree for a sum of money due upon a bond. As regards the rent, the Collector's Court was one of exclusive original jurisdiction, but, as regards the bond, except so far as it might form an answer to the claim for rent, he had no jurisdiction at all.

It is very important also to see what would be the result of the question of concurrency of jurisdiction were put out of the question. It appears to me to be of much more importance in this country than it would be in England, that, in order to render a judgment between the same parties, upon the same point in one Court, conclusive in another Court, the two Courts must be Courts of concurrent jurisdiction. If it were not so, the whole procedure, as regards appeals, might be entirely changed.

Suppose in an action brought in a Collector's Court for rent a general release of the rent and of all demands of the plaintiff against the defendant should be set up. The Collector would have power to try whether the release set up was a genuine document or not, because he could not determine whether the rent claimed was due, without trying whether the plaintiff had released defendant from paying it or not. The rent claimed might be only for a small amount. If the release were found by the Collector to be genuine, the suit for rent would be decreed in favor of the defendant. But suppose the same plaintiff should sue the defendant for a lac of rupees in the Civil Courts, could it be contended that the decision of the Collector was conclusive as to the genuineness of the release in answer to the suit for a lac of rupees ?

It might be that the suit for rent was for a sum under Rupees 100, in which case it might be tried by a Deputy Collector, with an appeal to the Collector, and no appeal to a Civil Court.

Suppose the release was contained in a deed which also conveyed a large zemindary from the plaintiff to the defendant, and the Deputy Collector should have raised the issue in a suit for the rent, whether the deed was a forgery or executed by the plaintiff. If he should have determined that it was genuine, and his decision were conclusive, it would be conclusive against the plaintiff in a subsequent suit brought against him by the defendant in the Civil Court to recover the zemindary. On the other hand, if the Deputy Collector should happen to hold that it was not a valid document, his decision would be conclusive against the defendant as to his right to the zemindary.

A bond of very large amount might be set up as an answer in a suit in the Moonsiff's Court, or in a Court of Small Causes, for a very small amount ; but it never could be held that a decision in those Courts as to the validity or invalidity of the bond as a defence to the suit would be conclusive upon the Judge in a suit brought upon the bond, and upon the High Court in a regular appeal from a decree in that suit.

It is clear, therefore, that, to render a judgment in such cases conclusive, the Courts must be Courts of concurrent jurisdiction. The validity of an instrument involving a title to lands worth lacs of rupees might have to be tried for some purpose in the Court of a Deputy Collector, with an appeal to the Collector, or before a Small Cause Court from which there is appeal; if the view taken by Mr. Justice Campbell is correct, the decision would be conclusive upon every other Court in which the validity of the same deed might come in question for an entirely different purpose and in a claim for a very large amount.

It appears to me, therefore, that the rule which is laid down, *viz.*, that to render a judgment of one Court between the same parties upon the same point conclusive in another Court, the two Courts must be Courts of concurrent jurisdiction. Concurrency of jurisdiction is a necessary part of the rule which creates an estoppel in such a case.

I do not know precisely how it is that the doctrine of estoppel has been engrafted into the rules of law applicable to the Mofussil Courts. It seems to have been taken from the English Law, without also taking the rule of English Law, that estoppels must be pleaded ; a rule which is not applicable to the Courts in this country.

If is quite clear that, in order to make the decision of one Court final and conclusive in another Court, it must be a decision of a Court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive. Then, would the Collector have had jurisdiction in this case, to give a decree in a suit upon the bond for the balance now claimed to be due upon it? Clearly not. He had power to give effect to it as an answer to the rent, but no power to enforce it in respect of the balance. His Court was, therefore, not a Court of concurrent jurisdiction, and his decision, which was passed for another purpose, would not be conclusive on the Civil Courts.

Sir William de Grey goes further and says: "But neither the judgment of a "concurrent or exclusive jurisdiction is "evidence of any matter which came "collaterally in question, though within "their jurisdiction, nor of any matter in- "cidentally cognizable, nor of any matter to "be inferred by argument from the judg- "ment."

It is unnecessary for me in this case to determine whether the matter did or did not come collaterally in question before the Collector. If it were necessary for me to determine that question, I should say that it did. But I think it unnecessary to deter-

mine that question, because it is clear that the Courts are not Courts of concurrent jurisdiction.

It is also unnecessary for me to determine whether the judgment of a Court of concurrent jurisdiction between the same parties on the same point is conclusive between the parties in another Court in this country, where it cannot be pleaded as an estoppel. I should be disposed to say that the English rule of estoppel ought not to be introduced into the Courts of this country. If the question should ever arise before me, I am at present disposed to think that such a judgment is only *primâ-facie* evidence, and not conclusive.

It is not necessary to allude to that part of the argument in which the judgment of Vice-Chancellor Knight Bruce was cited. If the principle which that learned Judge laid down is held to be law here, and the authority of that learned and acute Judge is entitled to very great weight, the judgment of the Collector in this case was not conclusive. But it was said that the Vice-Chancellor's judgment was overruled by the Lord Chancellor in appeal (1 Phil. 582). The ground upon which that decision was reversed has no bearing upon the present case. The principles laid down in the judgment of the Vice-Chancellor are wholly untouched by the reversal. *See* 2 Smith's Leading Cases, notes, 1470.

A Full Bench case was cited from Sutherland's Small Cause Court Rulings, p. 51, which appears to me to lay down the principle correctly. There it was decided that the Judge of a Small Cause Court had power to try a question of title which arose incidentally in a suit for damages; but it was expressly stated that the judgment would not be conclusive, except so far as it related to the right to the damages claimed in that suit; consequently, that it would not be binding on the Courts which would have jurisdiction to try the question of title.

Another case was cited from the Revenue, Judicial, and Police Journal, Vol. 3, p. 273. That case is not important. There it was merely held that, a mokurruree pottah having been adjudged to be valid in a suit for rent, the party could not sue in the Civil Court for the purpose of showing that the mokurruree pottah was voidable. Possibly, this case may not be correctly reported. The Court said: "We are quite clear that it is not "competent to a zemindar to sue to set "aside a tenant's mokurruree lease, when "once that mokurruree in a suit between "them had been adjudged to be valid, and "a claim for enhanced rent dismissed in "consequence of that finding." Why the Court should have no jurisdiction, simply because the mokurruree pottah had been upheld in a Civil Court, I cannot understand. They say: "As the Courts, there-"fore, in this suit have, on the opinion "expressed above, no jurisdiction, we re-"verse the decree of the Court below; "both parties will, under the circumstances, "bear their own costs." There it was held that the Court had no jurisdiction to try the question, not that the decision was conclusive between the parties. If the former judgment operated as an estoppel, it clearly did not take away the jurisdiction of the second Court. The second Court surely must have had jurisdiction to try the question whether there was an estoppel or not, and also to try whether the facts existed which were necessary to create an estoppel between the parties. An estoppel does not deprive the Court in which it is set up of jurisdiction. There is probably some mistake in the report of the case.

It is laid down in the Duchess of Kingston's case by Sir William de Grey that "fraud is an extrinsic collateral fact, "which vitiates the most solemn proceedings "of Courts of Justice;" and the Judges advised the House of Lords that fraud would vitiate a judgment, and that either of the parties might destroy the effect of it by proving that the judgment was obtained by fraud. I point this out to show that the Courts were not deprived of jurisdiction, for, if so, they could not try the question of fraud.

Upon the whole, then, it appears to me that the Collector's Court and the Judge's Courts were not Courts of concurrent jurisdiction, and therefore that the decision of the Collector was not conclusive, except upon the question relating to the rent.

Mr. Justice Campbell says: "The Col-"lector has full jurisdiction as to amount; "and the disputed document, though now "called a bond, was, in fact, not a bond, but "a document varying the original lease." No doubt, the Collector had jurisdiction to any amount so far as a claim for rent was concerned, but not to decree money due upon the bond, which is the purpose for which the bond is now set up. Though his jurisdiction was not limited so far as the rent was concerned, still it was limited to suits for the recovery of rent.

It appears to me, therefore, that the decision of Mr. Justice Phear was right. I agree with that learned Judge. The case must, therefore, be sent back under Section 354, Act VIII. of 1859, for the Lower Court to try the issue whether or not the bond is false and fabricated, and to return its finding thereon, together with the evidence, to this Court.

The 12th July 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Tenure—Ryot—Sub-lease—Enhancement.

Case No. 467 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 29th December 1866, affirming a decision passed by the Deputy Collector of Baroepore, dated the 1st December 1865.

Uma Churn Dutt and another (Defendants), *Appellants,*

versus

Uma Tara Debee (Plaintiff), *Respondent.*

Baboos Sreenath Doss and *Anund Chunder Ghosal* for Appellants.

Baboos Onookool Chunder Mookerjee and *Romesh Chunder Mitter* for Respondent.

The holding of an intermediate tenures does not remove the holder from the category of ryots whose lands may be enhanced under Section 17, Act X. of 1859; nor does the sub-letting of part of a tenure alter the original character of the ryot's holding.

Seton-Karr, J.—As regards the *first* point raised in special appeal, *viz.*, that the zemindar is barred from enhancing the rents by the terms of the *ikrar* of 1247, we overrule the same without calling on the respondent.

The Judge is quite correct in holding that there are no expressions in the ikrar of Magh 1247, which is the only deed that the defendants can rely on, which create a fixed and unalterable rent.

On the *second* point, the pleader urges that the defendant, though found by both Courts not to be a dependant talookdar, has been found to hold an intermediate tenure, and that his rent, therefore, should not have been enhanced under Section 17 of Act X. of 1859, which he urges applies to actual ryots. After hearing both parties fully, we think that the finding of the Lower Courts as to the character of the tenure does not, in law, remove the defendant from the category of ryots, whose rents may be enhanced under the Section quoted.

The defendant took a potta to clear and cultivate a Soondurbund *chuck* at a progressive rate of rent; and, if he cleared some of the land, not by his own labor, but by settling ryots under him on the said *chuck*, this does not alter the original character of his holding.

The cases quoted at page 16 of the Weekly Reporter, Volume VII., and page 70 of Volume I.; and Revenue Journal, Volume II., page 213, have clearly recognized this principle.

Moreover, we perceive that an allowance has been made in the defendant's favor; and that, in consideration of his clearing and cultivating the grant, he has not been assessed at the rates payable by persons who, as ryots, actually cultivate the lands in the neighbourhood. We have no reason to think these rates other than fair and equitable, or the judgment other than perfectly legal; and we dismiss the appeal with costs.

The 12th July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mesne-profits—Dur-putneedar—Rent—Ejectment.

Case No. 307 of 1866.

Regular Appeal from a decision passed by Baboo Kedarnath Banerjee, Officiating Additional Principal Sudder Ameen of East Burdwan, dated the 30th July 1866.

Digbijoy Chunder Neogy (Defendant), *Appellant,*

versus

Jadub Churn Thakoor (Plaintiff), *Respondent.*

Baboos Mohesh Chunder Chowdhry and *Khetturnath Bose* for Appellant.

Baboo Romanath Bose for Respondent.

Mesne-profits cannot be decreed against a dur-putneedar, nor can rent be decreed in a suit for ejectment.

Glover, J.—This was a suit by a putneedar (purchaser at auction-sale) to set aside the defendant's dur-putnee lease on the ground that it was collusive, and to obtain khas possession of the land.

The Lower Court held that the dur-putnee was valid, and could not be interfered with. It, therefore, refused the plaintiff's prayer for khas possession, but awarded him mesne-profits to the extent of the rent payable to him by the dur-putneedar.

In appeal it is contended that the above order is altogether illegal, and we have no doubt that it is so.

The appellant was found to be in *bond-fide* possession as a dur-putneedar. To demand mesne-profits from him was to do away with this finding, and to treat him as a wrong-doer in illegal possession of land to which he had no title. The Principal Sudder Ameen seems to have had some idea that the rent which the dur-putneedar had to pay could be recovered in the shape of mesne-profits.

It is quite clear that rent cannot be decreed in a suit for ejectment; and that, as the appellant's dur-putnee has been declared valid (a point not contested by the putneedar), the latter's only remedy is a suit under Act X. of 1859 for rent.

We, therefore, reverse the order of the Principal Sudder Ameen, and dismiss the plaintiff's suit with all costs.

Regular appeal No. 399 is, *mutatis mutandis*, the same as No. 307, and is allowed, and the plaintiff's suit dismissed with all costs for the reasons given in our judgment in that case.

The 13th July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Joint Hindoo Family—Alienation of ancestral property.

Case No. 306 of 1867.

Special Appeal from a decision passed by the Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of Bhaugulpore, dated the 15th January 1867, reversing a decision passed by the Moonsiff of that District, dated the 28th July 1866.

Mussamut Bona Koeree (Plaintiff), *Appellant,*

versus

Baboo Boolee Singh and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Gopal Lal Mitter* for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

If a member of an undivided Hindoo family invests the proceeds of the joint ancestral estate in the purchase of other estates, he does so for the benefit of the joint-family. Without the consent of all the members or a legal necessity, or a declaration and acts amounting to a division, he cannot alienate so as to bind even his own share.

Kemp, J.—In this case it is admitted that Bhowanee Pershad lived in commensality and in joint-estate with his two minor brothers. He alienated a portion of the joint-property, and this suit is brought by the mother of Bhowanee Pershad as guardian of his two minor brothers on the allegations: *1st*, that he was insane at the time the alienation was made; *2nd*, that the alienation of joint-property, without the consent of the co-sharers, and not under any legal necessity, was invalid.

The answer was that the vendor, Bhowanee Pershad, was not insane when he made the transfer, and that the property sold was not joint but the self-acquired property of the vendor, Bhowanee Pershad.

The first Court found that the vendor was sane, but that the property conveyed was not the self-acquired property of Bhowanee Pershad but joint, and that, therefore, the

sale, being without consent of the co-sharers, and not under the pressure of any legal necessity, was wholly invalid.

The Principal Sudder Ameen found also that the vendor was not insane, but he set up a case for the appellant which he did not raise himself, *viz.*, that, admitting that the estate was joint, Bhowanee Pershad could alienate to the extent of his share without the consent of the co-sharers.

We think that this finding is wrong and opposed to the Hindoo Law. The answer below was that the property was the self-acquired property of Bhowanee Pershad, not that it was joint, and that he could alienate to the extent of his own share. Both Courts having found that it was not self-acquired, the suit ought to have been dismissed.

The pleader for the appellant admits that there was a nucleus of ancestral property, and that the family are joint and governed by the Mitakshara Law. But he contends that, as Bhowanee Pershad was entitled to take his share of the proceeds, and convert it as he liked, his having mixed up his share with the share of the other members of the family will not deprive him of the power of alienating to the extent of his share. A decision is quoted, Volume II., Hay's Reports, 28th February 1863. In that case it is said that the learned Judges held; that properties acquired with the proceeds of the ancestral property do not become vested with the character of ancestral property, and that they may be alienated without the consent of the co-sharers to the extent of each member's share. It is doubtful whether this is an obiter. The matter being pending on review, it is not binding upon us, and is opposed to the Hindoo Law as laid down in the Mitakshara and the current of decisions on this point. It is also opposed to the decision of the Privy Council, dated 17th November 1866, in which their Lordships observed that, according to the true notion of an undivided Hindoo family, no individual member of that family, while it remains undivided, can predicate of the joint undivided property that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the Collector or bailiff of the rent a certain definite share. The proceeds of the undivided estate must be brought into the common purse, and then dealt with according to the modes of enjoyment of the members of an undivided property.

We think it very doubtful whether Bhowanee Pershad, if he had invested only his own share of the proceeds in the purchase of an estate, could have alienated that estate without the consent of the co-sharers, the proceeds not having been brought into the common purse; but that point is not before us. As manager and trustee for his younger minor brothers, if he invested the proceeds of the joint ancestral estate in the purchase of other estates, he did so for the benefit of the joint-family, and without the consent of all the members, or a legal necessity, or a declaration and acts amounting to a division, he could not alienate so as to bind even his own share. In this view we decree the appeal, reverse the decision of the Principal Sudder Ameen, and restore that of the Moonsiff with costs of all Courts and interest payable by the respondents.

The 13th July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Onus probandi—Enhancement—Lakheraj.

Case No. 316 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 10th January 1867, reversing a decision passed by the Deputy Collector of that District, dated the 29th December 1866.

Nehal Chunder Mistree (Defendant), *Appellant,*

versus

Huree Pershad Mundul (Plaintiff), *Respondent.*

Baboos Bungsheedhur Sein and *Nil Madhub Sein* for Appellant.

Baboo Nubo Kishen Mookerjee for Respondent.

Where there is *primâ-facie* evidence that a tenant holds part of the land sought to be enhanced as paying rent and part as rent-free, the *onus* is shifted from the ryot to the landlord.

Kemp, J.—THIS was a suit for enhancement of rent. It is alleged that the defendant, the tenant, held 78 beegahs 17 cottahs, paying a jumma of Rupees 145-14; that on measurement it is found that he holds beegahs 129-15, which, at the prevailing rate, ought to yield a jumma of Rupees 337-5-16.

The defendant, the ryot, admitted that he was the plaintiff's tenant to the extent of 78 beegahs 5 cottahs as found in a former decision between him and a former putneedar, and that the rest of the area claimed was his lakheraj, ancestral, and purchased. He gave a minute detail of four or five daghs, and of the rest he gave a list of the daghs, and stated that the lands comprised in those daghs, and of which he gave the aggregate area, were released to him under Regulation II. of 1819 as part of a village which he also names.

Now, without going to the length of holding that a bare allegation by a tenant that he holds part of the land sought to be enhanced as paying rent, and part as rent-free, will throw the *onus* on the landlord, we think that, where, as in this case, there is *primâ-facie* evidence that the tenant was in possession of lakheraj land, and he has pointed out what daghs amongst those claimed it consists of, and how he obtained it, and under what circumstances a portion of it was released, he has set up a *primâ-facie* case, and that the *onus* is shifted on the plaintiff. In the Full Bench decision of the 1st June 1863, it was ruled that, in a suit for enhancement, where the defence is that the land or any portion of the land is lakheraj, the plaintiff must prove that the defendant paid rent; and that, if the land has been, in fact, held rent-free, the validity or invalidity of the lakheraj tenure cannot be tried in such a suit. That question should be tried in a suit to resume or assess.

In another case published in Volume V., Weekly Reporter, Act X. Rulings, page 48, the learned Judges, Seton-Karr and Shumbhoonath Pundit, held that "it could "never have been the intention of the Full "Bench that a bare allegation of a defendant "of a rent-free holding was to bar the plaintiff; the meaning must have been that there "should be some *primâ-facie* evidence of an "*ostensible* rent-free title in some portion "of the land for which rent is sought."

Now, in the present case, we have *primâ-facie* evidence of more than an ostensible rent-free tenure. The defendant further points out how he derived it, and when and how it was released by the resumption-authorities. The *onus*, therefore, being clearly on plaintiff, and he not having proved that he has received rent from these lands, his suit ought to have been dismissed, leaving him to sue for assessment or resumption as he may be advised. The judgment of the Judge is reversed, and that of the Court of first instance restored, the special appeal being decreed with costs of this Court and the Courts below, with interest payable by the special respondent.

The 15th July 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Shumbhoonath Pundit and F. A. Glover, *Judges*.

Review of Judgment (Admission of—after prescribed period).

Case No. 3160 of 1863.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 11th August 1863, reversing on a review of the judgment of his predecessor a decision of the Moonsiff of Radhanuggur, dated the 25th January 1863.

Gunganarain Roy (Defendant), *Appellant*,

versus

Gonomoonee (Plaintiff), *Respondent*.

Baboos Kishen Succa Mookerjee, Chunder Madhub Ghose, and *Ashootosh Dhur* for Appellant.

Baboos Banee Madhub Banerjee and *Nil Madhub Sein* for Respondent.

The order of the Lower Appellate Court, admitting a review of judgment after the expiration of 90 days from the date of the decree, without showing whether there was sufficient cause proved to its satisfaction for the delay, was held to be illegal, and was set aside with the subsequent proceedings thereon (Pundit, J., dissenting).

Pundit, J.—WHEN a subordinate Court has admitted a review, I think, under the wording of Section 373, Act VIII. of 1859, the Appellate Court has no power, on the ground of illegality in the admission, to set aside that order, either on a direct appeal from the said order, or during the trial of the appeal from the decision ultimately passed by the said subordinate Court after admitting the review.

The Appellate Court, if hearing the regular appeal, may, either on facts or on a law-point, pass orders, by which virtually the former order reviewed and reversed by the subordinate Court may be confirmed, and the same may be done in course of the trial of the appeal from the subsequent decision, by the Court which can hear only appeals on special grounds of law. The latter Court may order, if it deem necessary for the ends of justice, the re-trial of a case in which the subordinate Court may have refused to allow a review. But these are orders which the Appellate Courts pass as the orders they think proper to pass in the appeals tried by them, and not as appeals against the admission or rejection of reviews by the subordinate Courts. In this case, apparently, the decisions passed first by both the Lower Courts were rather unjust orders, and the decision passed in review is, perhaps, a proper one. That, however, does not remove the objection that the review was applied for long after the 90 days originally allowed, and so could only be admitted on reasonable and good cause being shown for the delay. The Lower Appellate Court may have been tempted to admit the review in this case owing to the injustice of the form or orders; but rules and regulations cannot be allowed to be set aside for any special case, and require greater respect than any justice or redress to an individual. It would be, no doubt, a serious evil if there be no check against the abuse which a subordinate Judge may make of the power to admit a review against his own order, or that of his predecessor; the more so that now the necessity of obtaining the sanction of the superior Court has been done away with. The finality of a judgment passed, and not appealed, will become worthless, and all property will become comparatively endangered. It is, however, to be borne in mind that it is only when, after admitting a review, the former order is reversed, that any real injustice can be committed, and that practically the abuse of such a power by a Court of first instance is easily redressed by the next Appellate Court when hearing an appeal against the ultimate decision passed by the first Court after admitting the review. If the Legislature has not, however, given to the Appellate Court any power to judge in appeal of the propriety of the exercise of the discretion allowed to the subordinate Court in admitting a review filed within or after 90 days, the former cannot, on the ground of expediency, assume the powers in the face of the express terms of the law.

There is a possibility of redress by an appeal from the original order, when a review is disallowed against it. If the law is as I read it, it would be better it should be so altered that the finality of the order of a Court regarding reviews be confined only to their rejection, and not at all allowed to remain attached also to the admission of reviews. I fear our hands are tied from giving any redress to the party to whose prejudice a review may have been irregularly allowed, and against whom by that proceeding the decree in his favor may have been set aside; but, if there be any ground to suspect anything wrong in the conduct of the Judge who may proceed in this manner, or he be found too fond of exercising such powers, he can be taught a proper lesson by the English Department; and, if further steps are necessary, his conduct may be brought to the notice of the Government officers empowered to remove, suspend, or degrade him. I fear we cannot allow this special appeal on the ground that the review was admitted after 90 days without any reasonable cause being shown. If this Court has any such power, it will have to notice, not only, as in this case, that no notice was pleaded to and recorded by the subordinate Court admitting the review, but, when reasons for admission may be recorded by it, to examine also whether these are valid or improper grounds.

Now, it is evident that, as the law does not require a Court admitting a review to *record* the special reasons for admitting generally or for admitting it after 90 days, by a fiction of law, we may suppose that reasons for delay in this particular case were laid before and examined by the subordinate Court, and were considered by it to be good before the order for admission was recorded. The case is quite different when a Lower Appellate Court may, without recording any reason, admit an appeal preferred after the original time allowed for appeals. In such a case, after the Lower Appellate Court has decided the appeal, if it

decides in favor of the appellant before it, the party against whom the appeal was admitted may come up to the second Appellate Court, and plead that the appeal before the Lower Court was admitted after time without any reasons being recorded for the same. The orders of a Lower Appellate Court admitting an appeal under such circumstances, not being made final by any law, the second Appellate Court may allow the objection of the appellant before it when no reasons are given by the Lower Appellate Court for admitting the appeal after time. It may, however, be doubtful whether the second Appellate Court can, in an appeal before it, try also whether the reasons, as given by the Lower Appellate Court for admitting such an appeal, are good or bad grounds. The doubt is based upon the necessity of understanding the facts and circumstances of a case, before the second Appellate Court can discover the weight and application of the reasons given by the subordinate Court; and, as the former Court is not empowered to find facts, it will have to assume them as found by the latter, and so particularly when certain facts are not found at all by the Lower Appellate Court, it will find itself completely disabled from properly determining whether the discretion exercised under a law by the subordinate Court has or has not been rightly used.

Before deciding this point, regarding the power of an Appellate Court to decide whether any review has been legally admitted, when admitted within, or, rather specially, when admitted after 90 days, it is also necessary to see whether the Appellate Court, when trying the appeal from an order passed in review, is prohibited from revising the last order of a subordinate Court, if that Court has reversed a decision after granting a review, without serving any notice upon the opposite party. The Appellate Court will not, I think, before the review is decided below, allow any party to appeal on the ground that the review has been admitted against him without serving any notice upon him; but still the question remains, what is to be done if, the former decree being reversed in review, the party cast comes and pleads in appeal that the review was wrongly admitted below? He may have been present during the re-trial of the case after review; but he could only then be heard on the merits of the case, and not allowed to question the propriety of admitting the review. It is, however, an extreme case, but still a possible one. To be consistent, I am obliged to say that, perhaps, in this case also, the Appellate Court cannot intervene.

I do not question the expediency of such powers being granted to the Appellate Courts. I think such powers are very desirable, and, if given, are likely to do much good, and cannot do any harm. But the present question is to decide whether the Appellate Courts enjoy such powers. I will be glad to see it decided authoritatively that the Courts have this power; but, when I am required to construe the law, I am compelled to say that the present law has taken away such powers from Appellate Courts. I cannot, therefore, in this special appeal, find any legal ground to interfere with the order passed by the Lower Appellate Court.

Glover, J.—The question before us in this case is whether the Principal Sudder Ameen was legally justified in admitting a review of judgment.

It appears from the record that the Court of first instance decided the case in favor of the defendant, which order was confirmed in appeal by the Principal Sudder Ameen on the 3rd of July 1862. On the 5th of February ensuing, or almost eight months afterwards, another Principal Sudder Ameen admitted a petition for a review of his predecessor's judgment, and reversed that judgment accordingly.

This point is not taken in special appeal; but, as it is patent on the face of the record, and, moreover, involves a question of jurisdiction, we proceed to consider it *proprio motu*.

Section 377, Act VIII. of 1859, lays it down in very express words that no application for review of judgment shall be reviewed beyond the period allowed, *viz*, 90 days, "unless the party preferring the same "shall be able to show just and reasonable "cause to the satisfaction of the Court "for not having preferred such application "within the limited period." Section 378 follows the decision of this point, and the Judge's order on an application *once* allowed to be filed is, no doubt, final; but, before any order, either for rejection or admission, can be passed, the provisions of Section 377 must be carried out, and sufficient cause must be shown for the delay in bringing forward the application.

In the present case, no such cause is shown. In fact, no notice whatever is taken of the circumstance that, instead of three

months, nearly eight had elapsed since the date of the former Principal Sudder Ameen's judgment.

Under these circumstances, the review was clearly illegal; and, that being so, we are not necessitated to examine the grounds for admitting it which the Principal Sudder Ameen has propounded, or to determine whether there was any *evidence whatever* on which to grant the indulgence sought for.

The precedent of this Court, No. 381 of 1863, decided on the 24th of February last, is in point, and bears out my opinion in the present case.

The Principal Sudder Ameen's order, admitting the review having been passed in direct contravention of the law as laid down in Section 377 of the Civil Code, must be quashed, and his predecessor's decision of the 3rd of July 1862 revived.

The special respondent will pay all costs incurred.

Peacock, C. J.—In this case I agree with Mr. Justice Glover, and think that the decision of the Privy Council, Maharaja Moheshur Singh *versus* The Bengal Government (7 Moore, page 283), although not decided upon Act VIII. of 1859, has a very strong bearing on the case.

In that case the Privy Council held, in accordance with the rules laid down in Regulation XXVI. of 1814, Section 4, that a delay of 5½ years on the part of Government in applying for a review of judgment, without satisfactory cause being shown for the delay in presenting a petition of review, was fatal; and an order granting a review made by two of the Sudder Judges sitting as Special Commissioners of Revenue under Regulation III. of 1828, and all proceedings subsequently taken under it, were reversed on appeal by the Judicial Committee of the Privy Council as having been improperly granted after the long delay.

It appears to me that, upon the principle of that case, the order of the Principal Sudder Ameen admitting the review, without showing or stating that he was satisfied that there were any good reasons for the delay in presenting the petition of review, cannot stand.

It is contended that, under Section 378, Act VIII. of 1859, the order of the Principal Sudder Ameen in this case is final, and cannot be reviewed by the High Court. That Section says: "If the Court shall be "of opinion that there are not sufficient "grounds for a review, it shall reject the "application; but, if it shall be of opinion "that the review desired is necessary to "correct an evident error or omission, or is "otherwise requisite for the ends of justice, "the Court shall grant the review."

By that Section two cases are provided for, *1st*, when the Court thinks there are no sufficient grounds, and rejects the application; and, *2ndly*, when it thinks that there are sufficient grounds, and grants the review. The Section goes on to say, "and its order "in either case, whether for rejecting the "applicatton or granting the review, shall "be final."

The order in this case would be final so far as it decided either that there were or that there were not sufficient grounds for review; but the question is whether the Principal Sudder Ameen had power to grant a review upon an application made after the expiration of 90 days from the date of the decree, without showing that there was sufficient cause proved to his satisfaction for the delay.

Section 377 says: "The application "shall be made within 90 days from the "date of the decree, unless the party pre-"ferring the same shall be able to show just "and reasonable cause, to the satisfaction "of the Court, for not having preferred "such application within the limited pe-"riod."

The Principal Sudder Ameen has not stated that the party did show just and reasonable cause for not making his application within the period of 90 days; and it appears to me that he was not authorized to enter into the grounds for the review until he was satisfied that there was reasonable cause for the delay. If the Principal Sudder Ameen had power to admit a review in this case, he would have the same power 20 years hence, and any Principal Sudder Ameen might review a decree passed by his predecessor 20 years ago, without any cause for the delay in making the application being shown, or without pledging himself that the cause, if any, assigned for the delay is, in his judgment, sufficient.

Section 376 says that a review of judgment may be applied for "from which no "appeal shall have been preferred to a supe-"rior Court." Suppose an appeal has been preferred to a superior Court, the Principal

Sudder Ameen would have no power to enquire whether there were sufficient grounds for admitting a review or not. If a Principal Sudder Ameen were to admit a review after an appeal has been preferred, his subsequent proceedings would fall to the ground: so I apprehend his subsequent proceedings must equally fall to the ground if he were to grant a review upon an application made after the expiration of 90 days, without showing that he was satisfied that there were sufficient grounds for the delay. Not having stated that he was satisfied that there was just and reasonable cause for the delay, I think that, according to a fair and reasonable construction of Section 378, his order granting the review was without jurisdiction, and consequently cannot be final.

If sufficient grounds for the delay in presenting the application for review of judgment had appeared, there might be some reason for remanding the case to the Lower Court to enquire into those grounds. But in this case it is not necessary to do so, because the grounds stated by the applicant in his own petition do not appear to be just or reasonable.

The review having been admitted after the expiration of 90 days, without any just or reasonable cause having been shown to the satisfaction of the Court for not having preferred the application within the limited period, it will be ordered that the order admitting the review and the subsequent proceedings thereon be set aside, and that the decision of the 3rd July 1862 will stand good. The respondent will pay the costs of this appeal.

The 16th July 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Suit for Kubooleut.

Case No. 2665 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 26th July 1866, reversing a decision passed by the Deputy Commissioner of Hazareebaugh, dated the 28th April 1866.

Maharajah Ramnath Singh Bahadoor (Plaintiff), *Appellant,*

versus

Huro Lall Pandey and others (Defendants), *Respondents.*

Baboos Kishen Kishore Ghose and *Jugodanund Mookerjee* for Appellant.

Baboo Gopeenath Mookerjee for Respondents.

Until the right to assess has been properly determined, a suit for a kubooleut will not lie under Act X. of 1859.

Macpherson, J.—THIS is a suit for a kubooleut, and to fix the amount of rent to be paid for the half of Mouzah Soopaye. The suit is instituted under Clause 1, Section 23 of Act X. of 1859.

In 1863, the Civil Court decided that the plaintiff had no right to eject the defendants from this half village. That suit was brought to recover possession of the whole mouzah. As to one-half of the mouzah, the plaintiff obtained a decree; but, as to the other half which alone is the subject of the present suit, the plaintiff's claim was dismissed. It is unnecessary to refer to the proceedings in the former suit, save so far as they relate to the half in respect of which a kubooleut is now sought for. As to that half, the plaintiff in his plaint stated that Sewram Pandey, through whom the defendants make their title, received it from the ancestor of the plaintiff as *khyrat on condition of performing poojah;* and that, on Sewram Pandey's death, the *defendants refused to perform Davee poojah, the condition by which their tenure was held.* The defendants pleaded that the land was given to Sewram *as khyrat Bishen Preet,* rent-free, and without any condition annexed; and they denied that Sewram in his life-time—his death had taken place more than 14 years previously—ever performed any service as alleged. The Court held that the half mouzah was given to Sewram, on the condition of his performing the poojah alleged, and also that Sewram did, in fact, perform the service so long as he lived. But the Court also held that "the time for suing for the half "village given to Sewram Pandey has lapsed, "the plaintiff not bringing any proof that the "suit has been brought within twelve years "of the date of Sewram's demise," and the plaintiff got a decree for possession of only the *other* half of the mouzah. The Court

added, however, "This decree will not debar "the plaintiff from the right of assessing the "half village," which is the subject of the present suit.

The Court of first instance (presided over by the same officer who tried the former suit) has held that the decree in the former suit, not having been appealed against, declares and is conclusive as to the plaintiff's right to assess rent on this half mouzah; and he has given the plaintiff a decree accordingly.

On appeal the Judicial Commissioner reversed this decision, holding that the right to assess rent had not been in issue, and had not been decided in the former suit, and being of opinion that, until the right to assess had been properly determined, a suit under Act X. for a kubooleut will not lie.

The Judicial Commissioner is right. For, *in the first place*, the judgment of the Civil Court in the former suit does not, in fact, contain any declaration of the plaintiff's right to assess, but, on the contrary, expressly leaves that right an open question; and, *in the second place*, if the judgment did, in fact, contain any such declaration, it would be an extra-judicial declaration, and in no way binding on the parties in the present suit. The question of the liability of this half mouzah to an assessment of rent upon it is open and undetermined at the present moment; and the Deputy Commissioner seems wholly to have misapprehended the nature and effect of his own decree in the civil suit.

Under these circumstances, the suit for a kubooleut will not lie (*see* I. Weekly Reporter 15; III. Weekly Reporter 3 (Act X.); V. Weekly Reporter 62 (Act X.).

The appeal is dismissed with costs.

Seton-Karr, J.—In this case the plaintiff has sued the defendant under Clause I., Section 23 of Act X. of 1859, to obtain a kubooleut, and to fix the rent of one-half of a mouzah.

The ground of action was a certain civil suit which had been decided between the parties, in some measure in the plaintiff's favor, in April 1863.

The first Court has decreed the present claim.

The Judicial Commissioner has reversed that decision on the ground, apparently, that the suit is not cognizable in the Revenue Court at all, and that the civil suit of 1863 gives it no such jurisdiction.

The appeal before us really turns on the point of the rights of the parties, and of the precise situation in which they were left by the decision of the 11th of April 1863 of the Deputy Commissioner, against which no appeal was ever preferred.

In that suit the plaintiff, now special appellant before us, sued for possession of a whole village of which he said that one-half was held by the defendant on a lease which had expired, and the other was held on the tenure of service, which took the shape of worship, to be performed by the grantee on behalf of the plaintiff.

The defendant made no contest in regard to the half of the village of which the lease had expired, but urged that the other half was held, not on any service-tenure, but as *khyrat*, or pure charity.

It is with this last half that the present case is concerned.

The Deputy Commissioner ruled, in the civil suit already alluded to, that the plaintiff could not get actual possession of this half of the village, inasmuch as he had not sued within 12 years from the date of the grantee's demise, but the Court also held that the plaintiff, and not the defendant, had correctly described the nature of the tenure, and that the village had been given as *khyrat*, but coupled with the condition of performing poojah.

In this view of the case, the Deputy Commissioner, as a Civil Court, gave plaintiff possession of the one-half of the village of which the lease had expired, and refused actual possession of the other half, adding these words: "This decree will not, however, debar the plaintiff from the right of assessing the half village in possession of the defendants Nos. 1 to 5 for rent." These latter expressions seem to me altogether extra-judicial, and to form no part of the actual judgment or decree which was half in favor of, and half against, the plaintiff.

The points really decided by the Deputy Commissioner were, *first*, that the tenure was not a free gift, but one granted for service to be performed; and, *secondly*, that the plaintiff could not get actual possession of that half of the village.

In this state of things, it is not easy to see how the plaintiff, by the decree in question, became entitled to sue the defendant for a kubooleut so as to force him to pay a money-rent for the half of the village, in

place of that service which the Civil Court found that the plaintiff was entitled to demand. Baboo Kishen Kishore contends that, under the form of the action now brought, or as a matter of general right, his client, the plaintiff, is entitled to raise this question, and to convert the service into a payment in money.

No cases are within our knowledge which directly support any such contention.

Baboo Kishen Kishore for the special appellant has certainly brought to our notice the cases reported at page 1812 of the Sudder Dewanny decisions for 1857, and page 1609 of the decisions for 1858. But these cases do not appear to be in point. They merely rule that, when the services of ghatwals are no longer required, the zemindar is competent to resume a ghatwalee tenure.

In the case before us, the effect of the civil suit has simply been to leave the defendants in possession of one-half of the village, and to declare that the plaintiff is barred by limitation from obtaining possession of the same. The decree does not settle the plaintiff's right to demand rent. It merely says extra-judicially that he shall not be debarred from assessing rent, and we must construe this to mean that he would not be debarred from any such right, provided it already existed. As no authority has been shown us for the existence of any such right in the form in which it is now put, or under the action for a kubooleut as brought by the plaintiff, and as we see nothing to lead us to think that the Judicial Commissioner's decision dismissing the suit as brought is wrong in law, I would dismiss the appeal with costs.

The 16th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Sale of rights in mehal—Rights of purchaser—Declaratory decree.

Cases Nos. 3184 and 3197 of 1866.

Special Appeals from a decision passed by Mr. F. J. Cockburn, Judge of Sylhet, dated the 28th September 1866, reversing a decision passed by Baboo Ram Coomar Paul Chowdhry, Officiating Sudder Moonsiff of that District, dated the 2nd June 1866.

Newaz Mahomed and others (Plaintiffs), *Appellants,*

versus

Bhagoo Shikdar and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellants.

Baboo Nursingh Chunder Mitter for Respondents.

A person claiming as purchaser of the rights of another with whom a mehal was settled, and as entitled to have those rights confirmed, and to sue any person who set up a title which threatened to disturb his possession, is entitled to a declaratory decree, and to be registered in the Collector's books as the rightful owner.

Jackson, J.—THE special appellant's pleader in these two cases has shown, and the vakeel for the special respondent admits (which does him much credit), that in this case the Judge has entirely miscarried. He has given one decision in both cases upon grounds which, in the case of No. 3184, being the case in which Newaz Mahomed and others were plaintiffs, are wholly insufficient, and which in the other case are entirely inapplicable, and which, in fact, would go to support a decision the other way.

It appears that the suit relates to a mehal which is registered in the Collector's office of Sylhet as No. 1415. Newaz Mahomed and others alleged that they had purchased, on the 2nd September 1863, the rights of Gunga Pershad in that mehal, the conveyance having been made under the direction of Gunga Pershad by a person named Appa Ram, who was *benamee* holder for him. It was also alleged that, upon the proceedings in execution of a decree at the suit of Kisto Mohun Surmah, the rights of Gunga Pershad having been put up for sale, the plaintiff again purchased those rights. But Bhagoo Shikdar and others, who are the defendants in this suit, and plaintiffs in a suit of their own, alleging a purchase from Appa Ram above mentioned, made application to the Collector to register their names as the owners of this mehal, which application the Collector complied with in June 1865. Thereupon Mahomed Newaz sued to have that registration set aside as affecting his quiet possession of the talook, while Bhagoo Shikdar, on the other hand,

sued to set aside the alleged conveyance of Newaz Mahomed. Upon Newaz Mahomed's suit, a decree was given for the plaintiff by the Court of first instance. The Judge set aside that decree upon the ground that the suit would not lie. He says that the Collector is at liberty to settle with whom he pleases; that the plaintiff, if he has been injured by any body, may sue. (He does not say in what form or for what he n ay sue the person by whom he has been wronged.) He, therefore, upon that ground, sets aside the Moonsiff's decree in Newaz Mahomed's case; while in the case of Bhagoo Shikdar, which the Moonsiff dismissed, the Judge, upon the grounds already stated, reversed the Moonsiff's decision, and decreed the appeal.

Now, it appears to me that, whether or not the Judge was right in thinking that Newaz Mahomed's case was fit to be dismissed, on the ground that he had no cause of action, and could not sue, these grounds would not suffice for setting aside the decree of the Moonsiff in the other suit. The Judge, however, appears to be in error in thinking that the Collector was at liberty to settle with whom he pleased. The original person with whom this mehal was settled had acquired rights which were capable of being sold. Plaintiff claimed that he had acquired those rights by purchase, and that he was entitled to have those rights confirmed, and to sue any person who set up a title which threatened to disturb his possession. He was entitled, at least, to a declaratory decree; and, as far as I can see, he was entitled to have it registered in the books of the Collector that he, and not the intruder, was the rightful owner.

I think, therefore, that both cases must be remanded in order that they may receive attentive consideration from the Judge, and that a proper decision may be passed in each case.

Hobhouse, J.—I concur.

The 16th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Onus probandi—Suit for possession by landlord.

Case No. 6 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 4th October 1866, affirming a decision passed by the Moonsiff of Radhanuggur, dated the 9th July 1866.

Gudadhur Banerjee (Plaintiff), *Appellant,*

versus

Kanye Dekhooria and others (Defendants), *Respondents.*

Baboo Bungshee Dhur Sein for Appellant.

No one for Respondents.

When a landlord sues for possession of land within his estate, the *onus* is on him to prove that he is entitled to that possession.

Jackson, J.—I THINK the special appeal is groundless.

The appellant urges that the *onus* has been wrongly thrown upon him, though he was plaintiff. He says so, because in his opinion he, being the landlord suing for possession of the land within his estate, is *primâ facie* entitled to recover; and it lies on the defendant to prove his right to withhold the lands. It appears to me that the landlord is entitled to no such privilege. The landlord was *primâ facie* entitled probably to recover his rent; he is not *primâ facie* entitled to get possession of the land, unless he proves that he is entitled to that possession.

I think the special appeal must be dismissed.

Hobhouse, J.—I concur.

The 16th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Section 153, Act X. of 1859—Construction (of words "otherwise vary").

Case No. 7 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by Mr. W. T. Macdonell, Judge of Nuddea, dated the 3rd October 1866, affirming a decision passed by Baboo Hobima Chunder Paul, Deputy Collector of that District, dated the 24th November 1865.

Anund Chunder Deghee (Defendant), *Appellant,*

versus

Nubo Coomar Chatterjee (Plaintiff), *Respondent.*

Baboos Hem Chunder Banerjee and *Khettur Mohun Mookerjee* for Appellant.

Baboos Mohendro Lal Shome and *Bhugobutty Churn Ghose* for Respondent.

The words "otherwise vary" in Section 153, Act X. of 1859, are meant to include abatement claimable by the ryot; and this reservation is made in respect of questions of right to vary the rent whether raised by the landlord or by the tenant.

Jackson, J.—This case has been argued with much fairness by Baboo Hem Chunder Banerjee. But it appears to me that the decision of the Zillah Judge is right.

Plaintiff sued for a certain amount of rent alleged to be due from the defendant, which amount plaintiff stated he found entered in his *lowazima* papers of the mouzah in which the defendant held. The evidence was to the effect that, the plaintiff being a new landlord, the ryots had been called together, and had agreed to a general increase of the rents which it appears was to the extent of two annas per beegah. It seems to have been found that the defendant, like the other ryots, had agreed to this increase; and that, in consequence of such agreement, the rent demandable from him was 19 instead of 17 rupees. Upon this finding, the Deputy Collector gave the plaintiff a decree for the rent sued for; and, on the appeal of the defendant before the Judge, objection was raised by the zemindar (who is respondent) that the Judge had no jurisdiction to try the appeal. The objection was allowed by the Judge, and the question is whether the Judge was right or no. It is contended that, in the suit before the Deputy Collector, there was decided a question of "varying," by which Baboo Hem Chunder Banerjee now states that he means a question of "right to vary" the rent of the ryot. The words of Section 153 of Act X. of 1859 are these: "Unless in any such "suit a question of right to enhance "or otherwise vary the rent of a ryot or "tenant, or any question relating to a title "to land or to some interest in land as "between parties having conflicting claims "thereto, has been determined by the "judgment." It appears to me that the words "otherwise vary" are meant to include that which is the converse of enhancement, namely, abatement which is claimable by the ryot, and that this reservation is made in respect of questions of right to vary the rent whether raised by the landlord or by the tenant. I think that the question of the right to vary the rent is a question whether the tenant shall be called upon to pay, or the landlord to accept, irrespective of his own will, a different rate of rent from that which has been formerly paid by agreement. In this case it appears to me that no such question was raised or determined. The allegation in substance was that the defendant agreed to pay the rent claimed; and, in the opinion of the Deputy Collector, the evidence showed that he had so agreed. This, it seems to me, was a question of fact, and not a question of any right, and consequently I think the appeal lay to the Collector, and not to the Judge. At the same time, it appears to me that the appellant ought not to lose his remedy or the chances of a possible decision in his favor by the proper Appeal Court. It seems to me, therefore, that this appeal, which was instituted in the Judge's Court, ought by our order to be made over to the Collector, in order that he may enquire into it, and decide the points at issue.

Hobhouse, J.—I concur.

The 17th July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Partition—Hindoo Law—Places of worship and sacrifice.

Case No. 396 of 1866.

Regular Appeal from a decision passed by Mr. L. W. Hutchinson, Principal Sudder Ameen of Dacca, dated the 3rd August 1866.

Anund Moyee Chowdhrain and others (Defendants), *Appellants,*

versus

Boykantnath Roy (Plaintiff), *Respondent.*

Baboos Onookool Chunder Mookerjee and *Chunder Madhub Ghose* for Appellants.

Baboos Sreenath Doss and *Romesh Chunder Mitter* for Respondent.

Under the Hindoo Law, places of worship and sacrifice are not divisible. The parties can enjoy their turn of worship, unless they can agree to a joint-worship; and any infringement of the right to a turn in the worship can be redressed by a suit.

Kemp, J.—THIS is an appeal from the decision of the Principal Sudder Ameen of Dacca, Mr. L. W. Hutchinson, dated 3rd of August 1866.

The plaintiffs, Boykantnath Roy and Nilkant Roy, were two uterine brothers. The latter is dead, and is represented in this suit by his widow, Anund Moyee Chowdhrain, who is also the guardian of his two sons who are minors. The suit was for possession of a moiety of certain joint buildings, pucca privies, thatched houses, &c. The prayer was that the out-houses were to be pulled down, and the materials divided. The buildings reserved were two pucca buildings in the inside and outside of the premises. The tank and the approaches thereto to be left in the joint occupation of the members of the family. Claim laid at Rupees 6,113-8.

An ikrar between the parties is referred to, dated the 27th Magh 1271 B. S.

The defendants urge that a division can be effected without pulling down or destroying any of the premises which would interfere with the due performance of religious ceremonies, as well as destroy the symmetry of the premises, and put the parties to the greatest inconvenience; that the claim includes what had already been partitioned by the award of arbitrators; that the suit has been brought to harass the defendants to whom the plaintiff is indebted; lastly, that the claim has been very much under-valued.

The Principal Sudder Ameen observes that the parties, while living in commensality, created the premises on a homestead with an area of 15 beegahs, 18 cottahs, 1 powah, in the village of Boisrussee; that the dwelling-house to the east, and half of the dwelling-house to the south, were occupied by the husband of the defendant, and the dwelling-house to the west, and half of the dwelling-house to the south, were occupied by the plaintiff; that the remaining buildings marked Nos. 14, 15, 16, 17, and 20 on the map were held in common; that, after the death of one of the brothers, *viz.*, Nilkant Roy, the family remained in joint possession up to Magh 1269 B. S.; that subsequently an ikrar was executed between the parties on the 27th Magh 1271, whereby it was agreed that the homestead and the buildings should be equally divided; that the suit was brought with the object of enforcing a division, arbitrators having in vain attempted to effect an amicable adjustment.

The Principal Sudder Ameen found that the suit had not been under-valued. The institution-stamp is Rupees 250, a sum according to the stamp-law sufficient to cover a claim for ten thousand rupees. The Principal Sudder Ameen estimates the value of the whole of the premises at Rupees 20,000, the plaintiff suing for a moiety has, therefore, not defrauded the stamp-revenue.

He observes that it is not denied that, barring the three dwelling-houses and the buildings numbered 14, 15, 16, 17, and 20, the rest of the houses on the homestead were divided by the arbitrators, but that it was manifest that the parties themselves had mutually waived their title as awarded by the arbitrators, inasmuch as they had never held separate possession of them;

that, with regard to the partition of the three dwelling-houses and the buildings Nos. 14, 15, 16, 17, and 20, it must be observed that, when the zemindaree was divided between the plaintiff and the heirs of his brother Nilkant Roy, the homestead and the aforesaid buildings, including a tank in the homestead, were not included in the deed of partition; that an ikrar was executed between the parties agreeing to divide their properties at a future period, either by arbitration or through the intervention of the Court. Under such circumstances, the Principal Sudder Ameen was of opinion that the defendants could not well object to the partition of the homestead; though, in doing so, some of the superstructures or buildings must be damaged or broken down; but the Principal Sudder Ameen adds that, during the execution of the decree, the Court will see that nothing shall be wantonly destroyed. The case was accordingly decreed with costs.

In appeal the defendants urge, *1st*, that the Principal Sudder Ameen is wrong in deciding that the partition is to be made by pulling down buildings.

2nd.—That the buildings Nos. 14, 15, 16, 17, and 20 are not divisible according to the provisions of the Hindoo Law, looking to the purposes for which those buildings were created and hitherto used by the members of the family in common.

3rd.—That the Principal Sudder Ameen ought to have laid down more clearly the principles upon which the division was to be effected.

4th.—That the Principal Sudder Ameen was wrong in overlooking altogether the partial division made between the parties by arbitration. That division, as far as it was not shown to be an equitable one, ought to have been taken as a fair and reasonable basis.

On the case coming on for a hearing, we were gratified to find that the respondents were unwilling that there should be any demolition of buildings in carrying out the division to which both parties are clearly entitled. To persist in such a course would be evincing spite, and not a wish for an equitable adjustment of the respective rights of the parties.

The respondents also agree that the tank and the approaches thereto for the male and female members of the family must remain joint and undisturbed. This is also reasonable and necessary for the comfort of the family.

The real contention is as to whether the buildings numbered 14, 15, 16, 17, and 20, are to be divided by a wall into equal portions as contended for by the respondents, or to remain as hitherto joint, as contended for by the appellants. These buildings are used for the purposes of worship and sacrifice in which it is to be assumed and hoped that the parties have a common feeling. To divide them would be to render them utterly unsuited for the purposes and objects for which they were originally built by the two brothers when they lived in unanimity. Such buildings, when a butwarah is made by a Collector under the provisions of Regulation XIX. of 1814, are always left joint, and we see no reason why they should not be left so in this case. Under the Hindoo Law, places of worship and sacrifice are not divisible. The parties can enjoy their turn of worship unless they can agree to a joint worship; and any infringement of the right to a turn in the worship can be redressed by a suit. We cannot permit the object for which they were erected to be neutralized by dividing them. The pucca dwelling-houses have been fortunately so constructed, probably with an eye to the contingency of the family not remaining on good terms, that they can be divided simply by running a wall where we have marked a line with the letter A on the map, and this must be done, if applied for, in execution by the Local Court. This division the parties appeared to agree to.

The outlying homestead, exclusive of that occupied by the dwelling-houses and the buildings Nos. 14, 15, 16, 17, and 20, must be measured, and, if the plaintiffs are found to be in possession of a larger area than the defendants, the former must pay a compensation to the latter for the same at a valuation to be fixed by the Lower Court also in execution if possible; this part of the enquiry ought to be referred to arbitration, but if the parties will not agree to arbitration, the Court must fix the rate of compensation to be paid, if any. The out-houses to stand, and on no account to be pulled down. They appear to have been already divided by the arbitrators. The proposition of the plaintiff, respondent, that any excess land of the homestead found in the occupation of the defendant should be made up to them, not by a money compensation, but by award of an equivalent in land within the line of

boundary of the plaintiffs, would inevitably lead to future disputes and litigation, would probably be used by the plaintiff as a means of annoyance to the defendants, and cannot be entertained by a Court of Equity. The sudder durwaja and the courtyard which leads to the buildings appropriated for worship to remain in common; to divide either would be to destroy the main approach to the premises, and be obviously inequitable. The decree of the Principal Sudder Ameen is modified to the above extent. Each party to pay their own costs of the suit and of this appeal.

The 17th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Execution—Representative.

Case No. 271 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Midnapore, dated the 26th February 1867, affirming an order passed by the Principal Sudder Ameen of that District, dated the 8th January 1867.

Rajah Roodro Narain Roy (Judgment-debtor), *Appellant,*

versus

Nittyanund Doss (Decree-holder), *Respondent.*

Baboo Onookool Chunder Mookerjee for Appellant.

Baboo Doorga Doss Dutt for Respondent.

Exposition of the procedure to be observed for the execution of a decree against the legal representative of a deceased person.

Jackson, J.—It appears to me that there has been an error in the investigation of this case by the Court of first instance, which the Lower Appellate Court ought to have corrected.

This was a decree against Ranee Moyna Koomaree, the petitioner being the son of that Ranee. After several proceedings in execution of that decree, the Ranee having died, this petitioner was brought on and substituted as her heir and representative. The Court was proceeding to sell some property of his when he objected. The Court (the Sudder Ameen) threw out his objection as far as I can understand upon this sort of reasoning. Moyna Koomaree was the widow of a Rajah; that Rajah had property; consequently Moyna Koomaree must have had property; that property must have devolved presumably upon the petitioner; and, as he does not prove that he inherited no property from his mother, he is liable. Now, it is clear that the only way in which this petitioner could be made liable to satisfy this decree was in the manner stated in the 210th Section of the Civil Procedure Code. Application under that Section may be made to execute against the legal representative of the estate of a person dying before execution is fully had. And, if the Court order is to be executed against the legal representative, it is to be executed (Section 211 directs) in the manner provided in Section 203 for the execution of a decree for money to be paid out of the property of a deceased person. Section 203 then provides that, if the decree be against a party as representative of a deceased person, or in like manner

if the Court order execution of a decree against a party as the representative of the deceased defendant, then it may be executed by the attachment and sale of property of the deceased person, or if no such property can be found, and the defendant fail to satisfy the Court that he has duly applied such property of the deceased as shall be proved to have come into his possession, then the decree may be executed against the defendant to the extent of the property not duly applied by him in the same manner as if the decree had been against the defendant personally.

Therefore, supposing in the first place the Court to have issued notice, which it is required to do under Section 216 to the Rajah, calling upon him to show cause why the decree should not be executed against him as representative of his deceased mother, and supposing the Court to have ordered that it should be so executed, it would then be for the decree-holder in the first place to make search for property of the deceased; and, if no such property could be found, then to prove that some property of the deceased had come into this petitioner's possession. If that were proved, it would lie upon him to show that he had applied the property to the payment of his mother's debts, and, upon his failing to prove that, he would be liable to the extent of such property. In this case the Court appears to have gone far beyond that, because, without taking proof from the decree-holder as to any property of the deceased lady, he assumes that the petitioner has received such property, and then, without enquiring what the extent of the property was, he proceeds to sell the ancestral property of the petitioner as if he had been the original debtor. Then it seems that, in this vacancy of proof upon the subject, the decree-holder thought fit to name the petitioner as a witness. It does not appear what he was to prove; and, because the Rajah did not appear, judgment was given against him under Section 170. It appears to me that that was a harsh and extreme measure. If it were shown that some matter which the decree-holder had to prove could be proved alone by the evidence of this Rajah, and that he refused to appear, there might be some ground. But even then the utmost that the Court could do would be to make the Rajah responsible to the extent of his mother's property which had come into his hands.

I think, therefore, that the decisions of both the Courts below must be set aside, and that the proceedings should be sent back to the Sudder Ameen, in order that he may make such enquiry as the decree-holder may enable him to do, and make an order declaring the Rajah petitioner liable to the extent only of the property which has come into his hands.

The petitioner is entitled to the costs of the appeal.

Hobhouse, J.—I concur with my learned colleague.

I think that the proper course to have been adopted in this case was this. The Court should have called upon the decree-holder to prove what property of the judgment-debtor had come into the possession of the representative or rather of the son of that judgment-debtor; and then, having ascertained from proof which was to be given by the decree-holder what property of this description had come into the possession of this person, the Court should then have seen whether or not that property had been duly applied; and, if it had not, whether there was any remainder of that property that could be made liable.

In this particular instance, the Court distinctly went against that way of proceeding.

It stated that the decree-holder had not adduced any evidence to show that the property of the judgment-debtor had been inherited by the petitioner, and then because the petitioner had not shown that he did not inherit the properties of the judgment-debtor, and because he would not come apparently to depose to that particular point, he was then, under Section 170 of the Civil Procedure Code, held liable, for, I hardly know what—it seems to me for some particular fault which he had never committed.

I agree, therefore, with my brother Jackson that the proceedings must be returned to the Court below for the purpose he has mentioned.

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The 17th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Section 11, Act XXIII. of 1861—Right of appeal (by purchaser of decree).

Case No. 250 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Purneah, dated the 25th February 1867, reversing an order passed by the Principal Sudder Ameen of that District, dated the 10th July 1866.

Huro Loll Doss (Judgment-debtor), *Appellant.*

Soojawut Ali (Decree-holder), *Respondent.*

Baboo Khetter Mohun Mookerjee for Appellant.

Mr. R. E. Twidale for Respondent.

The words "party to a suit" in Section 11, Act XXIII. of 1861, include the heirs, assignees, and representatives of such party, and consequently give the purchaser of a decree all the rights of appeal, &c, which his vendor had.

Jackson, J.—THE contention of the judgment-debtor in this appeal is that the appellant below, who is purchaser of the decree, had no right of appeal, because he is not a party to the suit within the terms of Section 11, Act XXIII. of 1861.

It appears to me that to say that a person who has taken a decree by assignment, a transaction which is distinctly recognized and authorized by Section 208 of the Civil Procedure Code, is not a party to the suit, and has not all the rights of appeal, and otherwise that his vendor had, is an absurd contention.

I have not the least doubt that the words "party to the suit" include the heirs, assignees, and representatives of such party. This ground, therefore, it appears to me, is wholly untenable.

Then, on the question whether the decree had been kept alive by sufficient proceedings, it appears to me that, upon looking to the whole facts, after the judgment having passed there had been proceedings taken, and that no objection to the *bonâ fide* of those proceedings were preferred at the right time by the judgment-debtor; consequently the creditor cannot now be barred.

The special appeal, therefore, will be dismissed with costs.

Hobhouse, J.—I concur on both points.

The 17th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Section 3, Act XL. of 1858—Certificate—Representative of Minor.

Case No. 834 of 1866.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of 24-Pergunnahs, dated the 24th August 1866.

Sreemunt Koondoo and, after him, Bhujohuree Puramanick, *Appellant,*

versus

Sharoda Soonduree Dossee, *Respondent.*

Baboo Poorno Chunder Shome for Appellant.

Mr. R. T. Allan for Respondent.

A person who does not hold a certificate under Act XL. of 1858 is not debarred by Section 3 from representing a minor as plaintiff or defendant in a suit; but the Court has the fullest discretion, when the property is of small value, or for any other sufficient cause, to dispense with the production of a certificate.

Jackson, J.—THE proceedings in this case are not fully before us. The circumstances appear to be these.

The suit was brought on account of a debt contracted by Sham Chunder Paul against his widow and representative Sharoda Soonduree Dossee; the decree was given against her, and the decree-holder proceeded to execute. In the meantime, Sharoda Soonduree had adopted a son. On certain immoveable property belonging to the said Sham Chunder being attached and put up for sale, Sreemunt Koondoo, who, it appears, was the natural father of the minor lately adopted, came into the Principal Sudder Ameen's Court, and, in the character of next friend or guardian of the minor, objected to the sale. The objection proceeded on the ground that proper proclamation of the sale had not been made in consequence of which the property had been sold very much below its value, thereby prejudicing the minor.

The Principal Sudder Ameen was of opinion that Sreemunt Koondoo, not holding a certificate under Act XL. of 1858, was debarred by the 3rd Section of that Act from representing the minor. The Section provides that "every person who "shall claim a right to have charge of pro- "perty in trust for a minor under a will or "deed, or by reason of nearness of kin, or "otherwise, may apply to the Civil Court "for a certificate of administration, and "no person shall be entitled to institute "or defend any suit connected with the "estate of which he claims the charge until "he shall have obtained such certificate. "Provided that, when the property is of small "value, *or for any other sufficient reason*, "any Court having jurisdiction may allow "any relative of a minor to institute or "defend a suit on his behalf, although a "certificate of administration has not been "granted to such relative." Now, it is by no means certain that the word "suit" employed in that Section includes all proceedings of a miscellaneous character. But whether the word has that signification or not, it is quite clear that the Court is not bound to exclude persons claiming to represent a minor, whether in a suit or otherwise, from acting in his behalf, because the Court has the fullest discretion when the property is of "small value" or "for any other sufficient cause" to dispense with the production of a certificate. Now, in the present case, it was represented that immoveable property belonging to this minor, property worth one lakh of rupees, had been put up to auction, and, in consequence of an irregularity in the proclamation, had been sold for 8,001 rupees, and also it appeared that the purchaser was the decree-holder himself. It was further shown that the person who made application to the Court in behalf of the minor had been permitted by this Court (the High Court in its original jurisdiction) to maintain a suit on his behalf. Surely there were very sufficient, and more than sufficient, causes to induce the Court to allow that person to appear and defend the interests of the minor in such a case. It was a matter which admitted of no delay, because the sale had taken place, and the purchaser, no doubt, would require an immediate confirmation of the sale. We are told that the sale has been since confirmed, and the purchaser has actually taken possession. His vakeel urges that, if the minor's interests have been affected, he will be at liberty to bring a suit, that is to say, he refers him to a civil suit—to appeals *ad infinitum*—to recover possession of an estate which perhaps ought never to have been taken.

It seems to me very doubtful whether this sale ought to have taken place at all, because the suit was brought against Sharoda Soonduree as representative of her deceased husband. But it is obvious that, as soon as she adopted a son, she ceased to be her husband's representative, and the Court ought to have stayed proceedings until, on the application of the decree-holder, the lawful representative of the judgment-debtor had been made a party. However that might be, it is quite clear that the minor ought to have been heard on the question of confirming the sale.

Since the Principal Sudder Ameen's order refusing to hear him, Sreemunt Koondoo, who at first appealed to this Court against that order, has made a petition asking to be allowed to withdraw. But, upon the application of Bhujohuree Puramanick, who is the father of Sharoda Soonduree, and who appears to represent the minor, this Court allowed that person to argue this appeal, having been informed that the High Court in original jurisdiction has displaced Sreemunt from the guardianship, and appointed Bhujohuree in his stead.

It appears to me quite manifest in the interests of justice that we should set aside this order of the Principal Sudder Ameen, and direct him to hear the present appellant, that is, Bhujohuree, or any other person who may be duly and lawfully appointed to represent the minor upon the question of confirming the sale.

I think that the appellant is entitled to his costs in this appeal without reference to the issue, whatever it may be.

Hobhouse, J.—I concur.

The 17th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Limitation—Execution.

Case No. 227 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Rungpore, dated the 2nd February 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 14th April 1866.

Ameerun Bibee and others (Judgment-debtors), *Appellants,*

versus

Shib Pershad Thakoor (Decree-holder), *Respondent.*

Baboo Bhugobutty Churn Ghose for Appellants.

Baboo Mohinee Mohun Roy for Respondent.

Where a plaintiff, within three years next preceding the application, had enforced his decree by getting possession of the land decreed to him, and the defendants did not specifically allege that such proceedings were fraudulent or collusive—HELD that the Judge had no course but to allow further execution.

Jackson, J.—IN my opinion, the special appellant has made out no case for our interfering with the decision of the Lower Appellate Court.

The application to execute the decree, which is now under consideration, was made on the 12th September 1865. There had been an application on the 13th September 1864, upon which the Court was put in motion, and the plaintiff recovered possession of the land which had been decreed to him. The circumstances of the case are very singular, and have not been at all clearly explained to us. The decree, it seems, was made on the 9th May 1864 for possession of land with wassilat and costs. Apparently, therefore, the decree was carried out by giving possession of the land decreed 19 years after its date. Still, there is a reference to some earlier proceedings. One is alluded to by the Court, a proceeding of the 10th January 1863. What that proceeding was, does not appear. That proceeding itself is not on the record. But, considering that some person in possession of the land was deprived of possession in 1865 under the operation of this decree, it seems reasonable to infer that, by some circumstance or other, the plaintiff had escaped the consequence of the law of limitation, and that he was, therefore, for some good reason, entitled to execute his decree. Consequently, the Judge having before him this obvious fact that, within three years next preceding the application, the plaintiff had enforced his decree by getting possession of the land, and the defendants not specifically alleging that such proceedings were fraudulent or collusively obtained, it appears to me that the Judge had no course but to order further execution.

This case appears to me to be distinguishable from that to which the special appellant's vakeel has referred, which is to be found at page 91, VI. Weekly Reporter, Miscellaneous Rulings. In that case there was a specific and clear allegation of fraud in which the judgment-debtor impeached the proceedings of the decree-holder. The Court observed that that allegation had been made—that the proceedings in question had been subject of contest, and were then under consideration in appeal, and it held that such proceedings could not be looked upon as *bonâ-fide* proceedings to keep the decree in force. In this case there is no such allegation. The appellants state that one of them was a female, and one was sick, and consequently that they did not know. But they do not flatly state that the notice which is alleged to have been served, and which the Court considers to have been served, was not really served.

I think, therefore, that we cannot interfere with the decision of the Lower Appellate Court on the question of limitation.

I observe that the case has been remanded to the Sudder Ameen, in order that he may enquire into the amouut of wassilat due to the decree-holder. It will be necessary that he should carefully consider the precise and fair liability of the defendants in this case, considering the extraordinary length of time which, for some reason or

other, has been allowed to elapse before the decree was carried out, and, of course, he will consider who is liable, whether the actual defendant or the third person who, somehow or other, had got into possession of the land, taking care, however, that no liability is enforced against such third person, except in due form of law.

Hobhouse, J.—I concur.

The 17th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Section 217, Act VIII. of 1859—Verification.

Case No. 257 of 1867.

Miscellaneous Appeal from an order passed by Mr. H. T. Prinsep, Officiating Judge of Moorshedabad, dated the 22nd March 1867.

Sunt Gopal Chunder (Judgment-debtor), *Appellant,*

versus

Maharajah Jugut Indur Bunwaree Gobind (Decree-holder), *Respondent.*

Baboo Umbika Churn Banerjee for Appellant.

Baboo Jugodanund Mookerjee for Respondent.

A petition under Section 217, Act VIII. of 1859, is not required to be verified.

Jackson, J.—THE Judge appears to have gone wrong in this matter. He deals with the petition of the appellant before us as if he were a person whose case came under Section 273 of the Code of Civil Procedure. That Procedure applies to the case of a person arrested by warrant under execution of a decree for money, who, being brought before the Court, applies for his discharge on the ground that he has no present means of paying the debt. The application in such cases requires to be subscribed and verified by the applicant. This, however, is not an application of that kind. This is a case of a person against whom it is sought to execute the decree, he being a representative of the deceased person. Section 210 provides that a decree may be executed against such legal representative. But Section 216 declares that, if the application be for an enforcement of the decree against a representative, then the Court is to issue a notice to such party; and, under Section 217, he is enabled to come in and show cause why the decree should not be so executed against him. The applicant in this case was showing cause under that Section (217). The petition under that Section is not required to be verified. The Judge ought, therefore, to have received the petition, and to have enquired into the subject-matter.

The order, consequently, refusing to entertain the petition without verification, must be set aside, and the Judge will be directed to enquire into the objection.

The appellant will get the costs of this appeal, the vakeel's fee being fixed at Rupees 32.

Hobhouse, J.—I concur.

The 18th July 1867.

Present:

The Hon'ble W. S. Seton-Karr and Dwarkanath Mitter, *Judges.*

Joint Kubooleut—Suit for share of rent.

Cases Nos. 525 to 530 of 1867 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Patna, dated the 20th December 1866, affirming a decision passed by the Deputy Collector of that District, dated the 31st July 1866.

Kalee Churn Singh and others (Plaintiffs), *Appellants,*

versus

Mr. E. R. Solano and others (Defendants), *Respondents.*

Baboo Poorno Chunder Shome for Appellants.

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Baboos Umurnath Bose and *Toolsee Doss Seal* for Respondents.

It is not competent to landlords to whom a joint kubooleut has been given without any specification of shares, to institute separate suits, and to call upon the Collector, on the original contract between the parties, to apportion to each plaintiff that share of the rents to which he may be entitled.

Seton-Karr, J.—These six appeals must be dismissed.

We think that both the Lower Courts have correctly decided the one point of law which arises in all those cases. The defendant executed two kubooleuts for the rents of certain lands in favor of all the parties who now appear as the plaintiffs in these six suits. The kubooleuts were executed to the plaintiffs jointly, and no mention was therein made of any distinct or separate shares. The plaintiffs, it appears, are now at issue among themselves in regard to the particular share or shares of rent to which they are each entitled; and, in this state of things, it is not competent to them, on a kubooleut from the defendants, which was given without any specification of shares, to institute separate suits, and to call upon the Collector, on the original contract between the parties, to apportion to each plaintiff that share of the rents to which he may be entitled.

Such a division should be made by the parties themselves amicably out of Court, or else it should be effected by having recourse to a civil action in the ordinary way; but, as matters now stand, these plaintiffs have no right to bring their suit for rent in the form in which it has been laid by them in the Collector's Court, and to harass the defendants by multifarious litigation. A similar point of law has been decided in a case reported at page 4 of the Sudder Dewanny Adawlut decisions of 1861, case No. 227 of 1861, and the facts in the case before us are stronger than even the facts reported in that case. No decision of a contrary tendency has been quoted to us, and we, therefore, dismiss these six appeals with costs and interest.

The 18th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Execution—Joint-liability—Contribution.

Case No. 256 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Gya, dated the 20th February 1867, modifying an order passed by the Principal Sudder Ameen of that District, dated the 16th August 1866.

Roghoonath Doss (Judgment-debtor), *Appellant,*

versus

Alladeen Pattuck (Decree-holder) and another (Judgment-debtor), *Respondents.*

Baboo Khettur Mohun Mookerjee for Appellant.

Mr. R. E. Twidale and *Baboo Mohesh Chunder Chowdhry* for Respondents.

Where the liability is joint and several, a decree-holder cannot be compelled to proceed otherwise than against such of the joint defendants as he may elect; but this will not prevent one defendant from recovering from his co-defendant, in a suit for contribution, whatever he may have paid in excess of his joint-liability.

Jackson, J.—There is no valid ground for special appeal in this case.

The special appellant was one of two persons, representatives of one Chedee Lall, deceased, against whom a decree was obtained.

The *first* ground raised is that the co-sharer with the special appellant has not been made equally liable with him. It appears to me that the decree-holder cannot be compelled, where the liability is joint and several, to proceed otherwise than against such of the joint defendants as he may elect. This, of course, will not prevent the appellant from recovering from his co-defendant in a suit for contribution whatever he may have paid in excess of his just liability.

The *second* ground is that the Judge has calculated the wassilat upon a wrong princi-

ple. But it has not been shown to us upon what wrong principle the Judge proceeded.

Thirdly, it is contended that the appellant is not to be made liable beyond the extent of the assets which he received from Chedee Lall; but the special respondent has made no claim to hold him liable beyond that extent.

Consequently, I think the special appeal must be disallowed with costs.

Hobhouse, J.—I concur.

The 18th July 1867.

Present:

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges.*

Section 208, Act VIII. of 1859—Assignment of decree—Execution.

Case No. 265 of 1867.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Nuddea, dated the 6th April 1867.

Jodoonath Roy (Decree-holder), *Appellant,*

versus

Ram Buksh Chulungee (Judgment-debtor), *Respondent.*

Baboo Doorga Doss Dutt for Appellant.

Baboo Romanath Bose for Respondent.

Where a party who assigned over a decree was liable on account of cross-decree for a considerable sum to the judgment-debtor—HELD that, until the respective liabilities of the two parties had been settled, the Court was justified in refusing to allow one of them to assign the decree to a third party.

Jackson, J.—IT is not clear to me that an appeal lies in this case in which the Principal Sudder Ameen has exercised the discretion vested in him by Section 208 of the Civil Procedure Code, to grant or to refuse an application for the execution of a decree by a party to whom such decree has been transmitted by assignment.

Whether there be an appeal or not, it appears to me that the Principal Sudder Ameen has assigned good reason for refusing to allow the assignee to execute the decree in this particular instance. The party who assigned over the decree was liable on account of cross-decree for a considerable sum to the judgment-debtor.

I think that, until the respective liabilities of the two parties had been settled, the Court was justified in refusing to allow one of them to assign the decree to a third party.

I think, therefore, that we must affirm the decision.

Hobhouse, J.—I concur.

The 18th July 1867.

Present:

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges.*

Jurisdiction—Stay of Execution.

Cases Nos. 252 and 253 of 1867.

Miscellaneous Appeals from an order passed by the Principal Sudder Ameen of Moorshedabad, dated the 27th April 1867.

Mirtoonjoy Chuckerbutty (Judgment-debtor), *Appellant,*

versus

Mr. John Cochrane (Decree-holder), *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

No one for Respondent.

A Principal Sudder Ameen is competent, under Section 290, Act VIII. of 1859, to allow the stay of execution of a decree of the High Court on its original side, for a sufficient time to enable the judgment-debtor to make his application to the High Court for a new trial on the ground that the decree had been obtained *ex parte* without his knowledge.

Jackson, J.—THESE are two cases of application to execute decrees of the High Court on its original side in the Zillah Court of Moorshedabad. That Court, under the powers vested in it by Section 287 of the Civil Procedure Code, entrusted the execution to the Principal Sudder Ameen. In both cases, applications were made by the defendant to stay execution in order to enable him to apply to the High Court for

a new trial, on the ground that the decrees had been given *ex parte* without his knowledge.

In one of the cases to which appeal No. 253 refers, the Principal Sudder Ameen simply observes that the execution of the decree of the High Court cannot be suspended without the order of that Court. In this, it appears to me that the Principal Sudder Ameen is mistaken. All that he was asked to do was what he could lawfully do under Section 290, *viz.*, to allow the stay of execution for a sufficient time to enable the judgment-debtor to make his application to the High Court; and, upon such application being made within that time, the High Court itself would make the requisite order. He ought, therefore, to have considered whether sufficient ground was shown to induce him in his discretion to stay the execution for that purpose.

The papers will, therefore, be returned in order that he may make such order as he finds necessary.

In the other case it appears that execution had first been directed to a Moonsiff of the Moorshedabad District; and, it being afterwards found that the order was irregular, the certificate was withdrawn, and a further certificate was issued to the Judge; and the Judge, therefore, entrusted the execution as above mentioned to the Principal Sudder Ameen. In that case also the judgment-debtor applied for stay of execution, in order that he might apply for a new trial; but the Principal Sudder Ameen observed, and as I think very reasonably, that on the previous occasion, when this case had come down for execution to the Moonsiff, and when the judgment-debtor himself appeared and showed cause against its being executed by the Moonsiff, he had then ample opportunity and time to make his application, if he intended to make application, to the High Court for a new trial; and that, under such circumstances, the Principal Sudder Ameen was not called upon to allow him further time for the purpose. In this case, therefore, I think the appeal must be dismissed.

Hobhouse, J.—I concur in both cases.

The 18th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Mesne-profits.

Case No. 266 of 1867.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Nuddea, dated the 30th March 1867.

Jodoo Nauth Roy (Judgment-debtor), *Appellant,*

versus

Ram Buksh Chulungee (Decree-holder), *Respondent.*

Baboo Doorga Doss Dutt for Appellant.

Baboo Romanauth Bose for Respondent.

A defendant who, upon an enquiry into wassilat, absents himself at the time of enquiry by the Commissioner, and withholds his accounts and papers, and who lays before the Lower Courts no materials on which it can come to any decision as to the expenses at which he has been, is not entitled to invoke the assistance of the Court on appeal.

Jackson, J.—Two questions are pressed upon us by the petitioner, first, that the report of the Ameen who assessed the wassilat is founded entirely upon oral testimony.

Upon this point, I find it is stated that the ryots had, apparently in collusion with the defendant, given up their dakhilahs to him, and that, as the dakhilahs or receipts could not be got at, the decree-holder was compelled to prove what the wassilat had been by such means as he could.

The judgment-debtor shows no reason why we should disbelieve that statement, or suppose that a wrong conclusion has been arrived at.

The next point is that no entry of any thing on account of rent or Government revenue for this mehal, nor collection charges; have been allowed to the defendants. Now I

am of opinion that the defendant, who, upon enquiry into the wassilat as in this case, absents himself at the time of enquiry by the Commissioner, and withholds his accounts and papers, and who lays before the Courts no materials on which it can come to any decision as to the expenses at which he has been, is not entitled to invoke the assistance of the Court on appeal.

I think, therefore, that the appeal must be altogether dismissed with costs.

Hobhouse, J.—I concur.

The 19th July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Pre-emption—Hindoos.

Case No. 457 of 1867.

Special Appeal from a decision passed by Moulvie Nazeerooddeen Mahomed, Principal Sudder Ameen of Dacca, dated the 7th January 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 4th April 1866.

Sheraj Ali Chowdhry (Plaintiff), *Appellant,*

versus

Rumzan Bibee and others (Defendants), *Respondents.*

Mr. W. A. Montriou and *Baboos Romesh Chunder Mitter* and *Hem Chunder Banerjee* for Appellant.

Mr. R. V. Doyne for Respondents.

Unless a prescriptive usage and local custom be clearly established, a Hindoo defendant is not bound by the Mahomedan Law in a case in which a Mahomedan seeks to enforce his right of pre-emption.

Kemp, J.—THIS was a suit in right of pre-emption. The vendor was one Rumzan Bibee; the vendee was Raj Chunder Roy and others. The plaintiff is Sheraj Ali.

The suit was in the first instance decreed by the Sudder Ameen. On appeal it was remanded to try whether there was any local custom by which suits in right of pre-emption could be brought by a Mahomedan plaintiff against a Hindoo defendant.

The Sudder Ameen held that, according to two decisions—the one passed by the Principal Sudder Ameen of Dacca, the other by the Sudder Ameen of the same district—it appeared that such a custom prevailed. He also found that the plaintiff had duly observed the formalities required by the Mahomedan Law, and was entitled to his right of pre-emption. The suit was, therefore, decreed.

On appeal the Principal Sudder Ameen, Moulvie Nazeerooddeen Mahomed, tried the case. He observed that a claim in right of pre-emption is peculiar to the Mahomedan Law; that it is only in the Province of Behar that the Hindoos have followed the injunctions of the Mahomedan Law in this matter; but that no such custom is in vogue in Bengal.

The Principal Sudder Ameen then quotes three decisions of this Court noted in the margin, and observes that no such custom, as that alluded to by the Sudder Ameen, prevailed in the Dacca District, or had been established by evidence; that, in the local cases quoted by the Sudder Ameen in case No. 102 of 1860, the vendor, the pre-emptor, and one of the vendees, were all Mahomedans; that, such being the case, the claim could not be decreed in part, and dismissed in part; moreover, the question of custom was not raised in that case; that the other decision referred to by the Sudder Ameen was that of a Lower Court, and cannot be accepted as proving a custom.

29th November 1864.
2nd December 1864.
16th May 1866.

The Principal Sudder Ameen, therefore, finding that no local custom, which must, of course, be proved by evidence, had been established whereby a Mahomedan pre-emptor could sue a Hindoo vendee in right of pre-emption, dismissed the suit, and reversed the decision of the Sudder Ameen.

In special appeal it is contended—

1st.—That, when a Mahomedan seeks to enforce his right of pre-emption against a Mahomedan vendor and a Hindoo vendee, he is not bound to prove any local custom, but he is entitled to rely upon the provisions of the Mahomedan Law.

2nd.—Both the shufee and the vendor being Mahomedans, the former is legally competent to impose such limitations and restrictions upon the general right of alienation by the latter of his properties as the law by which they are respectively governed would warrant and allow, the accident that the purchaser is a Hindoo cannot render the vendor free from the operation of the Mahomedan Law.

3rd.—That of the cases quoted by the Lower Appellate Court, the two first do not apply, for it does not appear that in those cases the vendor was a Mahomedan; and the last case is decided in reliance upon a decision of the Full Bench, which does not touch the question now mooted.

4th.—Admitting for argument's sake that the Lower Appellate Court is right in its view of the law upon the point in question, its adjudication upon the existence or otherwise of the custom relied upon by the first Court is wrong: *first*, because a decision passed partly against Mahomedans and Hindoos is good evidence of such custom; and, *secondly*, because a decision, in which a right of pre-emption is allowed to be enforced against a Hindoo, is also good evidence as bearing upon this point, even if the question of custom was not directly raised in issue.

Mr. Montriou has been heard for the appellant, and Mr. Doyne for the respondent. Mr. Montriou was unable to quote any precedent in support of his argument, that it is unnecessary to prove the local custom, the Mahomedan Law being applicable to all cases of pre-emption whether the parties be entirely Mahomedan, or partly Mahomedan and partly of other religious sects. He also laid stress upon the inconvenience and probable frauds which would result if a Mahomedan could evade the Law of Pre-emption by selling to a stranger of another faith. He admitted that there was no conflict of opinion in the decisions of this Court on this question, but pressed us to submit the question for the decision of the Full Bench more for the sake of its importance to the Mahomedan community, than for any other reason which arises out of the case before the Court.

The Principal Sudder Ameen has found that no such local custom has been proved, whereby Hindoos in the District of Dacca are bound by the Mahomedan Law in suits brought in right of pre-emption; and, unless such custom be proved, this Court cannot depart from the principle laid down in a long current of decisions, that, unless a prescriptive usage and local custom be clearly established, a Hindoo defendant is not bound by the Mahomedan Law in a case involving the right of pre-emption, which is a right unknown to the Hindoo Law.

We fail to see any evil in adopting this view of the case. "The right of pre-emption," as observed in the decision of the Full Bench, dated 28th September 1863, published in the Special Number of the Weekly Reporter, pages 143-146, "undoubtedly tends to restrict the free sale "and purchase of property, and it is desirable, therefore, to encompass it within certain rules and limits, lest the right should "be exercised vexatiously."

Sir William Macnaghten in his Principles and Precedents of Mahomedan Law, a work the authority of which has been recognized by their Lordships of the Privy Council, though the learned Counsel, Mr. Montriou, contends it is not entitled to such consideration, he having found it to be incorrect at page 17 of the Preliminary Remarks, observes: "That, in the Hedaya, the right of "pre-emption is declared to be but a feeble "right, as it is the disseizing another of his "property merely in order to prevent appre-"hended inconvenience, and that its exten-"sion to all cases of neighbourhood cannot "fail to depreciate the value of landed pro-"perty; and, being impressed with a convic-"tion of the unreasonableness of the law "in question, he would feel very much "inclined to circumscribe its operation "within as narrow bounds as possible."

Mr. Montriou has alluded to the frauds, snares, and devices, which would be the result of our holding that a Hindoo defendant is not bound by the Mahomedan Law in a suit in right of pre-emption, unless a local custom be proved. But we find that the Mahomedan Law itself, upon which the learned Counsel has so strenuously relied, is fruitful in devices by which the right may be evaded and defeated. *See* pages 504, 505, and 506 of a Digest of Mahomedan Law by Mr. P. E. Baillie, the latest work on that law.

We dismiss this special appeal with costs and interest payable by the special appellant. This decision governs special appeal No. 458, which is also dismissed with costs and interest.

The 19th July 1867.

Present:

The Hon'ble W. S. Seton-Karr and Dwarkanath Mitter, *Judges.*

Alluvial Land.

Cases Nos. 624, 625, and 628 of 1867.

Special Appeals from decisions passed by the Principal Sudder Ameen of Rajshahye, dated respectively the 29th and 31st December 1866, reversing a decision passed by the Moonsiff of Shahzadpore, dated the 14th May 1866.

Gobindnath Sandyal and others (Defendants), *Appellants,*

versus

Nubo Coomar Banerjee and others (Plaintiffs), *Respondents.*

Baboo Romesh Chunder Mitter for Appellants.

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Respondents.

In a suit for alluvial lands, if the defendant pleads, and can establish his plea, that the lands in question were gradual accessions to his estate, neither the ground of reformation on the old site nor that of prior possession for a short period can avail the plaintiff. If, however, the plea be found against the defendant, the matter must be disposed of according to Clause 5, Section 5, Regulation XI., 1825.

Mitter, J.—THE plaintiffs in these three suits claimed three distinct but contiguous parcels of alluvial land, on the ground that they were reformations on the original site of the old lands belonging to their respective zemindaries. The special appellant, who was sole defendant in all these cases, pleaded, among other matters, that they were gradual accessions to his estate. The Moonsiff of Chowkey Shahzadpore, after holding a local investigation, found, upon a review of the whole evidence produced before him by the contending parties, that the lands in dispute were such as they were represented to be by the special appellant, and that the plaintiffs had failed to prove either title or prior possession with regard to the same. On appeal the Principal Sudder Ameen, without paying the slightest attention to the position of the lands with reference to the law of alluvion administered in the country, has reversed the Moonsiff's decision, holding simply that they were reformations on the old site of lands belonging to the plaintiffs, from which the special appellant had ejected them in the year 1272 B. S. We find, however, that these lands are admittedly separated from the plaintiffs' estate by a wide and flowing river called the Hoorasagur Nudee. It is also admitted before us that the plaintiffs have no other lands, old or new, lying on the same side of the river with those in dispute, but that the special appellant has. Under these circumstances, the plea of gradual accession raised by the special appellant, and determined in his favor by the Moonsiff after a careful investigation, was one of great importance, and we regret to find that the Principal Sudder Ameen has overlooked it altogether. If the special appellant can establish this plea, neither the ground of reformation on the old site, nor that of prior possession for the short period relied upon by the plaintiffs, will avail against the positive right given to him by the express provisions of the law. This principle has been clearly and distinctly laid down by a Full Bench of this Court in their decision reported in 3 Weekly Reporter, page 51. If, on the other hand, this plea is found against the special appellant, it will then be for the Court to "guide itself by the best evidence it may "be able to obtain of any established local "usage applicable to the case, or, if not, by "general principles of equity and justice." In short, the matter in controversy is then to be disposed of according to the express provisions of Clause 5, Section 5, Regulation XI. of 1825. We reverse the decisions of the Principal Sudder Ameen, and remand these cases to him to try them with special reference to the foregoing remarks. The costs of these appeals will follow the result of the final decision.

The 19th July 1867.

Present:

The Hon'ble W. S. Seton-Karr and Dwarkanath Mitter, *Judges.*

Jurisdiction — Remand.

Case No. 659 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 23rd January 1867, reversing a decision passed by the Moonsiff of Kytee, dated the 29th March 1866.

Mirza Jowad Ali (one of the Defendants), *Appellant,*

versus

Hossein Bibee (Plaintiff), *Respondent.*

Baboo Anund Chunder Ghosal for Appellant.

Mr. R. E. Twidale and *Baboo Chunder Madhub Ghose* for Respondent.

Every order passed by a Court is not void for want of jurisdiction, simply because it is illegal—*e. g.*, where a Court remands a case under Section 351, Act VIII. of 1859, instead of following the provisions of Section 355.

Seton-Karr, J.—THE only contention raised before us in this special appeal is, that a previous order of remand passed by the Lower Appellate Court, being contrary to the provisions of Section 351 of the Procedure Act, that order, together with all the proceedings subsequently held in furtherance thereof, ought to be set aside as being null and void for want of jurisdiction. We cannot, however, subscribe to the correctness of this doctrine. We admit that the Judge was wrong in law in remanding the cases, instead of following the provisions of Section 355; but, whilst conceding thus much in favor of the special appellant, we fail to perceive how we can quash the whole of the proceedings above referred to as being null and void for want of jurisdiction. The case was legally before the Judge, and he had full and ample jurisdiction to try it. Every order passed by a Court is not void for want of jurisdiction, simply because it is illegal, and we do not see how the present case can be made an exception to the general rule. Under such circumstances, it only remains for us to see, under the provisions of Section 350, whether the illegality complained of has affected the merits of the case so far as the special appellant was concerned. The order of remand was for his benefit. It gave to him an additional opportunity to discharge the *onus* which lay upon him, namely, that of proving the hibbanamah propounded by him, and this circumstance has explained to us the reason of his long silence. He does not now complain before us that any injustice has been done to him, but he tries at this late stage of the proceedings to get rid of judgments passed against him upon a careful review of the evidence, and he relies upon a plea which to our minds appears to be nothing more than a mere technical one. We dismiss this special appeal with costs.

The 19th July 1867.

Present:

The Hon'ble W. S. Seton-Karr and Dwarkanath Mitter, *Judges.*

Right of Suit—Sale under Section 185, Code of Criminal Procedure (Reversal of).

Case No. 484 of 1867.

Special Appeal from a decision passed by the Judge of Patna, dated the 25th January 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 29th March 1866.

Bukhooree Singh (Plaintiff), *Appellant,*

versus

The Government and others (Defendants), *Respondents.*

Mr. R. E. Twidale and *Baboo Bhowanee Churn Dutt* for Appellant.

Baboo Kishen Kishore Ghose and *Mr. C. Gregory* for Respondents.

A civil action will not lie to reverse a sale of property carried out under Section 185, Code of Criminal Procedure.

Seton-Karr, J.—THE facts out of which this case arises are not denied. In the year 1865, a warrant in the Criminal Department was issued for the apprehension of the plaintiff. On the 6th of December 1862, his property was ordered to be attached for non-appearance; and, on the 13th of February 1863, the completion of the attachment was reported. As plaintiff, special appellant before us, did not appear within two years of the attachment of the property, his property was sold on the 23rd of March 1865, and a few days afterwards the plaintiff was discharged from the offence of which he had been accused, for want of sufficient evidence.

The plaintiff now sues to get back the property sold, together with wassilat, and he makes both Government and the purchaser of his property defendants in his action. The first Court gave him a decree. The Judge reversed that decision, holding that the suit could not be maintained under Section 185 of the Criminal Procedure Code, according to which the property had been sold.

We think the Judge's view of the law to be quite correct. Mr. Twidale, for the special appellant, endeavors to contend, first, that the Criminal Procedure Code does not apply, because the offence with which the plaintiff was charged was committed before that Act came into operation. But this difficulty is removed by Section 4 of Act XVII. of 1862, which clearly lays it down that, in the investigation and trial of offences committed before the 1st of January 1862, the Criminal Court shall be guided by the provisions of the new Code of Criminal Procedure. The exceptions contained in that Section refer only to difference of punishment and to any substantial right of appeal or reference which the offender would have enjoyed under the old law. Neither do we think that the words in Section 185 of the Code of Criminal Procedure "upon trial before a competent Court" refer to actions such as the present. The words "competent Court" clearly refer to a Criminal Court. The special appellant might, no doubt, have availed himself of his privilege of appeal against the orders of the Magistrate, but we are quite clear that he has no right, whether under the old or the new law, to institute a civil action, and to make Government and the purchaser of his property parties to it, and to seek to reverse a sale of the property which was legally carried out under the provisions of the law applicable to such cases.

The Judge has dismissed the plaintiff's suit, holding that, under Section 185 of the Criminal Procedure Code, the suit could not be maintained; but we go further, and are of opinion that, under the circumstances, no civil action could be instituted at all.

We dismiss the appeal with costs and interest.

The 19th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Appeal—Remand.

Case No. 12 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of 24-Pergunnahs, dated the 6th October 1866, reversing a decision passed by the Moonsiff of Diamond Harbour, dated the 6th March 1866.

Kishen Chunder Gaen (Plaintiff), *Appellant,*

versus

Sreeshtee Dhur Khattah (Defendant), *Respondent.*

Baboo Poorno Chunder Shome for Appellant.
Mr. C. Gregory for Respondent.

The omission to appeal against an order of remand does not preclude a respondent on appeal from taking an objection to the order of remand as erroneous.

Jackson, J.—THERE are two questions raised in this appeal.

The first is, that the Principal Sudder Ameen was in error in deciding the suit in contravention of the previous order of remand in the same suit by a former Principal Sudder Ameen. Without going into the entire facts of the case, I may shortly state that the order of remand in question appears to me to have been clearly erroneous. But then the special appellant contends that the defendant, not having appealed against that order of remand, is now concluded by it, and that the Principal Sudder Ameen was not at liberty to re-open the question then settled. But the decision of this Court, to be found at page 66 of Marshall's Reports, to the effect that an appeal against an order of remand ought to be preferred when the order is given, and cannot be made afterwards, has been expressly overruled by the decision of a Full Bench* to be found at page 91 of V. Weekly Reporter. Consequently, the special respondent would be at liberty upon this appeal to take the objection against the first order of remand, if it were necessary. That appears to me sufficient to show that he cannot be considered to be now concluded by the order, and certainly nothing would oblige us, having the special appeal before us, to set up a former order which has been got rid of, it may be irregularly, but which, at any rate, was wrong and illegal.

* And *see* the ruling of the Judicial Committee in Forbes *versus* Ameeroonissa Begum, X. Moore's Indian Appeals, page 259.

I think, therefore, that we are not bound to entertain this point, and that the decision of the present Court, which appears to be correct, ought to be upheld.

There is a second ground taken, that the Principal Sudder Ameen has committed an error, that is to say, has made a defective investigation in omitting to find that the land in dispute in this case was 4½ cottahs as alleged by plaintiff, or 2½ cottahs as alleged by defendant. It appears that there is no question as to the identity of the land which lies within stated boundaries; and, as plaintiff was not entitled to recover possession of it, it is of little importance whether the land was more or less in quantity.

I think, therefore, that the special appeal must be dismissed with costs.

Hobhouse, J.—I concur.

The 19th July 1867.

Present :

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Limitation—Clause 6, Section 1, Act XIV. of 1859 — Onus probandi — Boundary-dispute — Lakheraj.

Case No. 21 of 1867.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 4th October 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 19th March 1866.

Beer Chunder Joobraj (Plaintiff), *Appellant,*

versus

Ram Gutty Dutt and others (Defendants), *Respondents.*

Bâboo Khetturnath Bose for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

Clause 6, Section 1, Act XIV. of 1859, provides that possessory titles by virtue of awards under the Regulations there mentioned shall become final unless questioned within three years. But that will not enable a person to come in within three years after the date of such awards, and recover possession of lands in respect of which his suit has been barred by the other provisions of the Law of Limitation.

In a question of boundary between a lakheraj tenure and a zemindar's mâl land, there is no presumption in favor of one or the other, but the *onus* is on the plaintiff to prove his case.

Jackson, J.—THE respondent has not appeared in this case, but it is very obvious from the argument of the special appellant's vakeel that there is no case for the appellant.

He sued for possession of certain land, and, amongst other things, asked to set aside an award of the Revenue Surveyors. Both

Courts below found that the plaintiff had not been in possession of the land in dispute for upwards of 12 years, and therefore they concurred in dismissing the suit.

The plaintiff now in special appeal contends that such finding will not bar his suit, because he has come to the Court within three years from the date of the survey-award. He seems to be under the impression that a man may be out of possession of his lands for a whole century, and notwithstanding, if the Survey authorities come and demarcate that land as being in the possession of the defendant, he would be entitled to come in within three years, and sue for possession of the land. That is, I should think, a very obvious fallacy. Clause 6, Section 1 of Act XIV. of 1859, provides that possessory titles, by virtue of awards under the Regulations there mentioned, shall become final unless questioned within three years. But that will not enable a person to come in within three years after the date of such awards, and recover possession of lands in respect of which his suit has been barred by the other provisions of the Law of Limitation.

There is another fallacy in the argument of the vakeel for the special appellant. He contends that the defendant failed to prove his title to these lands as lakherajdar. He says that, failing such proof, the land must come to the zemindar, the plaintiff. In this case there was an admitted lakheraj tenure. Plaintiff was the zemindar and owner of mâl land contiguous. The question was whether the boundary between these two properties lay in one place or in another, and there would be no presumption either in favour of one or of the other. But manifestly the plaintiff would have to prove his case.

It is quite clear to me, therefore, that the special appeal ought to be dismissed with costs.

It is admitted that the same decision applies to No. 22.

Hobhouse. J.—I concur.

The 20th July 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Mortgage—Redemption—Fi-fa.

Case No. 22 of 1867.

Regular Appeal from a decision passed by Baboo Kylash Chunder Deb, Principal Sudder Ameen of 24-Pergunnahs, dated the 9th July 1866.

Hurro Pershad Ghosal (Plaintiff). *Appellant,*

versus

Hurro Monee Debee and others (Defendants), *Respondents.*

Baboo Ashootosh Dhur for Appellant.

Mr. J. Cochrane and *Baboo Kishen Kishore Ghose* for Respondents.

In 1819 *A* mortgaged lands in the Mofussil to *B*, and, as a collateral security, gave *B* a bond and warrant of attorney to enter up judgment in the Supreme Court. In 1821 execution issued on this judgment, and, under a *fi-fa*, the property was seized and sold by the plaintiff. *B* was declared the purchaser, and got a bill of sale, and was put in possession. *B* having remained ever since in possession, *A's* representatives in 1865 sued to redeem, on the ground that the mortgage-debt was more than satisfied by the usufruct. HELD that the right of redemption still subsisted; that, at the time of the Sheriff's sale in 1821, an equity of redemption could not be seized and sold under a *fi-fa*, and, therefore, no title passed to *B* when he purchased; and that, as *B* had no right to possession save as mortgagee, he must be deemed to have obtained, and to have remained in possession in that capacity.

Macpherson, J.—IN this case the facts are somewhat complicated, and they extend over a considerable period of time. The chief contention is as to the position in which the parties have been left by a series of proceedings which commenced in 1819, and continued at intervals until the year 1863.

The plaintiff, who is the appellant before us, sues to redeem a garden at Belgurrea in the vicinity of Calcutta (consisting of some 125 beegahs), which was mortgaged by his father Buloram Ghosal as far back as the year 1819 to Shumboo Chunder Mookerjee and Ram Narain Mookerjee, through whom the defendants claim. The deed of mortgage has not been produced in Court; but, as will be hereafter pointed out, its existence has been admitted by Ram Narain Mookerjee in such a manner that the defendants cannot now contend that there was not such a mortgage.

The garden is stated by the plaintiff to have been mortgaged by the father Buloram Ghosal to Shumboo Chunder Mookerjee, on the 22nd of May 1819, to secure the repayment of a debt of 4,800 rupees.

On the same day Buloram Ghosal, as a collateral security, gave a bond and warrant of attorney to enter up judgment in the Supreme Court. Execution issued on this judgment; and, under a *fi-fa*, the property was seized and sold by the Sheriff, and Ram Narain, who was the brother of Shumboo Chunder, and was joint in estate with him, was the purchaser, the price being Rupees 8,700. On the 24th of December 1821, he got possession of the garden from the Sheriff; and from that time to the present day, he and those claiming through or under him have remained in possession. The balance which remained in the Sheriff's hands, after satisfying the judgment, was paid over by him to Buloram Ghosal.

On the 21st April 1822, one Bipro Doss Roy obtained a decree in the Court of the 24-Pergunnahs, against Buloram Ghosal and his brother Soodha Ram Ghosal; and, in execution of his decree, Bipro Doss attached the garden in dispute on the 13th of December of that year.

On the 24th of December, Ram Narain appeared in Court, and objected to this attachment, but his claim was disallowed on the ground (as we learn from a petition filed by Ram Narain in the Court of the 24-Pergunnahs in 1826, and on which that Court passed orders on the 17th of March 1826) that the purchase at the Sheriff's sale was subsequent to the institution of the suit by Bipro Doss Roy. This order, disallowing Ram Narain's claim, was, on the 11th December 1823, confirmed by the Sudder Court, which declared that the property was liable to be sold as belonging to the Ghosals.

In accordance with an intermediate order of the Sudder Court, dated the 8th January 1824, to the effect that, if Ram Narain chose to pay the money due to Bipro Doss, he might be substituted as decree-holder in his place, Ram Narain, on the 15th of March 1824, paid into Court the amount due under the decree which, with interest, came to Rupees 16,785.

On the 23rd August 1824, the Sudder Court ordered that the Rupees 16,785 should be paid out of Court to Bipro Doss, and that Ram Narain should have leave to execute the decree of the latter against the Ghosals.

The judgment-debtors objected on the ground that Ram Narain was liable to account for the mesne-profits of the garden for such time as he had been in possession; and the Sudder Court, on the 9th of November 1829, ordered that an account of mesne-profits should be taken from Ram Narain, who was directed to give in his accounts on oath or solemn affirmation.

On the 29th March 1831, the Sudder Court ordered that the mesne-profits should be calculated at the rate of Rs. 846-3 per annum; that the total should be deducted from the sum paid into Court by Ram Narain under the decree of Bipro Doss; and that the Ghosals should pay the balance, or, in default, their garden at Belgurria should be sold, and Ram Narain's claim be paid out of the proceeds of the sale. The sale was actually carried out in 1832, but it was cancelled in June 1833 for irregularity.

The sale having been again directed to take place on the 25th of September 1833, it was at the request of Ram Narain postponed until a family suit for partition between him and his brother Shumboo Chunder should be disposed of. A similar petition was put in by Shumboo Chunder on the same date.

On the 24th of December 1835, the application of Ram Narain for the sale of the garden, which had been pending up to that time, was finally struck off for "failure to take steps to carry out the sale."

In giving this statement of the proceedings in Bipro Doss Roy's suit, we have referred only to those which are of most importance, omitting many others which are less material.

Thus matters rested until the year 1862; and it is evident that their position was as unsatisfactory and ill-defined as it could well be. The original mortgage of 1819 seems to have been wholly lost sight of, and the Courts, though still holding that some fiduciary relation existed which rendered Ram Narain liable to account for mesne-profits, were ignorant of, or entirely misunderstood what was the true nature of that relation.

And this ignorance or misunderstanding was shared by the parties themselves. For, in 1862, we find the present appellant attempting to recover possession of the mortgaged property, not upon the only ground on which he really was entitled to relief, but on a supposed state of facts which had no existence save in the imagination of himself or his mooktear.

On the 15th of August 1862, the appellant presented to the Court of the Judge of 24-Pergunnahs a petition in the old suit of Bipro Doss Roy against the Ghosals. In this petition he recites the orders to which we have already referred, of the 23rd August 1824, and the 24th December 1835, and other orders, and then proceeds thus: "In this case Ram Narain "Mookerjee intervened and deposited the de-"cretal money. To pay off the money thus "advanced by the intervenor, the father of the "petitioner mortgaged to him his self-ac-"quired garden at Belgurrea. Agreeably to "an order subsequently made by the Sudder "Court, the garden was placed in the hands "of the intervenor, and the usufruct thereof "was applied to the liquidation of the "amount advanced by him. The petitioner "submits that the money due to the inter-"venor has been paid off from the usufruct, "and a surplus is left in your petitioner's "favor; he, therefore, prays that the inter-"venor may be summoned, accounts adjust-"ed, evidence taken from the petitioner, "and possession of the garden delivered "to him."

On the 23rd of May 1863, the Judge declared himself to be of opinion that the remedy (if any) could be enforced only by a regular suit. In disposing of the application, the Judge remarks: "I am asked "to re-open a question disposed of in 1835. "It is contended that a property was left "in the hands of the opposite party for re-"covery, out of the profits, of a sum ad-"vanced in payment of a decree, and that, "under the acts of the parties and the "orders of the Courts, this must be regard-"ed in the light of a mortgage, the power "of redeeming which still exists." The application was accordingly rejected.

The respondents have not rested any argument upon the manner in which the appellant presented his case to the Court of the 24-Pergunnahs in 1862; nor, indeed, did their Counsel allude to the matter at all. We do not think that the present suit is in any way barred or prejudiced by the proceedings of 1862. The misstatements then made appear to us merely to show how complete was the misapprehension which existed as to the state of the facts and the relative positions of the parties.

On the 15th of May 1865, the present suit was instituted (*in formâ pauperis*), being a suit to redeem upon the footing of the *original* mortgage of the 22nd of May 1819. The plaintiff's case is that the relationship of mortgagor and mortgagee still subsists between the appellant and the respondents (who now in this matter represent Ram Narain Mookerjee and Shumboo Chunder Mookerjee), and that much more than the mortgage-debt has been realized from the usufruct.

The Principal Sudder Ameen has found that the relation of mortgagor and mortgagee between Buloram and Ram Narain and Shumboo Chunder Mookerjee ceased to exist from the date of the Sheriff's sale on the 13th of December 1821, when the holders of the bond and warrant of attorney satisfied their debt and took possession of the garden, and when Buloram received and appropriated the surplus-proceeds of the sale; that the subsequent application of Ram Narain for the sale of the garden, after he had paid into Court the money due to Bipro Doss, was an act of "*ignorance or fatuity*" on his part by which his real interests could not be affected; and that, from 1830, when the application for sale was struck off, if not from an earlier date, Ram Narain's possession was that of a trespasser, and was consequently adverse to the plaintiff, who is accordingly barred as not having sued within 12 years. Being of this opinion, the Principal Sudder Ameen dismissed the suit with costs.

The question argued before us is the same as that argued before the Lower Court, *viz.*, does the relation of mortgagor and mortgagee still subsist, or has the title of the mortgagee been exchanged for any other title, and, if so, when and how?

The first point which we have to decide is, whether the alleged mortgage of Buloram of the 22nd of May 1819 is proved. It is stated distinctly in the plaint. Its existence is not positively denied by any of the defendants, but some of them (Sreeman Chunder, Dhunendur Chunder, Jadabendur Chunder, and Ghunessam) say in their written statement that they "have no knowledge at all of the truth or otherwise of the mortgage pleaded by the plaintiff, nor have they been able to find the deed of mortgage or any trace of the transaction."

The Lower Court apparently took it for granted that the mortgage did originally exist, and the matter does not appear to have been contested, which may account for no proper evidence having been given as to it. Nor was it, in truth, seriously contested before us, although our attention was called to the fact, that there was no sufficient proof of the mortgage.

Under the circumstances, we think that there is upon the record evidence which sufficiently proves that the mortgage did exist, and also what its terms substantially were. As it was accompanied by a bond and warrant of attorney to enter up judgment in the Supreme Court, the probability is that it was executed in Calcutta, and that it was in the English form. But we have it referred to and described by Ram Narain Mookerjee himself in the petition filed by him in Bipro Doss Roy's suit, and on which the Court of the 24-Pergunnahs passed orders on the 17th of March 1826. In that petition he says that Buloram Ghosal, having stood security to Government for one Byjnath Roy, a zemindar, was arrested and put in prison for certain arrears of revenue. "In the month of May 1819, the above-"named Ghosal and his brother Soodha "Ram Ghosal, for the purpose of paying "the arrears due to Government, borrowed "Rupees 4,806," and mortgaged to Shumboo Chunder Mookerjee and William Benjamin Preston (a jurisdiction-trustee) the gardens situated at Belgurrea, and at the same time gave a bond and warrant of attorney, the money being repayable in one year. He goes on in his petition to recite how, on the 3rd December 1821, the garden was sold in satisfaction of the judgment obtained on the bond, and was purchased by himself (Ram Narain). It appears to us that we have thus the means of knowing with certainty what the nature of the transaction was, and that, in the absence of evidence as to the rate of interest to be allowed, we must declare it to be 12 per cent. As the case, however, must be remanded for enquiry into the accounts, we shall reserve leave to any of the parties to prove the original mortgage-deed; and, if it is proved, the interest must, of course, be calculated according to any rate therein stipulated for.

The facts being as we have stated, we are of opinion that the right of redemption has not yet been lost. At the time of the Sheriff's sale in 1821, an equity of redemption could not be seized and sold under a *fi-fa*, and, therefore, nothing passed under the Sheriff's sale to Ram Narain. Ram Narain, no doubt, was put in possession; but, as he had no right to possession save as mortgagee, he must be deemed to have obtained, and to have remained in possession in that capacity.

It is evident from the course which he adopted in Bipro Doss Roy's suit that Ram Narain was himself well aware that he had no absolute title to the property of which he had obtained possession. That this was the case is shown also by his petition of March 1826 (to which we have already more than once referred), for we find him there saying expressly that "it was contrary "to the rules of practice of the Supreme "Court to institute any claim in any shape" regarding his right to this property as against the Ghosals—an observation no doubt true, inasmuch as, according to the law administered by the Supreme Court, the Sheriff's sale of the equity of redemption passed nothing whatever to the purchaser. Moreover, unless Ram Narain was intended both by the Zillah Court and by the Sudder Court to be treated as a mortgagee in possession (although his treatment, even in this view, was most extraordinary and inexplicable), we cannot conceive how he should have been deemed liable to account for the mesne-profits from December 1821, when he got possession. The accounts, too, were ordered to be filed by him just in the way in which he would have been ordered to file them if he had been a mortgagee.

It is contended that Shumboo Chunder and his representatives are not bound by what Ram Narain said and did. But Shumboo Chunder and Ram Narain were (as admitted by Shumboo Chunder in his petition of 25th September 1833) brothers joint in estate, and the name of one was used for both, and the acts of the one bound the other.

Clearly, Shumboo Chunder and his heirs, &c., are bound by all that Ram Narain did, and *vice versâ*.

The plaintiff will be charged in account with the original mortgage-debt of Rs. 4,800 with interest at 12 per cent. from its date; also with the *surplus proceeds* received from the Sheriff's office, with interest thereon at 12 per cent.; and also with the Rs. 16,785 odd paid to Bipro Doss by Ram Coomar with interest at 12 per cent.

The defendants, on the other hand, must account for mesne-profits up to date, with interest at 12 per cent. The finding of the Sudder Court as to wassilat is to be taken as conclusive on this point for the years to which that finding relates. With regard to other years, the defendants must put in their accounts and prove them.

If, on taking this account, anything, however little, remains due to the defendants, the suit must be dismissed.

As we find that the relationship of mortgagor and mortgagee exists, no question of limitation can arise as sixty years have not yet elapsed since the date of the mortgage. (*See* Act XIV. of 1859, Section 1, Clause 15.)

The case is remanded to the Lower Court under Section 351 of Act VIII. of 1859, in order that the accounts may be taken. As already mentioned, the parties may, if they can, prove the original mortgage-deed of 1819; and, if the mortgage-contract be proved, interest must be allowed according to it.

The Court will take the case up at once, and pass a final judgment upon it with as little delay as practicable.

The 20th July 1867.

Present:

The Hon'ble C. P. Hobhouse and Dwarkanath Mitter, *Judges*.

Stamp-duty—Solehnamah—Instalment-bond—Razeenamah.

Reference to the High Court by Baboo Anund Chunder Banerjee, Judge of the Court of Small Causes at Beauleah.

Case No. 318 of 1867.

Manick Chunder Roy, *Plaintiff*,

versus

Lallmon Sheikh and another, *Defendants*.

Case No. 317 of 1867.

Punchanun Sircar, *Plaintiff*,

versus

Gunesh Mundul, *Defendant*.

In a suit upon a bond for Rs. 40 with interest, the defendant filed a solehnamah, admitting that the amount due from him was Rs. 25, and agreeing to pay that sum by instalments. HELD that the solehnamah was not a petition within the meaning of Article 10, Act XXVI. of 1867, but an agreement within the meaning of Schedule A of Act X. of 1862, and was liable to a stamp-duty of 2 annas as for an instalment-bond.

After instituting a suit upon a bond for Rs. 32 with interest, the plaintiff filed a razeenamah, stating satisfaction of his claim, and withdrawing the suit. HELD that the razeenamah was rather of the nature of an application than of an agreement.

CASE.—THE plaintiff in No. 318 sued defendants for Rs. 59-10, being the amount due on a bond for Rs. 40 with interest. One of the defendants appeared and filed a solehnamah, admitting liability to plaintiff for Rs. 25, and promised to pay the same by instalments, the plaintiff expressing his consent to the arrangement. I have received this petition on a stamp necessary for a bond of Rs. 25. The point on which the opinion of the High Court is solicited is whether I have acted rightly in requiring for the solehnamah a stamp of two annas, being that required for a bond of Rs. 25, instead of allowing it to be filed on a stamp of one anna, *i. e.*, the stamp required for petitions.

The plaintiff in case No. 317 sued defendants for Rs. 43-8, being the amount with interest due on a bond for Rs. 32, and afterwards filed a razeenamah, alleging that the defendant had satisfied his claim, and so he withdrew the suit. I have allowed this petition of withdrawal to be filed on a stamp of one anna, being that required for petitions. The opinion of the High Court is solicited on a point similar to that noted above, whether I have acted rightly in allowing the petition to be filed on a stamp of one anna.

Section 6 of the new Stamp Act (Act XXVI. of 1867), while amending and replacing Schedule B, has made no provision for "razeenamah, ruffanamah, solehnamah, and the like," similar to that contained in Article 13, Schedule B, Act X. of 1862; but the penultimate column of the form of the return of the stamp-duty (forwarded to this office with the Government Circular No. 1549, dated 15th April 1867) directs that such papers described in Article 13 of the repealed

Schedule, shall "bear the stamp-duty appropriate to such under the provision of Schedule A."

As Schedule A of Act X. of 1862 does not provide for stamps leviable for razeenamahs, ruffanamahs, solehnamahs, &c., I think that the stamp which these documents shall now bear will depend upon the nature of their contents. As the solehnamah in case No. 318 is, in fact, an instalment-bond binding the defendant to pay Rs. 25 within a certain period, I am of opinion that the defendant has been justly required to pay for the solehnamah a stamp for two annas under Article 12, Schedule A of Act X. of 1862.

In case No. 317, however, it is to be observed that there is no contract which will have hereafter to be fulfilled; but, as plaintiff has only filed a razeenamah in evidence of his having withdrawn his claim, and received satisfaction from the defendant, he could not in justice be required to pay any stamp other than that required for petitions under Article 10, Act XXVI. of 1867.

As, in the absence of an express provision of the law, I entertain considerable doubts on the points above referred to, and as these are questions which will occur daily in the discharge of my duties, I have submitted the case for the opinion of the High Court.

The judgment of the High Court was delivered as follows by—

Hobhouse, J.—This is a reference from the Judge of the Small Cause Court at Beauleah under Section 22, Act XI. of 1865. The reference is under the Stamp Law (Act XXVI. of 1867), and is a reference on two points which have arisen in the interpretation of that Act.

The first case put before us is this: The plaintiff sued upon a bond for Rs. 40 with interest; the defendant filed a solehnamah in that case, by which he agreed that the money due from him was not Rs. 40, but Rs. 25, and he also agreed to pay that money by instalments as stated in the solehnamah.

The question put to us in this case is this, whether that solehnamah is an agreement within the meaning of Schedule A of Act X. of 1862, or whether it is simply a petition to a Small Cause Court within the meaning of Article 10, Act XXVI. of 1867.

We agree with the Judge of the Small Cause Court in holding that the solehnamah in this case is not a petition, but is an agreement, and that the proper duty was not one anna as for a petition, but two annas as for an instalment-bond. It seems to us that the solehnamah was, in reality, a new agreement by which, under new circumstances, for a different sum of money and a new instalment, the defendant did, in this case, agree to pay a certain sum of money within a certain time.

The second case, which is put before us, is this: In that case (No. 317) the plaintiff sued on a bond for Rs. 32 with interest; and, after he had sued, he filed a razeenamah, stating that the defendant had satisfied his claim, and so he withdrew the suit. The question before us is whether this razeenamah is an agreement under the provisions of Schedule A of Act X. of 1862, or whether it is a simple petition under the provisions of Article 10, Act XXVI. of 1867, before quoted.

We concur with the Judge of the Small Cause Court that the razeenamah in this case is rather of the nature of a petition than of the nature of an agreement. It is nothing more than an application to that Court by which the plaintiff states that he has received the sum of money for which he sued. If the plaintiff were in this case to be made to pay a stamp as for an agreement, he would really have been made to pay over a second time a stamp which he had already paid. He had already paid a stamp-duty on the bond, and the razeenamah was simply in the nature of an application, stating that the money due on that bond had been satisfied.

The 20th July 1867.

Present:

The Hon'ble C. P. Hobhouse and Dwarkanath Mitter, *Judges.*

Sale—Consideration-money—Presumption.

Case No. 270 of 1867.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 3rd December 1866, reversing a decision of the Principal Sudder Ameen of that District, dated the 12th March 1866.

C

Domun Singh and others (Defendants), *Appellants*,

versus

Bhuggobutty Debea (Plaintiff), *Respondent.*

Baboo Tarucknath Dutt for Appellants.

Baboos Sreenath Doss and *Romesh Chunder Mitter* for Respondent.

When it has been found that a deed has been duly executed, and that a certain sum of money has passed in consideration of that deed, and when there is a recital in the deed of the fact that the balance of the consideration-money was paid previously to the execution of the deed, then there is something more than a presumption that the whole consideration has passed upon the deed.

Hobhouse, J.—THE facts in this case, so far as they are admitted, seem to me to be these: There were four shareholders, three of whom are the special appellants in this case, and the fourth is the special appellant in the case No. 585, which we shall probably have to refer to hereafter. This being so, these four shareholders were possessed of a talook, and this talook was in suit between them and certain other parties. They required money, it is stated, to carry on this suit, and it is further stated that they gave a joint mooktearnamah to Gour Mohun Roy and Manick Chunder, who, I understand, are special respondents in this case. They are said to have given this mooktearnamah, and it is said to have contained a condition by which these two persons were empowered to sell out a certain share of this talook, in order to provide means for carrying on this suit.

Then the points, which are in special appeal before us, are these: The first point is whether this mooktearnamah was or was not given by the three special appellants in this case, that is to say, whether it was given with a knowledge that it contained a particular Clause, to the effect that these two mooktears or either of them might sell out a portion of the talook, in order to meet the expenses of the suit. On this point, I think that the Lower Appellate Court has found sufficiently as a fact that the mooktearnamah was executed by the three persons with a knowledge of its contents, because it is not shown to us that there is an alteration in those contents—any interpolation, interlineation, or anything of that kind; and it has been distinctly found by the Court below that the execution of that particular mooktearnamah was acknowledged in the presence of the Court.

The next point taken in special appeal is this: namely, whether the deed of sale was *bond fide* and executed for a consideration given. That it was executed has, I consider, been found sufficiently, as a fact, by the Court below. I also am of opinion that it was executed for a consideration. I observe that the deed itself sets forth that a certain sum of money had already been given at the time of the execution of the deed, and that the Court found, as a fact, upon the evidence of certain witnesses, that the remaining portion of the money was paid at the time of the execution of the deed. Now, it seems to me that, when it has been found that a deed has been duly executed, and that a certain sum of money has passed in consideration of that deed, and when there is a recital in that deed of the fact that the balance of the consideration-money was paid previous to the execution of the deed, then in such a case (and this is such a case) there is something more than a presumption that the whole consideration has passed upon the deed. This was, of course, a presumption capable of being rebutted, but it has not in this case been rebutted, nor even attempted to be so, and, I think, we must, therefore, hold that the finding of the Lower Court to the effect that the full consideration has passed is sound in law.

The next point (and that is a point which, with the permission of the Court, the pleader for the special appellant has raised in this appeal) is whether the mooktearnamah in question did contain a power, not only to sell a certain portion of the talook, but whether it contained a further power to sell a portion of the talook, and also a proportionate portion of the wassilat, which, it appears, was due upon the talook, and was in the hands of the Collector, the estate being, I understand, under attachment. It is true that this point has not been taken in the Court below, or, at any rate, that it was not strongly pressed. But it is also true that, in examining the plaint, there is no specific demand on the part of the plaintiff to take wassilat of the nature which I have described, that is to say, wassilat deposited in the Collectorate previous to the sale.

I think, therefore, that we are bound, as a Court of Equity, to enquire into the matter, and to see whether the mooktearnamah did or did not contain a power to sell a portion of the wassilat, as well as a portion of the talook; and I am quite clear, looking to the recital in the deed, and what is subsequently stated in the body of the deed, that the mooktearnamah did not contain a power to sell anything but a portion of the talook.

I think, therefore, that the decree of the Lower Court must be so far modified as to declare that the special appellant shall obtain possession of six annas of the talook, together with wassilat accruing from the date of sale (*i. e.*, Srabun 1269) up to date of possession.

Although I would thus modify the decree of the Lower Court, yet I think that the appeal must be dismissed with costs.

Mitter, J.—I concur.

The 20th July 1867.

Present:

The Hon'ble G. Loch and C. P. Hobhouse, *Judges.*

Security for costs (Plaintiff leaving India before decision).

Petition of the Calcutta and South-Eastern Railway Company (Defendants), Respondents in Regular Appeal No. 151 of 1867, praying for an order that Mr. F. Woodhouse (Plaintiff), Appellant, do furnish security for the costs incurred and to be incurred by the Petitioners within such time as the Court may order; and that, in the event of such security not being furnished within such time, judgment be passed against the Plaintiff, Appellant, pursuant to the provisions of Sections 35 and 342 of Act VIII. of 1859.

Mr. F. J. Fergusson for Petitioners.

Mr. T. R. Stokoe for Opposite Party.

Where a plaintiff leaves the country before the case is decided, the proper course for the defendant is to apply to the Court to take security for costs before the case is decided, and, if no security be furnished, the Court will pass judgment against the plaintiff by default. But, if the defendant allows the case to go to judgment, the Court on appeal cannot pass any order calling for security for the costs of the Lower Court, which must be left to be realized in execution.

Loch, J.—It appears to me that, as the plaintiff left the country before the case was decided, the proper course for the defendants was to have applied to the Court below with regard to the security for costs before the case was decided. The law provides a remedy if no security be furnished, which is, that the Court shall pass judgment against the plaintiff by default. But the case has now gone to judgment; and we cannot, as it appears to me, on appeal, pass any order as to the costs in the first Court.

With regard to Section 342, which requires that, in appeals of this kind, the Court shall demand such security in all cases in which the appellant is residing out of the British territories in India, as the appellant agrees to give security, we need say nothing more on that matter.

Hobhouse, J.—I agree. I think that, under Section 35, there is a special remedy provided; and that, inasmuch as the petitioners in this case did not have recourse to that remedy, we have not the authority (inasmuch as we could not apply that particular remedy) under Section 37, Act XXIII. of 1861, to call for any security for costs. Those costs can, of course, at any time be realized in execution of decree, and that seems to me to be the proper remedy to which recourse should be had.

Under Section 342, our cause is quite plain, inasmuch as the opposite party admits his readiness to give the security required.

The 22nd July 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Will—Execution.

Case No. 230 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 6th October 1866, affirming a decision passed by the Moonsiff of that District, dated the 28th March 1864.

Gooroo Doss Baboo (one of the Defendants), *Appellant*,

versus

Soondur Koomaree Debia (Plaintiff) and another (Defendant), *Respondents*.

Baboos Chunder Madhub Ghose and *Umurnath Bose* for Appellant.

Baboo Bama Churn Banerjee for Respondents.

Where, according to a will, until the testator's wife came of age, his mother had the beneficial interest in his property, and the rent which the mother recovered from the tenants was on her own account, and not as guardian of the wife—HELD that a decree obtained against the mother was consequently not as guardian of the minor but personal, and that the property of the wife could not be sold in execution of a decree personal to the mother.

Loch, J.—ONE Gokool Chunder died, leaving a widow, Soondur Koomaree, and a mother, Doya Koomaree. By his will, bearing date the 20th Bysack 1241, he gave the whole of his property to his mother Doya Koomaree for her sole benefit till his wife Soondur Koomaree attained majority, and then the property was to be made over to the widow for her sole benefit.

While Soondur Koomaree was a minor, and the beneficial interest of the estate remained with Doya Koomaree, she recovered rent from certain ryots under the provisions of Regulation VII., 1799. Subsequently, the ryots brought a regular suit to set aside that summary award, and were successful and got a decree against Doya Koomaree with costs. In execution of that decree, a certain property belonging to the estate of Gokool Chunder, which had by that time devolved upon Soondur Koomaree, who had attained majority, was sold, notwithstanding the opposition of Soondur Koomaree, and this suit is brought to set aside the sale.

The Principal Sudder Ameen gave a decree for the plaintiff, but it was pleaded that Doya Koomaree was acting as guardian of Soondur Koomaree when she brought the suit for rent, and when she was sued by the tenants; and, under such circumstances, the property of Soondur Koomaree was liable in execution. The case was remanded to the Principal Sudder Ameen by this Court on 15th June 1866, and he has adhered to his former opinion without properly carrying out the order of remand.

We think, however, that there is no necessity for another remand, as the terms of the will enable us to dispose of the case. It is clear from the will that, till Soondur Koomaree came of age, Doya Koomaree had the beneficial interest in the property, and the rent she recovered from the tenants was on her own account, and not as guardian of Soondur Koomaree, and the decree obtained against her was consequently not as guardian of the minor, but personal. Under such circumstances, it is clear that the property of Soondur Koomaree cannot be sold in execution of a decree personal to Doya Koomaree. We, therefore, affirm the order of the Principal Sudder Ameen, and dismiss this appeal with costs.

The 22nd July 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges*.

Sale—Payment of consideration-money.

Case No. 3211 of 1866.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 28th June 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 31st August 1865.

Dookha Thakoor (Plaintiff), *Appellant*,

versus

Ram Lall Sahee and others (Defendants), *Respondents*.

Baboos Kishen Succa Mookerjee and *Luckhee Churn Bose* for Appellant.

Baboo Poorno Chunder Shome for Respondents.

In a suit for possession under a bill of sale, the defendant pleaded that a large portion of the purchase-money still remained unpaid. HELD that the mere fact of a decree, having been subsequently passed in another suit, could not affect the validity of the defence relied upon in this case.

Mitter, J.—THE special appellant in this case sued to obtain possession of a certain share in Mouzah Bhabungoon on the allegation that the defendant, special respondent, had wrongfully refused to deliver possession of the same after having sold it to the petitioner under a bill of sale, dated 11th April 1863, and received from him the full amount of the purchase-money agreed upon. The respondent pleaded that a large portion of the purchase-money still remained

unpaid, and that, therefore, the petitioner was not entitled to maintain this action. The Lower Appellate Court has dismissed the claim, finding it, as a fact, that a portion of the purchase-money was still due from the petitioner. It is now contended before us in special appeal that possession ought to have been decreed to the petitioner, inasmuch as a decree for the balance of the purchase-money has been already passed in favor of the vendor in a separate suit brought by him for that purpose. We do not think that this contention is sound. Whether an order for delivery of possession could have been made in the latter suit on condition of the petitioner satisfying the amount decreed against him, it is needless for us to discuss, that suit having been, as we are informed by the petitioner's pleader, finally disposed of by a Division Bench of this Court. But, in the case now before us, we are unable to say that the Court below has acted erroneously in dismissing the petitioner's claim. The material averment, upon which this claim was brought forward, has been found against him. The respondent had every right to detain the property until the full amount of the price agreed upon had been paid to him; and, if he had this right, the Judge in the Court below acted properly in dismissing the suit with costs. The mere fact of a decree having been subsequently passed for the residue of the purchase-money in another suit cannot affect the validity of the defence relied upon in this case, and we are not informed even now that that decree has been satisfied. Under these circumstances, we dismiss the special appeal with costs, bearing interest at the rate of 12 per cent. per annum from this date to the date of realization.

The 22nd July 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Separate Kubooleut—Uncultivated lands.

Case No. 409 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Chittagong, dated the 10th December 1866, reversing a decision passed by the Deputy Collector of that District, dated the 29th June 1866.

Shaikh Mahomed Kaloo Chowdhry (Plaintiff), *Appellant,*

versus

Fedaye Shikdar (Defendant), *Respondent.*

Baboo Motee Lall Mookerjee for Appellant.

Mr. R. E. Twidale and *Baboo Kishen Dyal Roy* for Respondent.

A separate kubooleut cannot be claimed for uncultivated lands already comprised in a lease, on the ground that such uncultivated lands have now been brought into cultivation.

Loch, J.—The defendant in this case holds an istmoraree etmamee pottah comprising 20 droons of land. In 1207 he took out a fresh pottah from the zemindar, which set forth that, of the area comprised within the defined boundaries, 12*d.* 12*c.* were khela or uncultivated, and the remaining 7*d.* 7*c.* were assessed at Rupees 20 per droon. The zemindar now wishes the defendant to give him a fresh kubooleut for such of the khela lands as have been brought into cultivation; and contends that, admitting the tenure of the defendant to be a heritable one, the zemindar is not precluded from demanding rent for the uncultivated lands. We think it unnecessary in the present case to determine whether rent can, under the terms of the lease, be demanded for the khela lands brought into cultivation, for the plaintiff's suit is not to enhance the rent, on the ground that the defendant holds more land than he is entitled to, but he wants the defendant to give him a separate kubooleut for lands which clearly were comprised in his lease, on the ground that they have now been brought into cultivation. We think the plaintiff cannot ask for a separate kubooleut for these lands, and therefore dismiss this appeal with costs.

The 22nd July 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Onus probandi—Suit to contest distraint—Damages.

Case No. 261 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 6th December 1866, affirming a decision passed by the Deputy Collector of that District, dated the 30th April 1866.

Oojan Dewan and others (Defendants), *Appellants,*

versus

Prannath Mundul (Plaintiff), *Respondent.*

Baboo Bykuntnath Paul and *Moulvie Syud Murhumut Hossein* for Appellants.

Baboo Roopnath Banerjee for Respondent.

In a suit to contest the demand of a distrainer, the landlord is only required to prove the fact of tenancy and the amount of jumma. If, thereupon, the tenant pleads payment, and payment is denied, the *onus* is on the tenant to prove his allegation.

Before a tenant can obtain any decree for damages on the ground of illegal distraint, he must prove what loss he has actually sustained.

Mitter, J.—This was an action to contest the right of the special appellant to distrain certain crops belonging to the plaintiff, special respondent. The prayer in the suit was to obtain the release of the property distrained, and to recover damages for injuries wantonly done thereto. The first Court, finding that the special appellant had failed to prove the arrear demanded by him, and that the distraint itself had been made otherwise than according to the provisions of the law, directed the release of the crops, and awarded a sum of 125 rupees as damages. The Lower Appellate Court has held that the landlord has failed to prove the arrear claimed, and that there was no reasonable cause shown to justify any interference with the amount of damages awarded. In special appeal we observe, in the first place, that the Lower Appellate Court has erroneously required the distrainer to prove something more than he can be legally and reasonably required to prove. Section 138, Act X. of 1859, says, it is true that "in all suits to contest the "demand of the distrainer, the distrainer "shall be required to prove the arrear *in the "same manner* as if he had himself brought "suit for the amount under the foregoing "provisions of the law." Now, if the landlord, instead of distraining, had brought a suit for the arrears, all that he would have been required to prove was that the special respondent was his tenant, and that he was liable to pay at the rate specified. If, after the landlord had succeeded in proving these facts, the tenant wanted to get rid of the claim by pleading payment, and the payment was denied, the tenant would have been required to prove his allegation. In the present case the tenancy as well as the jumma are both admitted by the special respondent, who based his claim mainly upon the ground of certain receipts, the genuineness of which was disputed by the landlord. Neither of the Lower Courts has made any enquiry about the genuineness of these documents, or as to the fact whether the rent payable has been actually paid or not. It is necessary, therefore, to remand this case to the Lower Appellate Court to enquire into the truth of the allegation of payment, and of the receipts propounded in support thereof. On the question of damages, we remark that no enquiry has been made into the extent of the injury alleged to have been done to the crops distrained, the only ground upon which the claim for damages was based in the original plaint. Nor does it appear to us upon what data the Lower Courts have awarded the sum of 125 rupees. With reference to the illegalities dealt upon at great length by the Court of first instance, but overlooked by the Lower Appellate Court, we observe that the plaintiff did not ground his claim for damages upon them. As, however, an issue was laid down by the Deputy Collector on that point, it will be necessary to enquire into it; but, before the tenant can obtain any decree for damages on account of such illegalities, he must prove what loss he has actually "sustained thereby." (*See* Section 142 of the Act.) We remand the case, therefore, to the Lower Appellate Court to try it in conformity with the foregoing remarks. The costs of the appeal are to follow the result of the final judgment in the case.

The 22nd July 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Section 19, Act X. of 1859—Relinquishment of land—Application to Collector—Onus probandi.

Case No. 199 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 28th November 1866, reversing a decision passed by the Deputy Collector of Raneegunge, dated the 10th March 1866.

Mr. James Erskine (Defendant), *Appellant*,

versus

Ram Coomar Roy and others (Plaintiffs), *Respondents.*

Baboo Bungshee Dhur Sein for Appellant.

No one for Respondents.

Section 19, Act X. of 1859, does not imperatively require an application for service of notice of relinquishment of land by a ryot to be made to the Collector. The non-service of notice by the Collector cannot affect the rights of the tenant, if he can prove that, previous to his application to the Collector, he had given actual notice direct to the landlord himself or to his authorized agent. The application to the Collector is not bad, because it was not made in the month of Chyet preceding.

Where a tenant is found to have taken steps required by law in furtherance of his intended relinquishment, it is for the landlord to prove his continued possession notwithstanding. But where it is found that the tenant has not gone through the necessary steps, it will be for him to prove that the landlord took possession of the land, and enjoyed the profits by holding it khas, or by letting it to others.

Mitter, J.—The petitioner in this case was sued by his landlord for arrears of rent alleged to be due on account of the year 1269 B. S. In answer to the suit, it was pleaded by him that he had relinquished the land in his possession in due time; that notice in writing of his intention to relinquish had been served by him upon the authorized agent of the landlord in the month of Chyet of the previous year; that, on the agent refusing to sign a receipt for the same, an application was made to the Collector in accordance with the provisions of the law, and finally that the landlord himself was in possession of the land during the period sued for. The Judge in appeal decreed the landlord's claim, holding that there was no evidence to show that the landlord or his authorized agent had refused to sign a receipt for the notice; that the application to the Collector was invalid, inasmuch as it was made after the expiration of the month of Chyet; that nothing was done upon that application, and, finally, that an actual relinquishment of the land was not proved.

There are three grounds of special appeal now urged before us. With reference to the *first* ground, we observe that the Judge was clearly wrong in stating that "there is no evidence" before the Court, that the person entitled to the rent or his agent refused to receive any "notice, and to sign a receipt for the same." Three witnesses were examined by the petitioner to prove these facts, and he is clearly entitled to the opinion of the Lower Appellate Court upon the credibility of their testimony, more specially when the Court of first instance had dismissed the plaintiff's suit on the strength thereof.

With regard to the *second* point, we observe in the first place that the law does not imperatively require that an application for service of notice must be necessarily made to the Collector. Section 19, Act X. of 1859, simply declares that, on the refusal of the landlord or of his agent to receive the notice, and to sign a receipt for the same, the ryot "*may* make an application to the Collector, &c., &c." In the present case, however, the ryot had made an application according to the requisitions of the law. If the Collector failed to serve the notice contemplated by the law, his neglect of duty cannot affect the rights of the tenant, nor can the landlord have any substantial ground of complaint on account of the non-service of such notice by the Collector, if the tenant can prove that, previous to his application to that officer, he had given actual notice of his intention to relinquish directly to the landlord himself or to his authorized agent. Nor do we think that the application to the Collector was bad, because it was not made in the month of Chyet previous. The law does not require that it should be so. The time referred to in the Section quoted above has reference to the service of the original notice, which the tenant is required to give without the intervention of the Collector.

With reference to the *third* and last point, we observe that there has been a manifest failure of justice. If the tenant is found to have taken all the steps required by the law in furtherance of his intended relinquishment, it is for the landlord to prove that he continued to hold possession of the land, notwithstanding that such steps had been taken by him. If, on the other hand, it is found that the tenant has not gone through the necessary steps, it will be for him to prove that the landlord took possession of the land, and enjoyed the profits by holding it khas, or by letting it to other parties. The Judge has merely made a cursory remark at the end of his judgment that actual relinquishment has not been proved. He must, in the first place, find the preliminary points arising in the case, and then come to a distinct and clear finding upon the evi-

dence on the question of possession according as the *onus* of proof might be upon the one or the other party. We remand this case to the Lower Appellate Court to try it with reference to the foregoing remarks.

The 22nd July 1867.

Present:

The Hon'ble W. S. Seton-Karr and Dwarkanath Mitter, *Judges.*

Sale for arrears of Revenue—Purchaser of rights of Government—Estoppel—Limitation—Resumption.

Case No. 672 of 1867.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 5th January 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 9th July 1866.

Moonshee Buzlool Rahman (Defendant), *Appellant,*

versus

Pran Dhun Dutt (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Annund Chunder Ghossal* for Appellant.

Baboo Kalee Prosunno Dutt for Respondent.

An auction-purchaser of the rights of Government in a talook sold for arrears of revenue is not privy in estate to the defaulting proprietor. He does not derive his title from him, and is bound neither by his acts nor by his laches. The purchaser moreover is bound by no limitation which would not bind or affect the Government.

The talook in this case having come into the possession of Government by resumption in 1841—HELD that the auction-purchaser could have no better title, and could be in no better position than the Government at the time of resumption.

Seton-Karr, J.—THIS is a suit in which the purchaser of a certain talook known as No. 1186, at a sale for arrears of revenue, sued the defendant, who is lessee of another talook known as No. 38, for possession of some 166 beegahs of land which had been appropriated unlawfully, and belonged, the plaintiff stated, to the talook which he had purchased.

The first Court gave a decree, and its decision was confirmed by the Judge.

In appeal, it is first urged on us that a certain decision obtained by the defendant in a case in which Gunga Sunkar, the defaulting proprietor, was a party, binds the plaintiff, and that he is further barred by limitation.

Neither of these pleas, as put, has any force. The plaintiff, as purchaser of the rights of Government in the talook, is not privy in estate to the defaulting proprietor. He does not derive his title from him, and is bound neither by his acts nor by his laches. This is the doctrine which, with reference to the sale-laws and to public policy as regards the Government revenue, our Courts have invariably enforced and adopted in all these cases. The plaintiff, as auction-purchaser, is bound by no limitation, which would not bind or affect the Government.

We, therefore, overrule both of these pleas. We may observe that this view of the law was lately taken in a case decided by Justices Seton-Karr and Macpherson on the 19th of June 1867, case No. 346 of 1867.*

The opinion of two Judges in the case reported at page 191, Civil Rulings, of the Weekly Reporter, Volume II., seems to be somewhat to the contrary effect. But it is an opinion, and nothing more; and the point which was really ruled in that case was, that a purchaser at a sale for arrears of revenue was *not* bound by an agreement entered into by the former owner. Practically, therefore, the real decision on the point of law in that case does not differ from the other rulings of this Court and of the late Sudder Court.

The position of the auction-purchaser in the present case is not, however, that of a purchaser of an estate of which the revenue was fixed in perpetuity in 1793.

The talook came into the possession of Government by resumption in 1841. A settlement was finally concluded of the talook on the 30th of April 1846, and the plaintiff became the purchaser on the 12th of January 1861.

It follows, therefore, that he can have no better title, and can be in no better position than the Government acquired at the time of resumption. And, though the case in which the defaulting proprietor and the

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* *See ante*, p. 62.

defendant were parties is not binding and conclusive against the plaintiff, it is, we are bound to say, a piece of evidence in the dispute, which has now arisen, of a very important kind.

With regard to the other points pressed on us in special appeal by the defendant, they relate to the failure of the Judge to look into all the evidence on the record, and to give the case a full consideration. The Judge relies almost entirely on the chittahs made after resumption, and on the Ameen's report as identifying those chittahs with the lands of the plaintiff's talook. But he has not noticed the case already alluded to, nor the report and award of the survey, nor the oral evidence. And the first Court refused to send for the chittahs of the defendant's talook, which, it is urged, would have shown that the land in dispute belonged to the defendant. It may be quite possible that, although the chittahs of plaintiff's talook marked out the land now in dispute as belonging to the said talook, the lands themselves may have been in the possession of the defendant for a period which would have barred the Government at the time of its acquirement of the title in 1841, and would consequently bar the plaintiff now. But this would be a matter of evidence, and would be for the defendant to establish.

The case is remanded to the Judge, who will take it up, will send for the defendant's chittahs, which, we presume, are in the Collectorate, and will pass an entirely fresh decision on all the evidence, especially with reference to the previous case. If the plaintiff can succeed in showing that the lands really and actually formed part of the talook in 1841, and the defendant is unable to rebut or annul such proofs, the plaintiff may be entitled to his decree. If the defendant can show that he has had possession of the lands for a time which would have barred the Government in 1841, the defendant may retain possession, and the plaintiff's suit should be dismissed.

The 23rd July 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, *Judge*.

Mortgage—Foreclosure—Deposit or tender of Mortgage-money.

Case No. 3145 of 1866.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 25th of August 1866, reversing a decision of the Sudder Moonsiff of that District, dated the 15th of August 1865.

Dabee Rawoot and another (Plaintiffs), *Appellants*,

versus

Heeramun Muhatoon and others (Defendants), *Respondents*.

Baboo Poorno Chunder Shome for Appellants.

Baboo Doorga Doss Dutt for Respondents.

Where a mortgagee extended the time for payment to the 25th November, and the mortgagor was prevented by the closing of the Court from depositing the mortgage-money in the Judge's Court on that day—HELD that the mortgagor saved his estate from foreclosure by depositing the money in Court on the first day after the 25th Nove mber on which the Court was open.

The mortgagor having the option either of depositing the money in the Judge's Court, or of tendering it, if there is sufficient excuse for not depositing in the Judge's Court, he is not bound to tender the money and prove that tender.

Peacock, C. J.—IN this case the plaintiff claims through the mortgagor of an estate. The mortgagee, under the provisions of Section 8, Regulation XVII. of 1806, gave notice of foreclosure. The notice was issued by the Judge on the 11th August 1862. On the 10th August 1863, the mortgagee by petition allowed a further term of payment to the mortgagor, extending it to the 30th Kartick 1271, corresponding with the 25th November 1863.

It is clear that, if the mortgagor had tendered the mortgage-money and interest to the mortgagee on the 25th November, he would have been in time; so he would have been clearly in time if he had taken his money into the Judge's Court on the 25th November. But, unfortunately for the

plaintiff, the Sonepore fair and races were held; and the Judge thought it right not to open his Court on the 25th November, but to keep a holiday during the Sonepore fair. As far as I collect, the fair terminated on the 27th November; and, if the Judge was justified in closing his Court during the fair, he might have opened it on the 28th. But the 28th was a Saturday; and it appears from the decision of the Moonsiff that the Judge did not open his Court on that day: he probably extended his holiday until the Monday following. On that Monday, the plaintiff took his money into the Court, and deposited it there for the purpose of preventing a foreclosure of his estate.

The Principal Sudder Ameen seems to think that, if the plaintiff had deposited the money in the Judge's Court on the 28th, that would have been sufficient. He considers that from the 25th to the 27th was a customary holiday. I know of no holiday existing in the Court of the Mofussil on account of the Sonepore fair or the Sonepore races; and it appears to me that there was no legal holiday from the 25th to the 28th, and that there was just as good an excuse, *viz.*, that the Court was closed, for the plaintiff's not depositing his money in the Court on the 28th, as there was for his not depositing it on the 25th, or on any of the days intervening between the 25th and the 28th. It appears to me that on those days the Judge was improperly absent from his Court.

The question is whether the absence of the Judge from his Court is a sufficient answer to the mortgagor for not having deposited the money in the Judge's Court to prevent foreclosure.

It is clear that, if the Judge was bound to do anything himself, and it was not left entirely to his Ministerial Officers to do that which was required by the Regulations, there would have been no use in taking the money to the Court on a day on which the Judge was absent.

Section 2, Regulation I. of 1798, says: "The borrower is at liberty * * * to "deposit the amount due to the lender on or "before the stipulated date, in the Dewanny "Adawlut of the city or zillah in which "the land may be situated; and the Judge "receiving the same shall furnish the party "with a written receipt for the amount, "specifying on what date and for what "purpose such deposit may have been made. "He shall also, at the same time, cause a "written notice of such deposit to be "delivered to the lender, and on the appli-"cation of the latter and his surrender of "the conditional bill of sale, or showing "satisfactory cause why it cannot be sur-"rendered, shall pay him the amount "deposited, and take his acknowledgment, "to remain among the records of the "Court."

The period allowed for the deposit has been extended by Regulation XVII. of 1806 to the expiration of the year's notice of foreclosure required to be given by the mortgagor.

It appears to me that the plaintiff was not bound to deposit his money unless he got a receipt for it from the Judge; and, when the money was deposited in the Court, it was the duty of the Judge to issue notice to the mortgagee that the money was so deposited. The provisions of the Regulation, therefore, could not be complied with on a day on which the Court was not held by the Judge.

It may be that the Judge's neglect in not holding his Court on days which were not holidays might not be an excuse to the mortgagor for not taking his money in a case which depended strictly upon the Regulations. But, in this case, a strict compliance with the Regulations had been dispensed with by the mortgagee, for he had extended the time to the 25th November. We have to deal with this case by administering justice, equity, and good conscience; and it appears to me that, as far as equity is concerned, there was a very reasonable ground why the plaintiff did not deposit the money in the Court on the 25th November, the day fixed by the mortgagee. It has been held that, when the last day for depositing money under the Regulations is a legal holiday, the mortgagor is not bound to deposit his money until the following day.

There may be many other cases which would form as good an excuse as a holiday. Suppose the case which recently occurred in the Court of Beerbhoom, in which small-pox having broken out, and the Judge was advised by the Civil Surgeon to close his Court, and this Court by a telegram authorized the Judge to close it lest the holding of the Court should be the cause of spreading the disease; no one would contend that there would be any justice, equity, or good

conscience in holding that a mortgagor should absolutely lose his estate, because he could not go to the Judge's Court, and deposit his money there, while the Court was closed under such circumstances. I think that, in such a case, there would be as good an excuse for the mortgagee's not depositing his money within the prescribed time as for his not depositing on a legal holiday.

It is not necessary to determine whether the absence of the Judge and the closing of the Court, without a lawful cause, would form an excuse for not depositing the money within the time peremptorily fixed by the Regulations to prevent a foreclosure; for, in this case, the time fixed by law had been extended by the mortgagee himself to the 25th November, up to which date the mortgagee allowed the time for payment to be extended. A fraudulent mortgagee, who would resort to devices such as those which it was the object of the Regulations to guard against, might have fixed the 25th November, in the hope and expectation that the Judge would close his Court for the fair and the races, and that the mortgagor would not be able to deposit the money on that day, and would thus lose his right of redemption. I do not think that that was the object of the mortgagee in the present case, but I put the case to test the principle.

The day fixed for payment to prevent a foreclosure of the estate was not a day peremptorily fixed by law, but a day fixed by the mortgagee himself. Now, Courts of Equity, as a general rule, will relieve from forfeiture caused by not doing an act on a day fixed by the parties; and I think they ought also to relieve when the day is fixed by law, and the act is prevented by some accident which the person, to be affected by the forfeiture, could not prevent, and which was not caused by any default or misconduct on his part. Courts of Equity will not allow a lessor to forfeit a lease, because the rent is not paid on a particular day.

If ever there was a case in which a mortgagor should be relieved, it is in a case like this. The mortgagor did not know beforehand that the Judge would not be at his Court on the 25th: he certainly did not know that the Judge would not be there on the 28th. Not knowing that it would be a legal holiday from the 25th to the 27th, and not knowing that the Judge would be absent on the 28th, there was surely no negligence on the part of the mortgagor in not taking his money to the Court on the 24th. It would not be acting upon the principles of equity and good conscience to allow the mortgagor to lose his estate under the circumstances. The mortgagee has sustained no damage whatever in not getting his money on the 25th, except the interest on his money, which the plaintiff would be bound to make good to him.

But it is said that, inasmuch as the plaintiff could not take the money on that day to the Court, he was bound to make a tender to the mortgagee, and certain cases were cited as authority on that point.

I must say, however, that I cannot agree at all with those authorities, and, if necessary, to have determined the case upon that point, I should have referred it to a Full Bench. But it is not necessary to do so. The object of Regulation I. of 1798 and Regulation XVII. of 1806 is quite clear. Regulation I. of 1798 recites that, whereas mortgages become forfeited if the money was not paid on the day on which, according to the terms of the mortgage, it ought to be paid, and that mortgagees frequently denied the tender of money or kept out of the way for the purpose of avoiding tender or payment; therefore, to avoid all these difficulties and risks to which mortgagors were exposed, the Regulation went on to provide that mortgagors might deposit the money in the Judge's Court so that they might be safe.

But, if we were to hold that, when the Judge's Court is not open, the mortgagor is bound to make a tender to the mortgagee, the very object of the Regulation would be frustrated. I should hold that the plaintiff has the option, either of depositing the money in the Judge's Court, or of tendering it; and that, if there is a sufficient excuse for not depositing it in the Judge's Court, he is not bound to tender the money and prove that tender.

In this case, the mortgagee extended the time for payment to the 25th November, and the mortgagor was prevented by a circumstance to which he was no party, and which was not caused by any default or misconduct on his part, from depositing the money in the Judge's Court on that day. He, therefore, had a reasonable excuse for not doing so; and it appears to me that it would be contrary to any principle of justice, equity, and good conscience to allow the mortgagee to take advantage of his in-

ability to deposit the money in Court, and to treat the mortgage as foreclosed.

Under these circumstances, it appears to me that the plaintiff saved his estate from foreclosure by depositing the money in the Court on the first day after the 25th November, on which the Court was open.

The decision of the Lower Appellate Court must be reversed, and the decree of the first Court modified as follows, that is to say, the amount of the mortgage-money only without interest to be paid into Court within six weeks from this date, instead of on the 17th day of August mentioned in the said last-mentioned decree; the plaintiff not to recover any wassilat. In all other respects, the said last-mentioned decree is affirmed with the costs of this appeal and the costs of the Lower Appellate Court.

As the plaintiff appears to have since withdrawn the money from the Court, the decree will be that he shall have possession of his land upon his paying into Court the amount of the mortgage-money within six weeks from this date. Under the circumstances of the case, we think that the plaintiff is not entitled to recover wassilat; and that, on the other hand, the mortgagee ought not to have any interest on the money which has been drawn out.

The 23rd July 1867.

Present:

The Hon'ble F. B. Kemp, L. S. Jackson, and W. Markby, *Judges.*

Joint Hindoo Family—Ancestral Property—Presumption—Onus probandi.

Case No. 39 of 1866.

Regular Appeal from a decision passed by the Judge of Beerbhoom, dated the 22nd December 1865.

Tara Churn Mookerjee (Defendant), *Appellant,*

versus

Joy Narain Mookerjee (Plaintiff), *Respondent.*

Mr. R. V. Doyne and *Baboos Jugodanund Mookerjee* and *Onookool Chunder Mookerjee* for Appellant.

Baboos Dwarkanath Mitter, Sreenath Doss, Kedarnath Chatterjee, Shoshee Bhoosun Bose, Bama Churn Banerjee, Roopnath Banerjee, and *Banee Madhub Banerjee* for Respondent.

Suit laid at Rupees 4,143.

Held by the majority of the Court (Jackson, J., dissenting) that, the existence of joint-family property being admitted, the presumption was that all acquired property belonged to the family, and that the *onus* was on the defendant in this case, who set up a plea of self-acquisition, to prove that the joint-estate was so small that, after providing for the maintenance of the family, nothing remained to form a fund for the purchase of other properties for the benefit of the joint-family.

Markby, J.—In this case, which was originally argued in July last before my brother L. S. Jackson and myself, and has been again argued before us, sitting with my brother Kemp, the plaintiff sued for partition and possession of certain moveable and immoveable property, to which he alleged he was entitled as guardian of one Radha Madhub Mookerjee; the property in question being alleged to be ancestral family-property, of which the plaintiff claims a share to the extent of 1 anna 24 gundahs.

A schedule of the properties claimed, containing nearly 200 items, is attached to the plaint.

Radha Madhub, the common ancestor, had five sons: Shama Churn, Tara Churn, Modhoo Soodun, Bistoo Chunder, and Dhun Kristo, and two daughters whose names have not been mentioned. The plaintiff is the son of Bistoo Chunder, who is dead. Shama Churn and Dhun Kristo are also dead. Their descendants with Tara Churn, Modhoo Soodun, and the plaintiff's own brother, have been made defendants in this suit. The family belong to the caste of Koolin Brahmins, and are governed by the law of Bengal.

All the defendants, except Tara Churn, admit the plaintiff's right to the share which he claims, and they only seek to exclude from division certain minor articles of moveable property.

The real defendant in the suit is Tara Churn, and he alleges in his written statement that the landed property possessed by his father was divided by him during his life among his five sons and two daughters, under a deed executed in the year 1250; and that, after this voluntary relinquishment of all his rights, the father passed the remainder of his life with assistance received

from Tara Churn himself; that, for the gratification of his father's wishes, he (Tara Churn) lived during the father's lifetime in a state of commensality with his brothers, sisters, and nephews, and that he also continued to do so for a short time after his father's demise, in accordance with the custom of the Hindoo families.

Tara Churn also alleges that the talooks numbered 1 to 3 in the schedule, and 5 to 7, as well as a moiety of No. 4, and likewise Nos. 112, 180, and 181, which are appurtenances to the above-mentioned talooks, are not ancestral properties, but have been acquired by himself from his earnings as a mooktear of certain wealthy persons, and from other sources without the assistance of any of the rest of the family. A considerable portion of the property claimed he admits to be joint, and another portion he alleges to be the *streedhun* of his wife, but upon this no question has been raised before us.

The allegation of a division of the family-property in 1250 fell to the ground. The only proof adduced in support of it was a document (apparently mutilated), in which the father had drawn out a schedule of the property, and had enumerated the shares of his children excluding himself. But, as we intimated in the course of the argument, there was not the slightest evidence that this document was ever acted on.

We must, therefore, treat this as the case of a Hindoo family having joint-property, in which one member seeks to establish that certain property acquired by him is his separate property, and not the joint-property of the family. It has been admitted at the bar that in such a case the presumption generally is that the acquired property belongs to the family, and that it lies upon the party, who sets up the separate rights, to prove that the property was acquired exclusively from his separate resources, without assistance from the joint-funds, or the joint-labors of the family.

It has, however, been contended, in the first place, that this presumption is not applicable to the present case, because the joint-property was so small that there could have been no surplus after providing for the necessary wants of those members of the family who were living on the joint fund: whereas the foundation of the presumption is that there should be a surplus capable of being made a nucleus of further acquisition.

Whether or no this view of the law is in all respects correct, it does not appear to me necessary to consider, because I understood it to be conceded by Mr. Doyne that, the existence of family-property being admitted, the *onus* of showing that it was all absorbed by family-expenditure rested with the party setting up the self-acquisition. Now, here the existence of family-property was distinctly admitted; but where is the evidence that this was wholly absorbed by the family-expenditure? I find absolutely none. Tara Churn, whose admitted duty it was to produce this evidence, has left us wholly in the dark, both as to the amount of the family-income and the difference between that and the family-expenditure. He does not even hazard a guess at either. It is true that, in his written statement, he alleges that he assisted in the support of his father and of his brothers, and he and his witnesses have made in evidence vague statements of a similar character; but, in the 10th paragraph of the written statement, he charges his brothers with being possessed of various descriptions of property, "rent-paying and rent-free lands, tanks, gardens, farms, business, concerns, and other real and personal property," which, he says, they are keeping concealed for the purpose of preventing them being brought into division. As the basis of any sound conclusion, all these statements appear to me to be equally worthless. The point is one on which Tara Churn might easily have produced clear and precise evidence; and, as he has not chosen to do so, I think it must be found against him.

I think, therefore, that the presumption that this property was acquired for the joint-benefit of the family is applicable to this case, and it becomes necessary to consider what is the evidence which the defendant has produced to rebut this presumption.

The main facts relied on for this purpose, and which are themselves indisputable, are that Tara Churn was a mooktear carrying on a very considerable business at Sooree, about 50 miles from the family-residence; that the property in dispute was bought at Sooree, and for the most part managed at Sooree; that the purchases were negotiated, and the money found by Tara Churn, and Tara Churn alone; and that, after the purchase, the only person, whose name appears in all transactions connected with the properties is Tara Churn.

In further support of his contention, the plaintiff produced at the trial a number of

account-books which are admitted to be genuine, and which are kept in the name of Tara Churn, that is to say, he is credited with all expenditure, and debited with all receipts. In these books are entered the accounts of the purchase of all the properties in dispute, the money paid on account of the purchases being entered on one side, and, on the other side, items of money received from a variety of sources. On almost every occasion, the purchase-money appears to have been supplied, either by the application of money in Tara Churn's hands belonging to his clients, or by loans expressly contracted for this purpose.

If we look only to these items in the account-books and to the facts above stated, there is perhaps some ground for contending that the acquisition of these properties is shown to have been a private transaction of Tara Churn's for his own benefit, in which the rest of the family can claim no share. But, when the books are further examined, to my mind, they wear a very different aspect. It was admitted that two of the brothers, Modhoo Soodun and Bistoo Chunder, spent a great portion of their time at Sooree with Tara Churn. Both appear to have been employed in small situations of their own, and also to have rendered assistance to Tara Churn in his business as a mooktear.

Now, it appears by the account-books that the money earned by these two brothers was invariably, as far as I can see, brought in and entered to the credit of Tara Churn in common with the other items of receipts; so that the earnings of all three brothers *formed one general fund*. Tara Churn, when examined, tried to make out that these were loans only from his brothers to himself, but there is not to my mind any trace of this. There is no trace of any repayment, or any account kept between the brothers. Modhoo Soodun also, who was in the employ of the Principal Sudder Ameen, brought in moneys which were in his hands belonging to his employer just in the same way as Tara Churn brought in money belonging to his clients. On the other hand, the expenses of all three brothers are entered in the same books, and no separate balance is struck, showing the debit or credit in respect of each, but only a general balance of income and expenditure in respect of the whole fund. In fact, except as regards the magnitude of the amounts contributed and the name in which the books are kept, it appears to me that these are just as much the accounts of one brother as of another. But, more than this, we find by the books that, during the whole period which they cover, considerable sums of money were constantly being sent from Sooree to the family-house at Kindooli, and all such sums are similarly charged against the general expenditure. On the other hand, it frequently, though not so frequently, occurs that money appears as having been sent from Kindooli to Sooree, some of which is entered as the profits of the very lands which Tara Churn admits to be joint. Tara Churn says that the family were poor, and that the money sent to Kindooli was sent by him out of his own bounty; but that is hardly consistent with money being sometimes sent the other way. And it is hardly possible to conceive that a man of Tara Churn's experience should not have been alive to the danger of entering such items as these without explanation in the same books, and under the same heading, with the income and expenditure relating to properties which he, a member of a joint Hindoo family, claimed to have separately acquired.

But, if there were any doubt upon the matter on the evidence as it stands thus far, I think there can be none when we come to look at the nature of the correspondence which passed between the brothers. When, on the occasion of this case being first argued, Tara Churn was, by our direction, recalled and examined before us, certain letters were put into his hands, and acknowledged by him to be genuine. They were, accordingly, put in evidence and filed, and I do not quite understand the complaint of Mr. Doyne that he is taken by surprise by the reference that has now been made to them. They have now for months been filed, and open to the inspection of both parties. The first letter relied on is dated the 25th of Magh 1252, and is addressed by Tara Churn to Modhoo Soodun at Kindooli. It refers to a proposition which had been made by Modhoo Soodun to give up the business at Sooree, and to his expressed intention of going on a pilgrimage to Juggurnath. Tara Churn strongly deprecates the notion of giving up the business, not in the words of a sole owner, but of one partner to another equally interested with himself. He speaks of its advantages to "*us*," and says that "*we*" have not acquired sufficient properties to enable us to give up work. How can this language be reconciled with the idea that the business was

exclusively Tara Churn's, of which he had the sole control, and was entitled to the exclusive benefit? Several letters were also produced written by Tara Churn in Bysack 1264, in which reference is made to various expenses which would have to be incurred for different members of the family, and consulting Modhoo Soodun as to how these expenses are to be met. In the *same* letters he refers to a sum of Rupees 250, which would be required for the rents of a talook called Dabeepore, one of the properties which Tara Churn claims as separately acquired, and in one letter he says: "I have heard that a large portion "of the rents of Dabeepore and Ramosurma" (another of the alleged separately acquired properties) "have been spent at home; "now it is necessary to pay the rent; how "this money is to be raised, you write to "me." And a little later, he writes again to the same brother: "You need not be anx-"ious about the debts that have been incur-"red for the rents of the talooks." The language of these letters appears to me wholly inconsistent with the notion that the two properties mentioned were exclusively Tara Churn's. It seems to me highly improbable that Tara Churn would permit his brothers without even the most gentle remonstrance to help themselves out of his private funds, leaving him without the means even of paying his rent. Nay more, that he would express his desire that they would not give themselves any concern about the embarrassment in which they had thus placed him. Is it not far more probable that these rents were the common property of the family applied, in the ordinary course, for common family-purposes, and that the liability to pay the rent was a common liability for which all were concerned to provide? Taken altogether, the letters appear to me just such as might pass between two persons having a common interest in the concerns to which they relate, but utterly unlike such letters as a man would write about his private affairs to a person who could take no more than a friendly interest in them.

There was a good deal of minor evidence in the case which I do not think it necessary to notice. I have referred to the most important, and I have come to the conclusion that no portion of the property comprised in the lots above mentioned was separately acquired by Tara Churn.

I think that the source from which these acquisitions were made was the business at Sooree, and that the business at Sooree was, in the strictest sense of the term, the common business of the three brothers carried on for the benefit of the whole family. I think, that, Tara Churn has himself made it so by allowing his brothers to bring their earnings into a common fund with his own, and to draw their expenditure from the common purse. The inevitable result of this must have been, if the business had been a losing one, to have involved the whole family in serious liabilities. As the family, therefore, took the risk of loss, so I think they are entitled to a share in the gains, and that all the acquisitions made by Tara Churn, whilst carrying on that business, must be taken to have been for the general benefit of the family.

We were warned by Mr. Doyne that, if we laid down a strict rule as to the necessity of members of a Hindoo family making it perfectly clear in their transactions, whether they were acting on their own account, or for the general benefit of the family, it would lead to this that, as soon as one member of a family wanted to work for himself, he would be obliged to separate altogether, and that there would be an end of that mutual confidence which is so favorable a feature of Hindoo families. In this expectation, I dare say, Mr. Doyne is perfectly well-founded. I have no doubt that, as soon as it is clearly ascertained that one member of the family is working for himself, and not for the common benefit, that member ceases to hold the same intimate relation with the rest of the family that he did before. But any evils which result from this loosening of the family-tie are consequences of the act of self-acquisition, which must be discovered sooner or later, and they will be in no way mitigated, but, as I think, greatly increased, if we encourage a member of a joint-family to conceal his real position, and, though apparently working for the family, to turn round afterwards, and say he was working for himself.

This is the only point on which the decree of the Lower Court has been brought before us, the grounds of appeal which relate to other matters having been all abandoned by the appellant, except that which relates to the moveable property of the family. The plaintiff has, however, given up this part of his claim, so that the decree of the Lower Court will be modified to this extent. In other respects the decree of the Lower Court, in my opinion, ought to be affirmed with costs.

Kemp, J.—After hearing the argument of the learned Counsel, Mr. Doyne, and of Baboo Dwarkanath Mitter, the pleader for the respondent, I have come to the same conclusion as my learned brother, Mr. Justice Markby.

The deed of 1250 B. S., which purports to be a division of his estate by Radha Madhub, the common ancestor, appears to me to be a mutilated document—one of the sheets, the principal or "sudder" sheet, is wanting; it may be that some of the estates now claimed by the appellant, Tara Churn, as his self-acquired properties, were to be found in that missing sheet. Be this as it may, it is clear that the deed was never acted upon.

There was admittedly some joint-property, the extent of which is not very clearly shown. The appellant has, in my opinion, failed to prove, and the *onus* is upon him, that the joint-estate was so small that, after providing for the maintenance of the family, nothing remained to form a fund for the purchase of other properties for the benefit of the joint-family.

The account-books ranging over several years put in by the appellant Tara Churn show that the family was joint. There are items of entry in these accounts which are wholly inconsistent with the position taken up by Tara Churn, that these accounts represent his separate estate. My learned brother Markby has fully and clearly entered into this part of the case, and I need do nothing but express my entire concurrence in the view taken by him. Then the correspondence between Tara Churn and his brothers is to my mind conclusive evidence that the family were joint in estate, and that the properties in dispute were not acquired by Tara Churn alone, and without any assistance from the joint purse. The pleader for the plaintiff gives up his client's claim to the moveable property.

I would affirm the decision of the Lower Court, and dismiss this appeal with costs and interest payable by the appellant Tara Churn.

Jackson, J.—I have given this case the best consideration of which I am capable, and it has been my anxious desire to bring myself, if I could, to that view of it which has been adopted by my brother Markby, more especially as the same view has been taken by my brother Kemp, whose experience and judgment in questions of this kind impose upon the Judge who differs from him the necessity of supporting his own conclusion by the weightiest reasons.

I shall, therefore, state the grounds on which I rest my inability to concur in the opinion of those learned Judges, although I shall not state them at such length, as I should have done, if my judgment had been the judgment of the Court.

Stated broadly, then, the impression produced upon my mind by the whole of the evidence is this: That the family from which the plaintiff and the defendants came was a titularly respectable but really humble family of Brahmins.

That the family-property consisted of nothing but some parcels of debuttur land, with a few gardens, tanks, and other small possessions.

That their circumstances were so indifferent as to compel the eldest son to pass his life as the master of a small school, the second to enter on the career of a mooktear (a career occasionally profitable, but always evil spoken of), and two others to accept petty employments at a nominal salary in the Principal Sudder Ameen's Court, one of the two afterwards becoming an assistant to the mooktear brother, Tara Churn, the real defendant in the cause.

That the business of mooktear was in his case remarkably profitable; that he had frequently in his hands or within his reach during a long career considerable sums of money belonging to clients, or borrowed from other persons, of which he availed himself from time to time for the purpose of making advantageous purchases of land; that, in making these purchases, he occasionally used his brothers' names, and that he employed them in the management of the estates when purchased.

That he consulted them, and corresponded with them fully; that, in law-proceedings relating to these lands, he made such allegations (against third parties) as he believed would suit his purpose for the time; that in his dealings with his brothers there was entire unreserve; but that, through all his communications and acts, there ran a delicate

Note.—That so-called Koolins are so numerous, and in many instances so poor in Beerbhoom, that I had before me a few days ago a petition from several Mookerjees, in which they complain of their removal from the situation of serving-peons in the Civil Courts, on this ground that, after six months' notice, they had been unable to acquire the accomplishments of reading and writing sufficiently to discharge the duties of that situation.

line of ownership traceable to a keen eye, and especially visible to the brothers themselves, but lost sight of in the bad faith which too often follows upon dissensions.

That also Tara Churn's "bassa" or lodging at Sooree was the town head-quarters of the family; that his brothers lived with him and in great part at his expense.

That his accounts kept with great minuteness but little method, and contained in the books (which appear to me unquestionably his) produced in Court, exhibit trifling sums received from, as well as advances to, the brothers, and expenses incurred on their account, and on account of other members of the family.

That the younger brothers now advised him, and now acted under his directions; that they contributed in some small degree to the expenses of house-keeping at Sooree, but that neither of them ever made enough to pay for his own keep.

That the servants in the estates looked to Tara Churn as their master, and that he made all appointments of gomashtahs and the like.

That he was not the manager of the family, but worked for his own hand, though he did not take the precaution of making this evident.

And is there anything in this which has not occurred a hundred times in the experience of every one of us administering justice in this country.

The carelessness of the Asiatic overpowers the prudence of the man of business. The inborn tendency towards national usages and the easy confidence of brotherly relations prevail over the second nature bred in English Courts, and the professional sharpness of the mooktear.

The native suitor, as I have had occasion again and again to remark, is found to have oscillated between blind implicit trust, and unreasonable restless suspicion.

While peace lasts, the possibility of war is unforeseen: when discord begins, the existence of previous harmony is ignored.

Those who expect to find in the dealings of native suitors, the precaution, the reserve, the consistent conduct which might be looked for as indicative of persons filling a particular character, or claiming a particular status, and which elsewhere we generally do find, will usually be disappointed.

In cases of this kind, it is not generally by minute indications that we can afford to be guided. They will often point both ways. We must look to the body of facts, and observe which way it gravitates.

To these general observations I will add one or two of a more special kind.

Much has been said of the letters from Tara Churn which are produced, and some of which were read to us. It is to be observed that, in the first argument before my brother Markby and myself, although Tara Churn was questioned as to the authenticity of those letters, no attempt was made to use them in any way. But in the second argument, after the long interval which elapsed between the two hearings, certain passages from the correspondence were extracted and read. The fact of such expressions as those referred to occurring here and there in the course of a great mass of letters does not affect my mind in any abiding way. The letters were written in a confidential way by a man wholly off his guard, and not in the least thinking of the relative rights which he and his correspondents might possess in respect of the subject under discussion; and I am rather surprised that the expressions which might favor the plaintiff's contention are not three times as numerous.

Another noticeable point is the difference in conduct of the parties before us. Tara Churn has always courted long disclosure, has tendered himself for examination, and has, in fact, been twice examined at great length, once in the Court below, and once before ourselves. I failed to see the least untruthfulness in his statements. Whereas not one of his adversaries has come forward to give the information which they must necessarily possess. I say his adversaries, because, although, in point of form, the other members of the family are co-defendants, yet the disguise is too transparent to deceive for a moment. The sole contest is with Tara Churn, and the other defendants are alike interested with the plaintiff in the success of his suit.

I think this is a matter of the greatest significance, and it is quite obvious that information as to the actual resources of the family, which are alleged to have supplemented those of Tara Churn, could have come from those other members of it, and from them alone.

It seems to me, therefore, that there was no such nucleus of family-property in this

case as to leave anything after the maintenance of the members, on which a presumption could be founded that the proceeds had been in any way applied towards the acquisition of the lands in dispute; that there is nothing to show that the brothers contributed any resources of their own to a joint purchase, and the evidence is to my mind overwhelming that the several talooks, putnees, and tenures were purchased by Tara Churn through his activity and vigilance, and with money, which either belonged to him, or was at his disposal.

That, consequently, the property belongs to him, and that to deprive him of four-fifths of it by an application of the doctrines of Hindoo joint family will be carrying that law beyond its natural limits, and doing him a cruel injustice.

I have been careful not to allow my mind to be influenced in the decision to which I have come by any disadvantage which the plaintiff might suffer from the insufficient and perfunctory judgment of the Court below in his favor, a judgment of which the shortcomings have materially added to our difficulties in determining the appeal.

Two observations occur to me finally as arising out of this case:—

First, that it becomes increasingly a matter of question how far we are justified in applying the strict doctrines of the Hindoo Law of property to the suits of these times, the cramping rules of an absolute polity to the altered condition of Hindoos under English institutions.

Second, that, as remarked by Mr. Doyne, if cases like the present bear any fruit, that fruit will be the introduction of distrust and reserve into the Hindoo family system, the destruction of confidence, and the early separation of interests.

Whether or not this is a result which it is desirable to produce, it is needless now to speculate.

The 23rd July 1867.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Isumnuvissee papers — Ghatwalee tenure — Assessment by Putneedar — Sections 3 and 4, and 15 and 16, of Act X. of 1859 — Arrears of Rent — Possession.

Regular Appeals from decisions passed by Mr. F. Tucker, Judge of West Burdwan, dated respectively the 23rd, 24th, 25th, and 26th October 1865.

Cases Nos. 13—22 of 1866.

Mr. James Erskine and, after him, Mr. W. Fergusson (Plaintiff), *Appellant,*

versus

The Government and Dwarkanath Singh and others (Defendants), *Respondents.*

Baboo Dwarkanath Mitter, Mr. R. T. Allan, and *Baboo Bungshee Dhur Sein* for Appellant.

Baboos Kishen Kishore Ghose, Jugodanund Mookerjee, Mohesh Chunder Bose, and *Obhoy Churn Bose* for Respondents.

Regular Appeals from decisions passed by Baboo Ram Taruck Roy, Principal Sudder Ameen of West Burdwan, dated respectively the 14th and 15th June 1865.

Cases Nos. 305 and 306 of 1865.

Mr. James Erskine and, after him, Mr. W. Fergusson (Plaintiff), *Appellant,*

versus

The Government and Manick Singh and others (Defendants), *Respondents.*

Baboo Dwarkanath Mitter, Mr. R. T. Allan, and *Baboo Bungshee Dhur Sein* for Appellant.

Baboos Kishen Kishore Ghose, Jugodanund Mookerjee, Bunsheedhur Sein, and *Otool Chunder Mookerjee* for Respondents.

Isumnuvissee papers, which were mainly relied on by a plaintiff putneedar in a suit brought to assess lands said to have been held by a ghatwal in excess of the area to which he, was admittedly entitled, were rejected as

insufficient, in the absence of satisfactory proof as to whence the information in these papers was derived (decisions contra cited and dissented from); and the defendant ghatwal's contention that all the lands had been held at a uniform payment of rent from the time of the permanent settlement having been maintained, it was held, whether he came under Sections 3 and 4, or under Sections 15 and 16, Act X. of 1859, his rent could not be enhanced.

Where it was admitted that the ghatwal defendant's tenure dated from a time anterior to the decennial settlement and before the creation of the zemindaree, the defendant is protected, whether under Section 3, or under Section 15, Act X. of 1859, from any fresh assessment.

Sixty years' possession is a bar under Clause 3, Section 3, Regulation II. of 1805, not only to past arrears of rent but to future assessment of rent. Ruling of Privy Council in case of *Chundrabullee Debia* versus *Luckhee Debia Chowdhrain* followed.

Markby, J.—No. 13.—This suit was brought to recover possession of about 2,000 beegahs of cultivated and uncultivated land and 11 tanks. The right to eject was based on the ground that the defendant was in possession of the land of which the plaintiff was putneedar, and that the plaintiff had given the defendant notice to come in and deliver a pottah, and take a kubooleut within fifteen days, but that the defendant had refused to do so.

In the plaint, which is also a sort of written statement, it is alleged that these lands were held by the defendant without any right under the pretence that they were a portion of his ghatwalee tenure, whereas the defendant is entitled as a ghatwal to 100 beegahs only.

The defendant, Dwarkanath Singh, sets up a title as ghatwal to the whole mouzah in which the land is situate, saying that, with the exception of a few beegahs, which he claims as ancestral rent-free land, it has been held as a hereditary service-land, from the time of the permanent settlement. He also asserts that the plaintiff's suit is barred by limitation.

We should have been very much embarrassed to discover what the plaintiff's cause of action, as set up in the plaint, really was, but we are relieved from that difficulty in some measure by the issues drawn by the Judge which are as follows:—

1. Is plaintiff's suit fit to be dismissed for laches of limitation?

2. Is the property in dispute a part of mâl of plaintiff's putnee talook, or is it Government ghatwalee property and held as such?

Upon the first issue, the Principal Sudder Ameen found that the plaintiff's claim was barred by limitation under Clause 12 of Section 1, Act XIV. of 1859. He considered that neither the plaintiff, nor any person through whom he claimed, had been in possession of the land claimed since 1811, and that the defendant's possession had been adverse. That is how we understand his judgment.

Upon regular appeal, Morgan and Glover, JJ., reversed this decision, and remanded the case for trial on the merits. This Court then considered that this was the case of a tenant who had been permitted to extend his holding by adding field to field, and beegah to beegah, and that, consequently, when the proprietor of the estate sued to assert his proprietary rights, no plea of limitation could be raised, on the ground that the tenant's possession had been an adverse possession to the landlord.

As far as we can discover, no question has been raised in these appeals (Nos. 13—22) as to whether the suits are barred by limitation under Clause 3, Section 3 of Bengal Regulation II. of 1805, which are noticed more fully below in disposing of some other similar appeals.

It will have been observed that the issues, as drawn by the Judge, leave it ambiguous, whether the plaintiff did, or did not, as in the plaint, claim to eject the defendant altogether, or only claim to have his rights as proprietor declared. But this doubt is set at rest by the judgment of these two learned Judges, for they say: "The "plaintiff does not, as the pleader admits, "seek to disturb the defendant's possession, "however acquired, but merely to exercise "his undoubted rights as a landlord, and to "make the defendant pay for the land which "he has improperly usurped."

But still the issue does not remain very clear. That the land in dispute is within the zemindaree of the Maharajah of Burdwan, from whom the plaintiff derives the title, is admitted; that the land in dispute is within the putnee-talook held by the plaintiff (now that the question of limitation is disposed of) is also admitted; and, further, the relationship of landlord and tenant between the plaintiff and defendant has been found

to exist, and is not now disputed. But the question which has been argued before us, and which appears to have been argued before the Lower Court, is, *what are the rights* of the plaintiff, as landlord, against the defendant, as tenant; and, though this issue has been arrived at in a very informal manner, it is, we think, our duty to declare what, in our opinion, those rights are.

The Judge of the Zillah Court finds that the plaintiff has failed to prove his right to assess any portion of the land now in suit, which has been proved to have been held by the defendants "time out of mind" under a good title as ghatwalee.

A similar judgment was pronounced by the same Judge in nine other cases of a similar character (regular appeals 14—22), and, on the 27th of September last, an application was made on the part of the plaintiff to Trevor and Glover, JJ., that all these cases, including the present, might be remanded for the production of further evidence. The application for a remand was refused, but the cases were adjourned in order that the parties might produce in this Court such further evidence, oral and documentary, as they thought proper. The result, however, has been extremely meagre.

The plaintiff's case in the regular appeal No. 13, as far as, with great difficulty, we have been able to understand it, is that the true ghatwalee tenure of the defendant is limited to 100 beegahs, for which the defendant pays a quit-rent of Rupees 51-8, and that all the land which the plaintiff holds except this is an encroachment, which has been held by the defendant without any payment of rent at all; and the plaintiff now claims the right to have the lands held by the defendant in excess of the 109 beegahs assessed. That is, we suppose, admitting the defendant's right of occupancy, he asks to have his right declared to collect a "fair and equitable" rent within the meaning of Section 5 of Act X. of 1859.

The first enquiry, therefore, is whether the plaintiff's contention as to the relation in which the parties have hitherto stood and still stand with respect to the land comprised in the suit is the true one?

It is impossible to conceive a case more bare of evidence. The only evidence directly bearing on the case produced by the plaintiff were three *isumnuvissee* papers, as they are called, which appear to be returns made by police-officers to a Magistrate in the years 1811, 1812, and 1813. One of them, that of 1811, was produced in the Court below; the other two were produced for the first time in this Court. In these papers, which are said to be precisely similar, the number and rank of the ghatwals is shown for each ghat, and also the situation of the ghat, the quantity of land held by each ghatwal, whether sirdars or dependants, and the amount of pauchaki jumma or quit-rent; and the defendant is stated to hold 100 beegahs at the rent of Rupees 51-8.

It was asserted that these *isumnuvissee* papers were part of a regular series of returns, but no evidence was produced in support of this assertion, nor was a single other *isumnuvissee* paper produced before us in this case.

It was also asserted that these *isumnuvissee* papers were made up from information supplied by the ghatwals themselves; but this also was not established. There was no evidence that this was the usual course of business, or that this course was adopted with respect to this particular return. Upon this point, the plaintiff's advocate sought to rely on a judgment of the late Sudder Court of the 28th June 1862, reported at page 492 of the decisions of that year. There, also, certain *isumnuvissee* papers were filed, and the Court remarks (page 295): "These papers, we observe, are filed by the "police on information obtained from the "ghatwals themselves as to the extent of "their tenures, and the very nature of the "Ghatwalee tenure, namely, that lands are "so held by persons bound to prevent in-"cursions of the hill-folk into the plains "through the ghats or passes, renders the "production of them by this course both "natural and expedient." It is difficult to say from this passage how far the Court drew the inference that these returns were made upon information supplied by the ghatwals from general conceptions of what was natural and expedient, or from some statement to that effect contained in the documents themselves, or from external evidence given in that case. But here such external or internal evidence is entirely wanting; and, this being purely a question of fact, we must decide this case upon the evidence before us which may be wholly different from that submitted to the Court in the case referred to.

The plaintiff also produced in evidence a perwannah of a Magistrate, dated in the year

1815, requiring a police-officer to make a return of a similar nature to that contained in the *isumnuvissee* paper above described. The police-officer did so, and he states in his return that he has drawn it up after the Ghatwals had filed their documents. But the defendant's Ghat is not included in it, and this solitary statement appears to us to be insufficient to show that the particular *isumnuvissee* papers filed in this case were prepared upon information given by the Ghatwals themselves.

We think, therefore, that the evidence for the plaintiff rests solely on the three police-reports, and that these reports are based upon such information as the policemen who made them thought proper to adopt, but as to which no evidence is now adduced sufficient to show whence it was derived. We observe also that these documents do not show the situation of the 100 beegahs alleged to be held by the Ghatwal, and the plaintiff admits that he is wholly unable to point them out.

Now, what is there on the other side? No sunnud or other document of title is produced, it is true, but there is the fact, which is substantiated by evidence which has been explicitly found, and which has been admitted before us, that the defendant and his predecessors have been, as long as living memory can reach, that is, upwards of 60 years, in possession of the land which the plaintiff now seeks to assess, and that he and his predecessors have during all that time paid a uniform rent of Rupees 75, and that no claim either to increase this rent, or in any way to oust the defendant or his predecessors from his possession, has ever been set up by zemindar, or putneedar claiming under him, until Mr. Erskine took the property in putnee a few years ago.

The defendant also relied on certain decisions of ancient date in the Courts of the district. One was a suit brought in the year 1822 in the Zillah Court of the Jungle Mehals by the putneedar to assess lands held by the Ghatwals of *this* Ghat in excess of their tenure; in fact, a suit precisely similar to the present. The plaintiff there also relied on reports by the police-officers similar to those produced in this case, but failed to establish his right. The other was a suit of a precisely similar kind brought in the year 1817 in the Provincial Court in which the result was the same, though we are not quite clear whether it related to this or a neighbouring ghat. To this extent, however, we think both these decisions assist the case of the defendant; they show that the land-owner was on the alert anxious to establish his rights to their fullest extent; and that neither from ignorance nor good nature was he disposed to allow the Ghatwals to enlarge their holdings beyond their legitimate extent.

Contrasting the evidence on either side, we find it impossible to come to the conclusion contended for by the plaintiff. We think the case of the defendant, that the rent has always been paid in respect of the whole of these lands, is supported by obvious presumptions, and that the evidence by which it is opposed is of little or no value. What can be more improbable than that a succession of landlords should allow the tenant to go on for at least 50 years holding land to which he had no title whatever, and make no attempt to oust him, and only one or two unsuccessful attempts to make him pay rent? We, therefore, find on the issue of fact, in favor of the defendants, that the whole of these lands have been held at a fixed rent for upwards of 60 years.

Now, the position of a tenant who has held for 60 years at a fixed rent is clearly defined by Act X. of 1859. This defendant is either a "ryot" within the meaning of Sections 3 and 4, or he is "a person possessing a permanent transferable interest intermediate between the proprietor of the estate and the ryot" within the meaning of Sections 15 and 16; and, therefore, as he has held these lands at the same rent for more than 20 years, he must be presumed to have held them at that rent from the time of the Permanent Settlement; and, therefore, by the provisions of those Sections, the rent of these lands cannot now be enhanced.

We are aware that Trevor, Kemp, and Seton-Karr, JJ., in the decision of the late Sudder Court already referred to, and again Raikes and Seton-Karr, JJ., in a case, not reported, decided by this Court on the 6th December 1863, took a different view of evidence somewhat similar. But the point on which we differ is not a question of law; it is one entirely of fact; and, with the greatest respect for the learning and experience of those Judges, we are unable to come to any other conclusion than that above mentioned.

We observe also that Trevor and Glover, JJ., in a case reported in the 6th Volume of the Weekly Reporter, page 10, took a

view of similar evidence which is very much in accordance with that which we are now taking.

We, therefore, hold that the defendant is the tenant of the whole of the land comprised in this suit at a permanent fixed rent of Rupees 75, which rent the plaintiff has no right to increase; and we think the decree of the Lower Appellate Court, dismissing this suit, ought to be affirmed with costs.

We wish to add that we decline altogether to go into the question whether the defendant's present holding is in excess of what could possibly have been intended as a remuneration for his services as Ghatwal. We do not think we have the materials for considering that question, because we know nothing of the condition of the land when the grant was made. It may have been, and probably was, a mere jungle which, but for the labor of the Ghatwals, would have remained an almost profitless waste.

It is also desirable to add that no question was raised before us as to the admissibility in evidence of the documents to which we have referred.

The history of all the appeals from No. 14 to No. 22 inclusive is precisely the same as that of No. 13 above stated, and need not, therefore, be repeated. The plaints are also the same, and the answers of the Ghatwals are admitted to be substantially the same. They have, therefore, been all heard and decided together, both in this Court and in the Court below.

In the case No. 14 several documents were tendered on behalf of the plaintiff under the order of Trevor and Campbell, JJ, above referred to. The first was a return of the Jagheer held by Ghatwals at quit-rents and of the persons holding them in the year 1776, from which it appears that the Ghatwals held specific portions of land in villages, and not whole villages. In this case, as in that of all the other documents now tendered, only copies were produced before us, but they were taken by consent to be equivalent to the originals; we admitted the return with some hesitation. But we have none in saying that it has no weight in favor of the plaintiff's contention. If anything, it rather helps the defendant as showing the antiquity of his tenure. The next was a kaifeut, or return of a mohafiz or record-keeper, as to the result of his investigations amongst the papers in the Judge's office. This we rejected as of itself no reliable evidence. The next was the answer of Government in a suit brought by the present plaintiff against a Ghatwal in another village, in which it is alleged that the Government made some admission affecting the title of the Ghatwal. This we also rejected as not binding the parties in this case. The next two documents were the decree of the Court of first instance, and of the Court of Appeal in that suit, which we also rejected for a like reason. The next document was a purwanah of a Magistrate addressed to a police darogah in 1847, which was tendered as evidence that a regular register in the form of *isumnuvissee* papers was kept of these Ghatwalee tenures. This we also rejected as not sufficient to prove the fact. The next two documents were a proceeding before a Magistrate of the 27th December 1839, who, in a dispute between the zemindar and a Ghatwal in *another* village, is said to have relied on *isumnuvissee* papers as evidence, and a decree in a suit in a Zillah Judge's Court in 1840 of a similar character; these also were rejected as not applying to this case and village. And it will be as well to mention here that all these documents were tendered in each of the Regular Appeals 15, 16, 17, 18, 19, 20, 21, and 22, with the same result.

The appeals Nos. 14 to 22 inclusive were all included in the remand order of Morgan and Trevor, JJ.

The *isumnuvissee* papers or Police Returns of 1812 and 1813 produced as evidence in No. 13 were also tendered in this case; but the plaintiff's Advocate was not able to point out anything in them applicable to this defendant's tenure.

In all other respects, this case is precisely similar to Regular Appeal No. 13, and the result will be the same, namely, that this appeal is dismissed with costs.

No. 15.—This case is precisely similar to No. 14, and the same result will follow—that it is dismissed with costs.

No. 16.—The two additional reports of 1812 and 1813 are available in this case, so that the evidence is precisely the same as in No. 13, and the appeal will be dismissed with costs.

Mr. Allan proposed in this case to examine a Ghatwal who happened to be present in Court, as to when he was appointed, and as to the practice of preparing *isumnuvissee* papers; but we refused to per-

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mit him to do this at this late stage in the case, when, in fact, the whole argument was concluded, and we were only going through the cases to see in what minor particulars they differed.

Nos. 17, 18, 19, 20.—These appeals all stand precisely on the same footing with each other; and also with No. 13, except that one more *isumnuvissee* paper is filed, that for 1814. They are all dismissed with costs.

Nos. 21 and 22.—In these two cases no new evidence was tendered, except that disposed of under appeal No. 14; so that they also will be dismissed.

Nos. 305 and 306.—These two cases come on for hearing before this Court on Regular Appeal now for the first time. They were both dismissed by the Principal Sudder Ameen in the Court below on the ground of limitation in a judgment which governs both cases, and that judgment is now under appeal.

All the parties were represented before us by vakeels; but, though the facts of these cases are somewhat different from those just decided, and the grounds of the decision in the Court below entirely so, no new argument was presented to us, and indeed it was suggested that one decision would govern all these cases.

To this extent these two cases are identical with those which have gone before, *viz.*, each is a suit brought by Erskine as putneedar against ghatwals, on precisely similar allegations to those in the other suits. And (as in all the other suits) the original claim is to eject the defendants altogether; but that claim has been abandoned, in these as well as in the other cases, and, as far as we are able to gather from the exceedingly irregular manner in which these cases have been argued, the issue which the parties desire to have tried in these two appeals is the same as in the previous ones, namely, what are the rights of the plaintiff, as landlord, against these two defendants, respectively, as tenants?

The two cases are precisely the same, and may be considered together.

The facts found by the Principal Sudder Ameen must, of course, now be taken to be undisputed, neither party having objected to them. And we understand him to say that it was admitted before him, as a fact, that these ghatwals had held their office from before the Decennial Settlement; and that, from the circumstances of the case, he presumes that the whole of the lands in dispute have been held by these ghatwals *as ghatwali lands* from before the creation of the zemindary, that is, from a date at least as early as the Decennial Settlement; but we are not quite sure whether he means that they have been held by the ghatwals as tenants of the zemindar or not. But, however this may be, he proceeds to dispose of the cases under Clause 12 of Section 1 of Act XIV. of 1859, holding that the defendant's possession has been adverse to the putneedar; and that, as he has been in such possession more than 12 years, the cause of action accrued more than 12 years ago, and the plaintiff is therefore barred.

Were it necessary to dispose of these appeals on this ground, we should have to consider how far this judgment is reconcileable with the judgment of Morgan and Glover, JJ., above referred to, and the principles upon which that judgment is founded, including the doctrine of adverse possession, the exact nature of the plaintiff's cause of action and when it arose; and the precise relation of these ghatwals to the zemindar or the putneedar who represents him. But it appears to us wholly unnecessary to advert to any of these questions, because, if this ghatwalee tenure is anterior both to the creation of the zemindaree and to the Permanent Settlement, as the Principal Sudder Ameen has found it to be, then one of two things follows; either the ghatwals hold altogether independently of the zemindar, whose zemindaree was only created by the Permanent Settlement, in which case there is nothing on which a claim to assessment upon these lands can be founded in favor either of the zemindar or those claiming under him; or, if the payment of the quit-rent to the zemindar is considered as creating the relation of landlord and tenant between the ghatwals and the zemindar, then the land has been held, "at a "fixed rate of rent, which has not been "changed from the time of the Permanent "Settlement," and, therefore, either as a "ryot" under Section 3, or as a "person "possessing a permanent transferable inter-"est intermediate between the proprietor "of the estate and the ryot" under Section 15 of Act X. of 1859, these defendants are entitled to continue to hold at the same rents, and the plaintiff, as putneedar, has no right to any fresh assessment.

There is also another ground equally clear upon which the right of the defendants to hold these lands free from any liability to

enhancement may be based. It was held by the Privy Council in the case of *Mussamut Chundrobullee Debia *versus* Luckhee Debia Chowdhrain, Moore's Indian Appeals, Volume X., page 214, that where lands were granted in perpetuity in consideration of setting up and maintaining an idol thereon without rent, and were so held for 60 years, even assuming this grant to be absolutely void, the 60 years' possession was a bar under Clause 3, Section 3 of Bengal Regulation II. of 1805, to any claim for arrears of rent. Their Lordships held that the claim for past arrears of rent must be considered as a cause of action arising immediately after the grant; and, that being so, the claim to assess rent for future years must also arise at that time, both claims being founded on the same right, namely, the right of the landlord, notwithstanding the grant, to impose on the tenant the ordinary liabilities to the full extent. This case appears to us to be precisely similar to the present, and to show that, whatever the rights of the parties were 60 years ago, the right to enhance the rent is now barred.

For these reasons we think that, on the facts found by the Principal Sudder Ameen, these two appeals ought also to be dismissed with costs.

We have purposely abstained from making any allusion to Government which has been made a party in every one of these suits. We are at a loss to see on what grounds the Government has been brought in at all. It may be that the Crown has a right to call upon these Ghatwals to perform such services; and, if so, it may be that the Crown has a right of escheat, or some analogous right, on failure of the Ghatwals to perform the services; and it may be that those rights would be in some sense weakened (though we cannot see how they would be legally prejudiced) if these suits were decided unfavorably to the ghatwals. But such an interest is too remote to give the Government of India, as representing the Crown, any right to be a party to this suit.

We think, therefore, that the Government should not have been made a party to these appeals; but, being a party, we are unable to distinguish their case from that of the Ghatwals; and we, therefore, think that all the appeals should be dismissed as against Government also, but without costs, as Government was introduced on its own application.

* *See* 5 Weekly Reporter, Privy Council Cases, p. 1.

The 23rd July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Suit by ryot—Occupancy—Possession.

Case No. 512 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 21st December 1866, modifying a decision passed by the Moonsiff of Sonamookhy, dated the 27th September 1866.

Sreemutty Wooma Soonduree Thakooranee (Defendant), *Appellant,*

versus

Kishoree Mohun Banerjee and others (Plaintiffs), *Respondents.*

Baboos Romesh Chunder Mitter and *Umbika Churn Banerjee* for Appellant.

Baboo Poorno Chunder Shome for Respondents.

A zemindar obtained a decree against a ryot for assessment, on the ground that the ryot held under an invalid lakheraj, but instead of assessing turned the ryot out of possession. HELD that a suit by the ryot for recovery of the land on the ground of anterior possession is not sustainable, and the ryot must prove his title as against the zemindar, his anterior possession under the invalid lakheraj, the decision as to which he did not sue to set aside within the proper time, being the possession of a mere trespasser, and not that of an occupant ryot.

Glover, J.—THE plaintiff in this suit sued to be restored to possession of a holding from which the defendant, the zemindar, ousted him some four years ago. It appears that the zemindar sued to assess and resume the plaintiff's land on the allegation that he held it on an invalid lakheraj title. This was established in a suit, and a decree given authorizing the zemindar to assess.

Instead of doing that, he turned the ryot out of the land, and the latter sues for recovery on the ground of anterior possession.

Both Lower Courts found for the plaintiff.

We have no doubt that this order was wrong. Had the special respondent instituted a possessory action within six months of the ouster, it would have been a question whether the zemindar, who had merely got

a decree for assessment, could legally eject him; but, as he chose to delay for four years, and now comes in on his rights, he is in the position of any other plaintiff, and must prove his title to recover possession.

Now, his lakheraj title having been found to be worthless, long possession under it will give him no claim to hold the land as an occupant ryot. All the time he held under the alleged lakheraj he was a trespasser; and no trespasser can acquire a right of occupancy, however long he may remain on the land (3 Weekly Reporter 147). To create a right of occupancy, it is requisite that a ryot must have remained on the land, and paid rent for 12 years. And, as it is the special respondent's own case that he paid no rent, he cannot have acquired any right against his landlord during the years he was in unlawful possession of his holding.

We think, therefore, that the Lower Appellate Court's order should be reversed with costs on the special respondent.

The 23rd July 1867.

Present:

The Hon'ble F. B. Kemp and
F. A. Glover, *Judges.*

Jurisdiction—Civil Court—Section 308 of the Code of Criminal Procedure—Control over joint-family house.

Case No. 488 of 1867.

Special Appeal from a decision passed by Moulvie Nuzeerooddeen Mahomed Khan, Principal Sudder Ameen of Dacca, dated the 11th December 1866, affirming a decision passed by Baboo Gobind Chunder Doss, Moonsiff of Naraingunge, dated the 30th April 1866.

Eshan Chunder Banerjee and others (Defendants), *Appellants,*

versus

Nund Coomar Banerjee and others (Plaintiffs), *Respondents.*

Baboos Womesh Chunder Banerjee and *Nuleet Chunder Sein* for Appellants.

Baboo Hem Chunder Banerjee for Respondents.

Section 308 of the Code of Criminal Procedure refers to nuisances in a thoroughfare or public place, and has nothing to do with the interior of private houses, and therefore does not bar the jurisdiction of the Civil Courts in a suit brought to set aside an order of a Deputy Magistrate restricting some of the owners and occupiers of a house from the free use of their own portion of joint-property. Full Bench Ruling of *Koer Bejoy Keshub Roy* versus *Shama Soonderee Dassee,* which recognized the absolute right of a shareholder in a joint-family house to the extent of allowing him to partition off his own specific share in every single part of the premises, followed.

Glover, J.—This was a suit to set aside certain orders passed by the Deputy Magistrate of Dacca, restricting the plaintiffs from the free use of their share of the joint-family house.

It appears from the record that the parties to this suit, who are nearly related to each other, lived originally in the same family-house, and that the plaintiffs afterwards changed their residence to Dacca, where they at present live.

A complaint was made against them by the present defendants before the Deputy Magistrate, the result of which was that certain restrictions were laid upon the plaintiffs as to the persons allowed to enter the family-house, and certain arrangements made as to each party's liability for repairs. The object of the complainants was apparently to prevent their co-sharers from introducing into their portion of the house persons who, according to the usages of Hindoo society, would be objectionable visitors.

The Deputy Magistrate's order was contested in a civil suit, the suit now before us.

The Moonsiff dismissed the plaintiffs' claim, on the ground that the Deputy Magistrate's order did not prevent their making use of the house.

And the Principal Sudder Ameen confirmed this order with some trifling exceptions, the result of the litigation being a set of rules which defined the number and character of the persons to be admitted into the plaintiffs' portion of the family-residence.

Both parties appeal specially against this decision, the plaintiffs under Section 348 of the Civil Procedure Code.

The defendants urge (1) that the Civil Court had no jurisdiction to try the case; and (2) that the Deputy Magistrate's order was consonant to the usages of Hindoo society, and that the Principal Sudder Ameen had no right to modify it.

The plaintiffs' cross-appeal is that the Principal Sudder Ameen's order, interfering with their acknowledged rights in their own property, was illegal.

With regard to the question of jurisdiction, the special appellants have quoted Section 308 of the Code of Criminal Procedure, and argue that, as the question between the parties was one of "nuisance," the Deputy Magistrate was empowered to deal with it, and there is no appeal to a Civil Court from his order.

The Section quoted, we observe, refers to "nuisances" in any thoroughfare or public place, and has nothing to do with the interior of private houses. This plea of the defendants is, therefore, untenable.

The point involved in the other plea has been settled by the Full Bench ruling of this Court in the case of Koer Bejoy Keshub Roy Bahadoor *versus* Shama Soonderee Dassee and others (2 Weekly Reporter 30, Miscellaneous cases), in which the absolute right of a shareholder in a joint-family house was recognized to the extent of allowing him to partition off his own specific share in every single part of the premises. In that case the claimant was an auction-purchaser, and he was held entitled to take possession of what he had bought, although his doing so necessarily broke up the household, and forced the other members of the family to remove.

In the present case the parties are all near relations; but, were it otherwise, the decision above quoted would prevent any interference with the plaintiffs' right to make whatever use they please of their own property. The defendants can, if they anticipate any inconvenience from the plaintiffs' conduct, petition for a partition of the property, and so secure themselves from annoyance. The cross-appeal is allowed, and the special appeal No. 488 is dismissed with costs. The Deputy Magistrate's order will be reversed.

The 12th July 1867.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Jurisdiction—Clause 6, Section 23, Act X. of 1859.

Case No. 476 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 22nd December 1866, reversing a decision passed by the Deputy Collector of Pubna, dated the 31st July 1866.

Rajah Anundnath Roy Bahadoor (one of the Defendants), *Appellant,*

versus

Junmeyjoy Biswas (Plaintiff), *Respondent.*

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Appellant.

Baboos Bama Churn Banerjee and *Kalee Kishen Sein* for Respondent.

A purchaser of an under-tenure at a sale in execution of a decree, who has never been able to obtain any substantive or real possession, and whose title, as well as that of the person whose rights he purchased, is contested, cannot sue to recover the land under Clause 6, Section 23, Act X. of 1859, but must proceed by suit in the Civil Court to prove his title in the ordinary way.

Macpherson, J.—We think that this suit will not lie, and that the plaintiff's remedy is by a regular civil suit, and not under Act X. of 1859.

The plaintiff seeks to get possession of an under-tenure purchased by him at a sale in execution of a decree against Ghassee Sirdar. The sale to the plaintiff was duly confirmed, he got a certificate, and a bamboo, &c., was stuck up on the land as provided by Section 264 of Act VIII. of 1859, but he never got any substantive or real possession of the land, having been from the first resisted by the appellant.

Under these circumstances, a suit to recover possession will not lie under Clause 6 of

Section 23 of Act X. of 1859, which relates only to cases where the relation of landlord and tenant has been admitted, or is conclusively established.

Here the plaintiff has, in fact, never had any possession, and the appellant denies that he or Ghassee Sirdar (whose rights he purchased) has or had any right to possession or any possession at any time; and the plaintiff cannot succeed but by a civil suit in which he will have to prove his title in the ordinary way.

The decision of the Lower Appellate Court is reversed, and the plaintiff's suit is dismissed with all costs both of this and the Lower Courts.

The 24th July 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble J. P. Norman and Shumbhoonath Pundit, *Judges*.

Adoption—Certificate under Act XX. of 1841—Rights of reversioners—Grandsons in the female line.

Case No. 307 of 1864.

Regular Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 25th May 1864.

Mussamut Brojo Kissoree Dossee (Defendant), *Appellant*,

versus

Sreenath Bose and others (Plaintiffs), *Respondents*.

Messrs. R. V. Doyne and *R. T. Allan*, and *Baboos Dwarkanath Mitter, Kishen Kishore Ghose, Chunder Madhub Ghose*, and *Nilmadhub Bose* for Appellant.

Mr. W. A. Montriou and *Baboos Ashootosh Dhur, Mohendo Lall Shome, Sham Lall Mitter*, and *Sreekant Mullick* for Respondents.

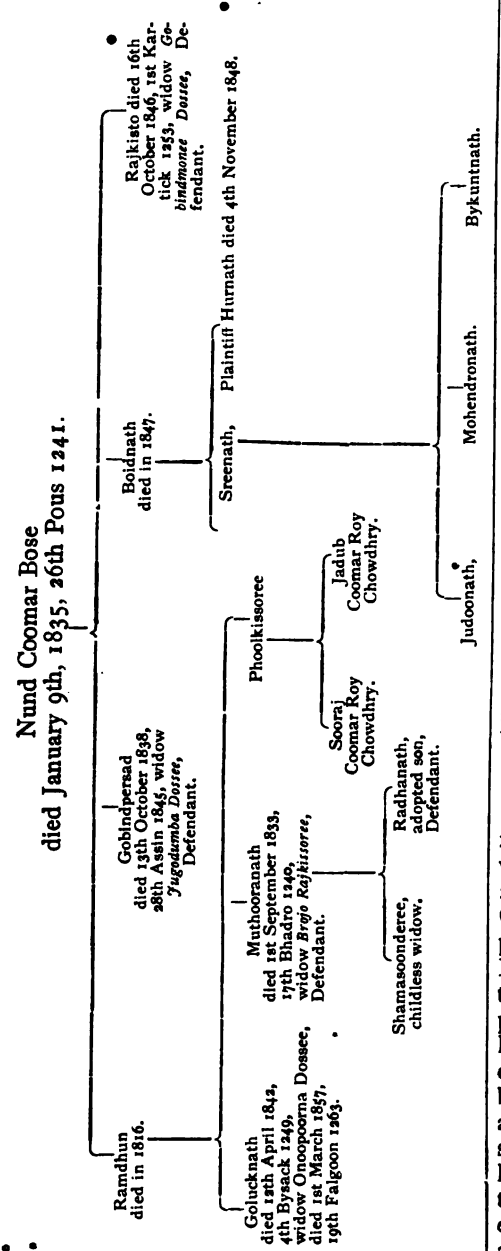
A plaintiff sued to set aside a certificate to collect debts on account of the estate of his deceased uncle *G*, obtained under Act XX. of 1841 by defendant (widow of his uncle *M*) as guardian of her adopted son, and to set aside the adoption, as well to obtain a decree declaring generally his right as heir of *G* and *M*. While the suit was pending, the two sons of a sister of *G* (claiming as heir of *G* and reversioner to the estate of *M*), who had ineffectually opposed the granting of the certificate, filed a petition stating that they had entered into a deed of compromise with plaintiff, and consented to the institution of the suit. HELD that, as plaintiff was not the general heir-at-law either to *M* or *G*, even if he were heir, according to the terms of the deed, to the property comprised therein, if the issue had been whether, as heir-at-law of *G*, he had a right to dispute the adoption, it must have been determined against him.

But, the issue laid down at defendant's request being whether plaintiff had a right to question the adoption, it was held that, as under a deed of compromise of 15th September 1839 plaintiff had an interest in showing that the adopted son was not an heir of *G*, or entitled to maintenance, or to divide any surplus after paying expenses provided for therein, he had a right to question the validity of the adoption.

Held by the majority (Shumbhoonath, J., differing) that "grandsons in the female line" do not include sister's sons.

Norman, J.—SREENATH BOSE, the plaintiff, instituted this suit on the 31st of December 1861, for himself and as guardian of his minor sons Judoonath Bose, Mohendro Nath Bose, and Bykuntnath Bose, against the defendants Sreemutty Brojo Rajkissoree Dossee, the widow of Muthooranath Bose, and guardian of her alleged minor adopted son Radhanath Bose, Sreemutty Jugodumba Dossee, widow of the deceased Gobindpersad Bose, and Sreemutty Gobindmonee Dossee, widow of Rajkisto Bose, alleging that Muthooranath Bose was son of his father's elder brother; that on his death without leaving a son, on the 17th Bhadro 1240 B. S., *i. e.*, in September 1833, the defendant went to reside in her father's house; that she applied to obtain a certificate in 1263 under color of having adopted a son in 1260; and on the allegation that the said adopted son was heir to the property left by Golucknath Bose, that her husband, the said Muthooranath, had left her no permission to adopt a son; that the now plaintiff filed a petition of intervention in the suit stating the adoption to be invalid; that the Judge trying the case summarily, and holding the adoption to be a valid one, granted a certificate to the defendant as the mother and guardian of her adopted son; that, the plaintiff having appealed to the Sudder Court, the Judge's order was confirmed on the 14th of December 1857; that, in order to put a stop to any injury being caused to the petitioner's ancestral property and rights, it was expedient to bring a civil suit for setting aside the adoption, inasmuch as the deceased Muthooranath Bose neither left permission to adopt a son, and the son was not adopted according to the shasters: therefore, the plaintiff prayed the Court to set aside the certificate of administration, to declare the adoption invalid; and that, after the death of the defendant Sreemutty Brojo Rajkissoree Dossee, the plaintiff and his sons in succession are entitled to succeed as the heirs of Muthooranath Bose and Golucknath Bose.

The history of the family is shown by the annexed sketch:—



The plaintiff got a decree in the Lower Court.

The defendant appeals and objects that the suit is either barred by limitation, or that the plaintiff has no right to maintain this suit; and, *secondly*, that the plaintiff's suit is barred by a prior decision between the same parties.

The material facts on this part of the case are as follows: Immediately on the death of Onoopoorna Dossee, *viz.*, on the 14th March 1857, the now defendant Brojo Rajkissoree, setting up a title as guardian of Radhanath Bose, whom she alleged herself to have adopted in 1260, under a power given her by her husband Muthooranath for that purpose, applied to the Judge for a certificate, as being the representative of Golucknath under Act XX. of 1841. The now plaintiff, as well as Sooraj Coomar Roy Chowdhry and Jadub Coomar Roy Chowdhry, the sons of Phoolkissoree, the sister of Golucknath, who according to ordinary Hindoo Law were his heirs and representatives if the adoption had not been established, intervened, and opposed the granting of the certificate. A petition of Sooraj Coomar Roy Chowdhry and Jadub Coomar Roy Chowdhry, claiming the certificate for themselves as heirs of Golucknath, was filed on the 17th of July 1857. In July 1858, the Judge made an order, declaring that the adoption of Radhanath was proved, and adjudging that the certificate should be granted to Brojo Rajkissoree as his guardian. The other parties appealed to the Sudder Court; and on such appeal the Judge's order was finally upheld by a decree, dated the 14th of December 1858.

The present suit was instituted by Sreenath Bose on the 31st of December 1861; while this suit was pending, *viz.*, on the 23rd January 1864, Sooraj Coomar and Jadub Coomar entered into an agreement with the plaintiff, by which, after reciting that Brojo Rajkissoree, their maternal aunt, alleging that she had lawfully adopted a son, and had prayed for a certificate to enable her to collect the estate of Golucknath, that they had objected and put forward their own claim, but that, by a summary decision, she obtained a certificate; that they had delayed to institute proceedings, but that the plaintiffs having instituted a regular suit to set aside the certificate and the adoption at great expense, claiming as heir of Golucknath, and entitled as reversioner to the estate of Muthooranath, an amicable arrangement had been made with which they were satisfied, they, Sooraj Coomar and Jadub Coomar, declared that they consented to the institution of the suit. The agreement provided for the mode in which the property should be divided if the adoption should be set aside. In pursuance of this agreement, Sooraj

Coomar and Jadub Coomar filed a petition, dated the 4th of February 1864, in the Judge's Court, by which they say: "Suit 17 of 1861 is pending, in which Sreenath Bose is plaintiff, and Brojo Rajkissoree is defendant. We are the sons of Phoolkissoree, the sister of Golucknath and Muthooranath. The plaintiff Sreenath has brought this suit for a declaration of his right as heir of Golucknath and brother of Brojo Rajkissoree's husband, and his right as reversionary heir of Muthooranath. There has been an amicable arrangement between ourselves and Sreenath, and an ikrar dated the 23rd of January in the present year. According to that document, Sreenath is competent to sue in the manner he has done."

On these facts, I am of opinion that, prior to the execution of the ikrarnama of the 23rd January 1864, the plaintiff had no right to sue. According to ordinary Hindoo Law, Sooraj Coomar and Jadub Coomar were the heirs of their uncles Golucknath and Muthooranath.

The case of Nackeram Loll *versus* Soorajbuns Sohie, Sudder Dewanny Adawlut Reports for 1859, page 891,* shows that the plaintiff, not being the *immediate* reversioner, and not coming in on any allegation that the more immediate heirs were colluding with the defendants, had no right to maintain a suit to set aside the adoption.

* *Note.*—*See* also Rambunshie Koowar *vs.* Moheshar Koowar, 1 Sutherland's Weekly Reporter, p. 388; Mussumut Pranputtee Koowar *vs.* Lalla Futteh Bahadoor Singh, High Court, March 23rd, 1863, Hay's Reports, p. 608; and Sreemutty Raj Coomaree Dossee *vs.* Nobo Coomar Mullick, 1 Boulnois, p. 137.

If this defect is cured by the petition filed by Sooraj Coomar and Jadub Coomar, which may be well doubted (*see* Ranee Kunnaye Gossame *versus* Meernomoyee Dossee, 2 Sutherland's Weekly Reporter, page 65), the Judge, before admitting them as parties or entertaining the suit on that ground, should have considered how the interests of the defendants would be affected by an order for that purpose.

Now, it seems to me that the present suit, if instituted on the 4th of February 1864 by Sooraj Coomar and Jadub Coomar, would have been barred by limitation. The plaintiff prays for a declaration that the adoption of Radhanath Bose is invalid. It is not a suit for the recovery of possession of property; for, in fact, the plaintiff alleges himself to be in possession. It therefore falls within the 16th Clause of Section 1 of Act XIV. of 1859, and, therefore, as more than six years had expired from the 17th of July 1857 (when they not only had full notice of, but were themselves contesting, the adoption of Radhanath), before they intervened in the suit in any way, the suit for a declaration of the invalidity of the adoption would have been barred; and, as the plaintiff's cause of action only arose and became completed, and his suit became for the first time maintainable upon the filing of the petition by these parties, his suit must be treated as having been instituted upon the date on which this petition was filed.

I may observe that the case of Issuree Persaud *versus* Urjoon Lall, 2 Hyde's Reports, in which it was held that a suit was not barred by limitation against a party, whose name was added as a co-defendant after the period allowed by law, appears to me not to be law.

I think that the order of the Judge, so far as it deprived the defendant of the benefit of the Statute of Limitations, was irregular and illegal. So far as the plaintiff seeks to set aside the certificate obtained by the defendant to enable her to collect the estate of Golucknath under Act XX. of 1841, under Clause 5, Section 1, Act XIV. of 1859, any such suit must have been brought within one year from the date of the final decision of the Sudder Court.

I may add that, as regards Muthooranath's estate, he was no party to the deed of compromise, and therefore that deed cannot in any way affect the right of inheritance to his property, so as to give the plaintiff any right of suit independently of the ikrar and petition; and, as regards both estates, that there is nothing in the deed which in terms affects the title of Sooraj Coomar and Jadub Coomar as heirs, and it is a well-known and well-settled principle that the rights of an heir cannot be taken away by a mere conjecture as to the probable intention of a testator or settler.

The case must go to a third Judge, in order to determine whether the preliminary objection above mentioned bars the hearing of the present suit to declare the invalidity of the adoption.

Pundit, J.—This suit was brought on the 31st December 1861 by the plaintiff on behalf of his two sons and for himself as the son of Boidnath, deceased (one of the four sons of Nund Coomar Bose, deceased), to obtain a declaration regarding their and his own title to inheritance, of himself as

heir to the estate of Golucknath, and of himself and of his sons as reversioners to that of Muthooranath, the two deceased sons of Ramdhun, one of the three deceased uncles of the plaintiff, and also as reversioner to the estate of the plaintiff's other two deceased uncles, *viz.*, Gobindpersad and Rajkissen, and to set aside the adoption of Radhanath, alleged to have been adopted by Brojo Rajkissoree, the widow of the said Muthooranath, without any permission from her husband. The prayer in the plaint is also to set aside the certificate under Act XX. of 1841 obtained by the said Brojo Rajkissoree, on behalf of her said son, to collect the debts due to the estate of the aforesaid Golucknath, brother of the said Muthooranath. The minor adopted son, through the widow of Muthooranath, the aforesaid widow, and the widows of the uncles Gobindpersad and Rajkissen, were made defendants.

The defendant Brojo Rajkissoree, among other things, objected to the right of the plaintiff to succeed as to the estate of Golucknath as heir, as well as to his right as reversioner to that of Muthooranath in preference to the two sons of Phoolkissoree, the daughter of the aforesaid Ramdhun, the father of Golucknath and Muthooranath.

Plaintiff urging that, according to some family-arrangement, the sons of daughters were not entitled to succeed, asked that these two sons of the sister of Golucknath and Muthooranath might be made defendants; and, as under the law prevailing in Bengal they would, in an ordinary case, succeed as heirs to the estate of Golucknath, and were the next reversioners to the estate of Muthooranath, they were summoned as defendants by the Court below.

In a later stage, the plaintiff removed the names of his sons, and asked to stand by his own title alone. This request was also granted by the Zillah Judge. Jadub Coomar and Sooraj Coomar, the two sons of Phoolkissoree, having appeared and consented to the action brought by the plaintiff, the Judge at once proceeded to decide the merits of the adoption in dispute, and pronounced a decree in favor of the plaintiff.

Against this decision Brojo Rajkissoree has appealed, and, among other objections, raised the following issues in bar, several others raised being abandoned by her Counsel.

(1.) That the plaintiff is no heir, in preference to the two sons of Phoolkissoree, to the estate of Golucknath, and no reversioner to the estate of Muthooranath.

(2.) That these persons having assigned their right to the plaintiff, and that only as regards one of the two estates, and given their consent to the plaintiff's suit long after its institution, the action of the plaintiff cannot stand.

(3.) That, even if it be allowed to stand, it should, with regard to the plea of limitation, be decided by the new law. These persons assigned their rights at a time when the rights of the plaintiff had become affected by limitation, and the plaint in this case is for all these purposes to be construed as filed on the date of the deed of assignment by the said two sisters' sons of Golucknath.

(4.) That, under Act XIV. of 1859, a suit to set aside a certificate under Act XX. of 1841 must, under Clause 5, be instituted within one year; that a certificate in the case was finally granted to her in 1848, and so the case is out of time.

(5.) That the present suit, being merely for a declaration, does not come under Clause 12; and that, under Clause 16, it should have been instituted within six years of the action; that the adoption having been made in 1853, and Unoopoorna, the widow of Golucknath, having died in 1857, the action from the date of its becoming a new suit is beyond time from both these two dates.

(6.) That the alleged family-agreement cannot bind Phoolkissoree or her sons, or the estate of Muthooranath or his widow, as none of them were parties to the deed.

(7.) That the agreement excludes only *daughter's* sons, and not *sister's* sons of the parties to it.

(8.) That it further affects only the ancestral properties of the parties, and not those self-acquired by them.

Now, as the plaintiff has chosen to keep aside the question of possession or dispossession of the estate of Golucknath, whose widow had died before the suit, and as with regard to his right as a reversioner to the other estate he has no occasion to raise any question connected with the present or future possession of these several estates, it is immaterial in this case to know and find

who is in possession of the estate of Golucknath, or what properties he left, and whether the family-arrangement affects some property or all. As a reversioner, he was under the old law required to sue within 12 years of the adoption, and as an heir within 12 years of the death of the surviving widow. The plaintiff's suit is admitted to be within the said period. Further, his suit was instituted just a day before Act XIV. came into operation. If it can be shown that the plaintiff had a right to sue, he will be found to be in time.

Even if the case of the plaintiff be considered as governed by the new law of limitation, I think that, as regards the question of necessity to sue within a year to set aside a certificate under Act XX. of 1841, I am not prepared to hold that a case involving rights to the possession of landed property under right of inheritance in which, among other reliefs asked for, there is a prayer to set aside a certificate under Act XX. of 1841, must be brought within a year from the date of the Act XX. case. I am not also quite convinced that, in a case where, by the alleged adoption, the right of a plaintiff to hold possession of immoveable ancestral property is affected, the plaintiff has not, under Act XIV. of 1859, a period of 12 years from the cause of action. The valuation of the suit was raised by the plaintiff on the objection of the opposing defendant as regards the value of the properties likely to be affected by this decision, and these included landed estates. Had the plaintiff sued for *confirmation* of possession, his suit, I do not think, would have been considered to be one governed by Clause 12 of the new law, because it only provided for suits for the *recovery* of lands and of any interest in land, &c.

I am constrained to admit that the new law does not, I should think owing to a mistake, make any distinct allusion to cases of inheritance. Each such case may not necessarily be one involving rights to immoveable property. The word *recovery* must, however, be taken to mean, besides *regaining*, obtaining for the first time; or otherwise the word would not cover a case for possession within the right of inheritance, or under a deed of sale or mortgage of lands never held before by a plaintiff.

As to the appearance and consent of the two sons of Phoolkissoree, I think that from the first plaintiff passed them over upon no other ground, but that which he afterwards more distinctly stated below; that, according to his notions, the daughter's sons were not entitled to succeed. I cannot conceive under what other ideas can he have for a moment expected to have succeeded in his case. He could not have expected of *concealing* them or their existence, which he knew was known to the defendants. I have no concern to rely upon the consent of these persons, but the agreement put in does not show that the plaintiff acquired *after* his plaint had been filed any *new* rights. He only managed on payment of a consideration and by exchange of deeds between him and them, to make these persons come and say something to this effect "that, in order to make the case instituted by the plaintiff fit to be adjudicated on the merits, we give our consent, and here we are present to make the case a complete one as far as necessary parties are concerned." They were purposely omitted to be named as respondents in the appeal by the appellant, and they, having appeared here, prayed to be admitted as respondents. I think that, in order to have a complete representation of parties, their request should be allowed. If the case of the plaintiff was in my opinion not a good case, showing a right of action when it was brought, I would have, if I had allowed him to proceed in this case on the consent of the two sons of Phoolkissoree, held his case liable to the rules of limitation as prescribed by the new law, because this consent was given after the new law came into operation.

It is true that the estate of Muthooranath cannot be bound by an agreement to which he or his heirs were not parties, but Golucknath, now deceased, had, according to the Bengal school of Hindoo Law, a right to exclude certain legal heirs from their ordinary rights of succession. The fact of Phoolkissoree, or her sons, not joining in the family arrangement said to have been made by Golucknath and others, does not invalidate Golucknath's right to define who will succeed to his estate after his death.

Further, looking to the interest of the parties, I find that, though the words in the agreement are "daughters" and "daughters' sons," yet, as, when drawing up this deed, the parties to it dealt with the property of the common ancestor Nund Coomar, and a paper supposed to be a draft of a will by him, but which was never proved to have been executed by him, was adopted as the

basis of the arrangement, it is quite clear that the parties executing the deed really excluded, not only sister's sons, but also paternal grandfather's daughter's sons along with the sons of the daughters. The object was to exclude altogether all descendants in the *female line*. There could be no object in excluding daughter's sons, and not the sister's sons and the others. The argument, on the other side, cannot be that the omission of the persons not named was intentional. It must only be that, by the words used in the deed, only the daughter's sons being excluded, the interpretation should not supply the omission. I, however, hold that it is quite legal to go beyond the letter of a deed, in order to find out the real intent of the parties executing it. The intent is evident from the entire deed, and the circumstances under and the manner in which the family-arrangement is said to have been made. Several passages on this point in Broom's Legal Maxims support my view.

If the plaintiff was, in this view of the matter, the heir to the estate of Golucknath, upon that right alone he is entitled to see the validity of the adoption tried, though he may not be a reversioner to the estate of Muthooranath, and may not be in time with regard to this estate, and though his right of inheritance to the estates of his two other uncles may not be affected by the adoption in dispute.

I, therefore, think that the plaintiff is entitled to proceed to a trial of the merits of the alleged adoption, on the ground of his being the only heir to some portion of the estates of Golucknath, deceased.

I lay no stress upon the assertion made by the Judge below in his decision that, when he laid down the two issues on the merits as the only issues arising in the case, both parties assented to this proceeding. I also cannot make any legal use of the apprehension which the legal advisers of the plaintiff may have entertained when they thought proper to advise the plaintiff to sue before Act XIV. came into operation. I also cannot attach any importance to any grounds of apprehension or miscalculation which have led the plaintiff originally to include also his sons as co-plaintiffs with him. I see the case was unnecessarily complicated by the plaintiff, but that would be no ground to dismiss his plaint, when the existence of some right to sue is proved to my satisfaction.

I should, therefore, hold that the plaintiff is entitled to proceed to a trial of the merits of the adoption in dispute.

Peacock, C. J.—This was a suit filed by Sreenath Bose against Brojo Rajkissoree Dossee, widow of Muthooranath Bose, and guardian of her alleged minor adopted son Radhanath Bose, and other defendants to whom it is not necessary to refer more particularly.

The suit was brought to set aside a certificate to collect debts which she obtained under Act XX. of 1841 as representing her alleged adopted son. The *second* object of the suit was to set aside the adoption, and the *third* was to obtain a decree declaring generally the plaintiff's right as heir of Golucknath and Muthooranath, but the plaintiff did not ask to have his rights declared as to any particular estates.

The question referred for the opinion of a third Judge is, whether the plaintiff is entitled in this suit to have the validity of the adoption tried, or whether he is barred by limitation. Mr. Justice Norman considered that, as the plaintiff was not the heir of Muthooranath, he being the son of an uncle of Golucknath and Muthooranath or a cousin, whereas Sooraj Coomar Roy and Jadub Coomar Roy were nephews, the sons of Phoolkissoree, a sister, he had no right to dispute the adoption at the time when the suit was commenced; and that, if the defect was cured by the ikrarnamah, and petition filed by Sooraj Coomar and Jadub Coomar, it was too late, inasmuch as the suit would have been barred if it had been commenced on the 4th of February 1864, when the petition was filed. On the other hand, Mr. Justice Shumbhoonath Pundit considered that, by the terms of a deed of compromise, dated 15th February 1839, the sons of the sister were excluded from succeeding to Golucknath's estate. Mr. Justice Norman considered that, as regards *Muthooranath's* estate, the deed could not affect the right of inheritance, as Muthooranath was no party to it; and that, as regards the estates both of Golucknath and Muthooranath, there was nothing in the deed which in terms affected the title of Sooraj Coomar and Jadub Coomar as heirs. Mr. Justice Shumbhoonath Pundit admitted that the estate of Muthooranath could not be bound by an agreement to which he and his heirs were not parties, but he held that Golucknath had a right to exclude certain legal heirs from their ordi-

nary rights of succession, and that the fact of the sister and her sons not having joined in the family-arrangement did not invalidate Golucknath's right to define who should succeed to *his* estate after his death.

It is clear that the plaintiff was not the general heir-at-law either to Muthooranath or Golucknath, even if he were Golucknath's heir, according to the terms of the deed, of the property comprised therein, which, I think, he was not. The deed settled the property comprised in it in a particular manner, but it did not profess to declare who should or should not be Golucknath's heir. Consequently, if the issue had been whether, as heir-at-law of Golucknath, he had a right to dispute the adoption, the issue must, I think, have been determined against him. But the issue raised at the instance of the defendant, after the plaintiff had paid an additional stamp-duty on the plaint, was simply whether the plaintiff had a right to question the adoption.

The deed of compromise, to which I shall presently more particularly refer, was put in evidence, and has been referred to by both the learned Judges. Golucknath was a party to that deed, but Muthooranath was not a party to it. In fact, Muthooranath died before the deed was executed, and in Nund Coomar's lifetime. If he had survived his grandfather Nund Coomar, he would have taken a share of his grandfather's estate equal to that of Golucknath; and, if he had left a son living at the time of his grandfather's death, that son would have been entitled to a share of the grandfather's estate equal to that taken by Golucknath. It appears to me that the plaintiff ought to succeed upon the issue as to his right to question the adoption if he took under the deed such an interest as would or might be affected by the adoption, although that deed did not constitute him heir to Golucknath or to Muthooranath.

The suit was commenced on the 31st December 1861, the day before Act XIV. of 1859 came into operation; and if it was rightly commenced on that day, and, if the plaintiff Sreenath had at that time a right to dispute the adoption, either with or without the consent of Phoolkissoree's sons, the suit was commenced in time, and was not barred by limitation. The plaint does not allege that, as heir of Golucknath, or of Muthooranath, plaintiff had a right to question the adoption, although he asked to have his right as such heir declared. We should do great mischief in holding parties too strictly to their pleadings. The issue raised was quite wide enough to let the plaintiff into the merits. The deed was not referred to in the plaint, nor did the plaintiff set forth the ground upon which he claimed to dispute the validity of the adoption. But, the defendant having disputed the plaintiff's right to dispute the adoption, an issue was laid down at the defendant's request whether the plaintiff had a right to question the adoption.

With reference to the view of the case which I have taken, I do not think it necessary to consider the effect of the ikrarnamah of the 23rd January 1864 executed by Sooraj Coomar and Jadub Coomar, nor of the subsequent proceedings in the suit, nor to determine whether all heirs in the female line were excluded by the deed of compromise. If the case turned upon that point, I should be disposed to hold that the words "grandsons in the female line" in Clause 4 would not include Golucknath's sister's sons.

The deed of compromise referred to was dated the 15th September 1839, and was made between Jugodumba Dossee, the widow of Gobindpersad, 2nd son of Nund Coomar, of the 1st part; Rajkissen Bose, 4th son of Nund Coomar, of the 2nd part; Golucknath Bose, son of Ramdhun, who was the eldest son of Nund Coomar, of the 3rd part; and Boidnath Bose, 3rd son of Nund Coomar, of the 4th part. It recited that disputes had arisen between Gobindpersad, Rajkissen, Golucknath, and Boidnath respecting the property left to them as the joint heirs and personal representatives of Nund Coomar Bose, and that a bill had been filed in the Supreme Court by Gobindpersad, Rajkissen, and Golucknath against Boidnath and two other persons; that Nund Coomar had died intestate, leaving no widow but three sons, that is to say, Gobindpersad, Rajkissen, and Boidnath, and one grandson Golucknath, the son of Ramdhun, who died in his father's lifetime, which said three sons and grandson were joint-heirs under the Hindoo Law, and entitled to succeed to their father and grandfather in equal shares of one-fourth each; and praying that it might be declared that Nund Coomar died intestate, and that the plaintiffs and Boidnath were his heirs, and entitled to the estate of Nund Coomar. The deed then recited that the parties had agreed to a compromise upon the terms set forth in the several articles thereof.

By the 1st article it was declared that the worship of Sree Sree Issore Samsoonder Thakoorjew of the homestead of Boroo should be conducted according to a certain estimate dated 1st Pous 1238 with the produce of the three talooks, ilcca, and other lands, mentioned in a deed of gift of the said Nund Coomar Bose, deceased, dated 2nd Assin 1232.

The 2nd article directs that "the five "new talooks having been transferred in "the name of the said Sree Sree Samsoon-"der Thakoorjew, the expenses of the food "and clothing of the family, according to the "estimate dated 1st Maug one thousand "two hundred and forty of the said late "Nund Coomar Bose, should be defrayed "from the produce thereof, and also from the "produce of the garden called Rambagan "and other newly-purchased free-lands, &c., "and that those who had no allowance "provided for them should receive agreeably "to the rates of the said estimate of the "1st Maug one thousand two hundred and "forty, and thereafter, on the increase of the "family of any party, such addition to the "family should receive at that rate, and, "upon the death of such parties, such allow-"ances should cease. That the names of the "said Sree Sree Samsoonder Thakoorjew "and Issore, the said late Nund Coomar "Bose as sebait thereof having been con-"tinued in force in the three talooks, &c., "in the deed of gift mentioned in the 1st "article of that proposal the names of the "said Gobindpersad Bose, Boidnath Bose, "Rajkissen Bose, and Golucknath Bose "should be entered therein in the serishta "of the Collector as heirs and jemmadars of "Nund Coomar Bose, deceased, the late "sebait of the idol Sree Sree Samsoonderjew, "and among the five talooks newly pur-"chased, the three talooks, *viz.*, Turruf "Allypore, Doorganugur, and Rangopola "Radanuggur, will be transferred agreeably "to the directions of the said Nund Coomar "Bose contained in a letter dated 5th "Joistee one thousand two hundred and "forty-one from the name of Boidnath "Bose, and which said transfer to be made "to the names and forms as aforesaid, and "the said three talooks having been included "with the property of the said Sree Sree "Issorejew, the expense of the food and "clothing of the family should be defrayed "and paid out of the produce thereof, and "of the said garden called Rambagan and "other newly-purchased and mortgage-free "lands according to the said estimate of the "1st Maug one thousand two hundred and "forty, and those of such family who were "not included in the said estimate also "receive agreeably to the rates of the same, "and hereafter on the increase of the family "*as legal heirs* and personal representatives, "except the sons and daughters of the "daughters of any of them the said Gobind-"persad Bose, Boidnath Bose, Rajkissen "Bose, and Golucknath Bose should receive "at the rate mentioned in the said estimate "of the said 1st Maug one thousand two "hundred and forty, and on the decease "of such person such allowance should "cease."

The article proceeded to declare that the two other of the five talooks should be sold, and the proceeds credited to the account of the idol, or, if all the parties should consent to the same, should be transferred to the sebait.

The 3rd article stated that, "for the purpose "of carrying on the worship of Sree Sree "Radagobindjew at Sree Brindabun, the "moondee or chuck and shops that were "at Muthoora, and those that were at Sree "Brindabun, out of the produce thereof the "worship of that place should be conducted "in the manner as theretofore performed; "and, should the produce thereof fall short "to defray the expenses of the worship "thereof, then the same should be defrayed "out of the funds of the said Sree Sree "Samsoonderjew; and if it would be sufficient "and surplus, then the same should be "credited in the state of the said Sree "Sreejew."

The 4th article declared that "neither of "them the said Gobindpersad Bose, Boid-"nath Bose, Rajkissen Bose, Golucknath "Bose, should at any time, down to their "sons, grandsons, and heirs, be at liberty to "divide, give away, sell, pledge, or mortgage, "for the debts of them individually, the said "talooks, &c., or the worship of the said ta-"looks, *and that none of them, the said "Gobindpersad Bose, Boidnath Bose, Raj-"kissen Bose, and Golucknath Bose in the "female line* should be at liberty to interfere "in the worship of the said idols, or to sell, "mortgage, or give away the properties, "above stated of the said idols, nor should "they have any right, title, or interest "whatsoever in the worship of the idols."

In the first part of article 4, which re-strains the parties therein mentioned from dividing, giving away, selling, pledging, or mortgaging the property for their private

debts, the words "sons and grandsons and *heirs*" are made use of, if in the latter part, which applies to the worship of the idols, the words "grandsons of any of the said parties in the female line" are used, and not "grandsons and *heirs* in the female line." A son of Ramdhun's daughter Phoolkissoree might offer funeral oblations to Ramdhun, whilst a grandson of Golucknath, through a daughter of Golucknath, could not. I cannot say what precise object the parties had in view when they used the words "grandsons" in the female line; they might have considered Golucknath in making the arrangement as standing in the place of Ramdhun, his father; and as making the same arrangement which all the sons of Nund Coomar might have made had they been living. But it is unnecessary for me, in my view of the case, to determine the question whether the words "grandsons in the female line" in that part of the deed excluded all heirs generally in the female line from interfering in the worship.

I apprehend that Sreenath had an interest to try the question whether Radhanath was the adopted son of Muthooranath exclusively of the provisions of the 4th article. The deed does not merely provide for the worship of the idols, but also for the maintenance of Nund Coomar's family and of other members, who, on the increase of the family, should be legal heirs and representatives, except the sons and daughters of daughters of any of the said parties including Golucknath.

Further, the 5th article of the deed provides as follows: "That for the purpose of "providing for the future payment of the "Government revenue (should it happen so) "of the eight talooks, old and new, above "stated, and to meet the deficiency (should "any such occur) in the worship of Sree Sree "Issorejew at the homestead at Boroo and "Sree Sree Brindabun, and to defray the ex- "penses of the embankments, tagabees, or ad- "vances to the ryots, and law-suits relating "to the talooks and charges for the food and "clothing of the family, there should be "kept a fund in Company's paper to the "amount of sicca rupees forty-five thousand "from the estate which should at all times "be ready, and that such Company's paper "should be kept in the names and form "of Gobindpersad Bose, Boidnath Bose, "Rajkissen Bose, and Golucknath Bose, the "heirs and jemmadars of Nund Coomar "Bose, deceased, the late sebait of Sree "Sree Samsoonderjew, and that such sum "of sicca rupees fifty-five thousand should "be made up as follows: sicca rupees sixteen "thousand and five hundred from the funds "in Court, and which were then standing to "the credit of the cause, and from collections "from the arrears of the talooks and out- "standings due on account of loans to the "amount of twenty-eight thousand and five "hundred rupees, which being invested in "Company's paper would make the aforesaid "sum of sicca rupees forty-five thousand, "and that, in the event of there happening "any deficiency in the above stated expendi- "tures, such deficiency should be made up "with the interest of that money and pro- "duce of the talooks; if even the interest "of such money and produce of the talooks "should not be adequate to make up or meet "such deficiency, then it should be paid "out of the principal stock, but that after- "wards the Company's paper to the said "amount of sicca rupees forty-five thou- "sand should again be made up from the "interest of the money and produce of the "talooks, &c., and that the Company's paper "of the said amount should be kept at the "homestead at Boroo under the locks and "keys of them, the said Gobindpersad Bose, "Boidnath Bose, Rajkissen Bose, and "Golucknath Bose, and when the Com- "pany's paper to the amount of sicca ru- "pees forty-five thousand should have been "made up in the manner before stated, year "after year the interest of the said money, "the arrears and outstanding dues on ac- "count of loans (the above-stated payments "of Government revenue, should it happen "so, the expenses for the worships of Boroo "and Brindabun, and for the food and cloth- "ing of the family and law-charges, "should any be incurred, having been paid "off), the amount that should remain there- "after should be equally divided amongst "them, the said Gobindpersad Bose, "Boidnath Bose, Rajkissen Bose, and "Golucknath Bose, and *that neither of "them nor their heirs* should be at liberty "to divide the principal stock, nor should "any or either of them be competent to pay "his or their debts out of it; as long as the "family should exist, so long should the "Company's paper to the amount of sicca "rupees forty-five thousand be kept ready "for the purpose of defraying the expenses "of the worship of Sree Sree Issorejew of "the homestead of Boroo, as per estimate "1st Poos one thousand two hundred and "thirty-eight, and of Sree Brindabun, and for "supplying the food and clothing of the "family according to the said estimate of

"the 1st Maug one thousand two hundred "and forty, and paying the deficiency of the "Government revenue and law-charges that "might be necessary; and that, until the "Company's paper so to be deposited "as aforesaid should amount to sicca rupees "forty-five thousand, the profits of the "several talooks arising after the above "stated expenditures being made should not "be divided by any one, but reserved to make "up the said sum of sicca rupees forty-five "thousand in Company's paper, and that "until the fund would amount to sicca rupees "forty-five thousand in part of the sicca "rupees forty-five thousand above alluded to, "the expenses of the worship of the said "Sree Sree Issorejews should be borne in "the reduced scale in conformity with the "expenses incurred in the year one thousand "two hundred and forty-four."

By article 28 of the deed it was appointed that Gobindpersad having taken up his residence at Boroo should personally manage the business; in case of his refusal or mismanagement, Boidnath was to manage, and so on, in like manner, Rajkissen, Golucknath, Sreenath, the plaintiff, Huronath, whoever should be the elder of the family; the 28th article also provided for the holding of certain offices under the deed.

If Radhanath Bose were lawfully adopted, he would be the legal heir and personal representative of Golucknath within the meaning of the 2nd article, and would also as the heir of Golucknath, not being the daughter of a son, be entitled to divide any surplus after setting aside and keeping up the 45,000 rupees in Company's paper, and paying the expenses provided by the 5th article. Sreenath, the plaintiff, therefore, as the heir of Boidnath, and as manager under the deed, had an interest in showing that Radhanath was not the heir of Golucknath, or entitled to maintenance under the deed or to divide any surplus after setting apart the 45,000 rupees in Company's paper and paying the other expenses provided for by article 5. Sreenath as manager would be wrong in paying a sum of money to Radhanath if he was not the son of Muthooranath, and as such the heir of Golucknath. Consequently, he had an interest in having it determined whether the adoption were valid or not.

Further, if Radhanath were the legally adopted son of Muthooranath, he would; if he had been adopted in the lifetime of Nund Coomar, have taken an equal share with Golucknath as heir of Muthooranath. It is by no means clear that, upon his adoption, if valid, he did not become entitled to contest the deed so far as it affected one-half of what passed under the conveyance from Golucknath, and whether he did not become entitled to an equal share with Golucknath in the property of Nund Coomar Bose, the common ancestor. Macnaghten's Hindoo Law, p. 70, Vyavasta Durpana, p. 1040.

Therefore, independently of the construction of the 4th article, Sreenath had in my opinion the right to dispute the validity of the adoption of Radhanath.

Without determining whether Mr. Justice Norman or Mr. Justice Shumbhoonath Pundit was right as to the construction of those words "grandsons in the female line" in the 4th article, it appears to me that Sreenath, when he commenced his suit, had a right to question the validity of Radhanath's adoption. Having that right independently of the ikrarnamah from Phoolkissoree's sons, I agree with Mr. Justice Shumbhoonath Pundit that the Statute of Limitation did not apply. The appeal must, therefore, be heard upon the merits.

The 24th July 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Occupancy (for 12 years)—Section 6, Act X. of 1859.

Case No. 401 of 1867.

Special Appeal from a decision passed by Moulvie Anwar Ali, Principal Sudder Ameen of Tipperah, dated the 14th December 1866, reversing a decision passed by Baboo Greesh Chunder Roy Sudder Moonsiff of that District, dated the 1st May 1866.

Kalee Kishen Biswas (Plaintiff), *Appellant*

versus

Sreemutty Jankee and others (Defendants) *Respondents.*

Baboo Khetternath Bose for Appellant.

Baboo Sreenath Banerjee for Respondents.

The occupation intended to be protected by Section 6, Act X. of 1859, is occupation of land, the subject of agricultural or horticultural cultivation, and used for purposes incidental thereto, and does not include occupation, the main object of which is the dwelling-house itself, and where the cultivation of the soil, if any there be, is entirely subordinate thereto.

Phear, J.—In this suit the plaintiff seeks to have it declared that he is entitled, under a lease from the zemindar, to the possession of certain land occupied by the defendant. There does not seem to be any contest between the parties as to the authenticity of this lease, although it is suggested that it was executed, not for the purpose of passing a real interest to the plaintiff, but to enable the zemindar behind its cover to bring this suit of ejectment against the defendant.

The defendant is widow of one Raj Chunder Biswas, who, on the 24th Joistee 1258 F. S., obtained from the zemindar a pottah of the same plot of land for a term of ten years. At the expiration of this term, he held over for a period of some five or six years more, when he died leaving his widow in possession.

The Lower Appellate Court on this state of facts has held that the defendant has a right of occupancy under the provisions of Section 6, Act X. of 1859, and on this ground alone has dismissed the plaintiff's suit.

The pottah granted to Raj Chunder, under which he held possession of the land in question, runs as follows:—

"This ryottee pottah is executed in favor "of Sree Raj Chunder Biswas, inhabitant "of Nepaira, in Pergunnah Noornagar, "within my zemindary, &c. (setting out cer-"tain boundaries at length): within these "boundaries a *lodging-house* (basha-baree) "pottah is given to you of your lodging-"house including Pearee Nultee's house, as "per above boundaries, for a period of ten "years from 1258 to 1267 Tipperah, at a "rent of eight annas Company per year, that "is, for five rupees for the whole period. "You shall pay rent year by year in the cut-"cherry of the chukla."

It also appears from the finding of the first Court (seemingly acquiesced in by the Lower Appellate Court) that Raj Chunder constructed buildings, and planted gardens on the leasehold plot, and that, in fact, the lease was granted to him for the sole purpose of enabling him to reside on the plot by the construction of a lodging-house.

In view of these facts, I am of opinion that the subject of this pottah was not "land" within the meaning of Act X. of 1859, and that consequently neither the defendant nor her husband could be considered in respect of their occupation of this plot as "a ryot who has cultivated or held land" within the words of Section 6. In my judgment, the occupation intended to be protected by that Section is occupation of land considered as the subject of agricultural or horticultural cultivation, and used for purposes incidental thereto, such as for the site of the homestead, the ryot, or Malli's dwelling-house, and so on I do not think that it includes occupation, the main object of which is the dwelling-house itself, and where the cultivation of the soil, if any there be, is entirely subordinate to that. I had occasion in the case of Khellut Chunder Ghose *versus* Umirto, reported in the 1st Volume of the Indian Jurist, New Series, 426, to consider this matter very fully, and I see no reason now to alter the opinion which I then expressed.

It seems to me, therefore, that the provisions of Act X. of 1859 do not apply to this case; and I think the case ought to be sent back to the Lower Appellate Court, in order that it may determine whether the defendant's tenancy under the plaintiff's lessor (which it is admitted subsisted up to the time of the granting of plaintiff's lease by reason of the holding over after the expiration of the pottah of 1258) has been duly put an end to or not, and may give judgment according to the result of its finding.

Bayley, J.—I concur in considering that this case is not one coming within the meaning of Section 6, Act X. of 1859. The terms of the pottah refer simply and solely to bare ground on which a basha-baree should be made. It is not for bastoo and other *lands* as might be in an ordinary cultivator's pottah, but for an exclusive tenure quite irrespective of the various sorts of land generally leased to ryots and held by them as cultivators of the soil. These alone are, I think, contemplated by Section 6.

The 24th July 1867.

Present :

The Hon'ble W. S. Seton-Karr and Dwarkanath Mitter, *Judges.*

Notice of enhancement — Distinct and independent holdings — Arrears at old rates.

Case No. 613 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 24th December 1866, affirming a decision passed by the Deputy Collector of Jungeepore, dated the 7th July 1866.

Beejoy Gobind Bural and others (Plaintiffs), *Appellants,*

versus

Jannobee Bromonya (Defendant), *Respondent.*

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Appellants.

Baboo Kalee Kishen Sein for Respondent.

A landlord serving notice of enhancement under Section 13, Act X., has no right to consolidate distinct and independent holdings, without the consent of the ryot. The ryot, on the other hand, is entitled to a notice or notices specifying the several holdings in his possession, the amount of enhanced rent he is liable to pay for each, and the ground of such enhancement in each instance.

Where a landlord's claim for arrears of rent at enhanced rates was dismissed *in toto* by the first Court, and in his appeal to the Judge he advanced no claim for arrears at the old rates, he cannot in special appeal object to the Judge's decision on the ground that such arrears were not decreed to him.

Mitter, J.—This was a suit brought by the special appellant for arrears of rent at enhanced rates after service of notice under the provisions of Section 13, Act X. of 1859. The first Court dismissed the claim, holding that the special appellant had failed to make out the grounds of enhancement relied upon by him. On appeal, the Judge found that several distinct and independent jummas or holdings were included in the suit; that two of these jummas belonged to third parties; and that, under such circumstances, which created great confusion in the pleadings, the plaintiff was not entitled to the decree he asked for. Against this judgment three grounds of special appeal have been urged before us: *1st*, that the Lower Appellate Court should have come to a more clear and distinct finding, with reference to the two jummas mentioned above; *2nd*, that it should have decreed the claim of the special appellant, with reference to the other jummas found to be in the possession of the respondent; and, *3rd*, that it should have at least decreed such arrears as were due to him according to the old rates.

With reference to the first two grounds, we observe that the decision passed by the Judge is substantially correct. On referring to the notice of enhancement, we find that the separate existence of these holdings is entirely ignored, and the ryot is called upon to pay a consolidated sum of 39 rupees 12 annas and 8 gundahs upon an aggregate area of 32 beegahs 17 cottahs and 2 chittacks of land alleged to be in his possession. Such a notice is, in our opinion, wholly illegal. The landlord had no right to consolidate several distinct and independent holdings into one without the consent of the ryot. The ryot, on the other hand, was clearly entitled to a notice or notices specifying distinctly the several holdings in his possession, the amount of enhanced rent he was liable to pay for each, and the ground upon which such enhancement was claimed in each particular instance. There is a total absence of such specification in the notice before us, and we are, therefore, clearly of opinion that it is absolutely bad in law. It has been contended before us that this is mere technical objection. We entirely differ from such a view. For aught that we know to the contrary, some of these jummas might be absolutely protected from enhancement, while the others might not. What then would be the legal consequences, under such contingency, if all of them were lumped together and treated as one entire holding? Instead of possessing some jummas of a permanent and mokurruree character, and others liable to enhancement (only when proper grounds for such enhancement are found to exist), the ryot would be reduced to the position of the holder of one single jumma, the rents of which could be always enhanced by his landlord, whenever he would be able to do so according to the rules of enhancement laid down by the law. Then, again, supposing

that every one of these holdings were liable to enhancement, it cannot be denied that the tenant in this case was at perfect liberty to retain some of them, and to relinquish the others according to the provisions of Section 19 of the Act. This appears to be the chief, if not the only, reason why the law imperatively requires that such notices should be served in or before the month of Chyet of the year previous to the year in which the proposed enhancement is to come into operation. Was this opportunity given to him by the special appellant by the mode in which he has proceeded? Certainly not. Upon a perusal of the notice in question, it was not only impossible for the ryot to avail himself of any such opportunity, but it was also impossible to ascertain how and upon what grounds he was to meet his landlord's claim for enhancement with reference to the several jotes held and occupied by him. It has been said that the question regarding the sufficiency or otherwise of the notice has been already disposed of by a previous order of remand passed by the Lower Appellate Court. The grounds of this adjudication have not been shown to us, but, even if they were, we do not think that we are precluded from taking up the question at the time when we are finally disposing of the case; more especially when the tenant has been throughout contesting the legality of the notice served upon him. With reference to the third point raised before us by the special appellant, we find that it was never urged before either of the Lower Courts. The first Court dismissed his claim *in toto*, and, although he was the party who appealed to the Judge, he did not raise it in any manner before that official, either in his memorandum of appeal, or in the course of his oral pleadings. On looking to the plaint, we find that the receipt of a certain sum of money, the amount of which even is not specified, is admitted by him, and the record does not disclose anything with reference to the amount that he would be entitled to claim if the rent had been calculated according to the old rates. To permit him at this late stage of the proceedings to take up this new objection would be to allow him to amend his whole case, and thereby to subject the ryot to additional trouble and expense in a litigation which has already proceeded to a harassing length. We dismiss the special appeal with costs and interest upon those costs at the rate of 12 per cent. per annum.

The 25th July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Execution of decree—Sale of son's right (to succeed his father)—Section 205, Act VIII. of 1859.

Case No. 122 of 1867.

Regular Appeal from a decision passed by Baboo Gunga Churn Shome, Principal Sudder Ameen of Sarun, dated the 30th January 1867.

Baboo Gour Surun Dass and others (Plaintiffs), *Appellants,*

versus

Baboo Ram Surun Bhukut and others (Defendants), *Respondents.*

Baboos Unnoda Pershad Banerjee and *Mohesh Chunder Chowdhry* for Appellants.

Mr. R. E. Twidale for Respondents.

Suit laid at Rupees 5,446-3.

The right of a son to succeed by survivorship to his father's specific share of property cannot be sold in execution of decree, such right being too remote. Section 205 of the Code of Civil Procedure, which specifies the kinds of property which are liable to attachment and sale in execution of decree, makes no mention of contingent interests. The property must belong at the time to the defendant.

Glover, J.—This case was remanded by the High Court on the 30th January 1866. The circumstances are fully detailed in the remand-order, and it is needless to recapitulate them here.

The order passed by this Court was to declare that the sons of Ram Suhaye had a present vested right in the ancestral property, which might be followed by creditors to the extent of the son's shares, without waiting for the death of their father.

And, with regard to one of the respondents, the only one who appeared, Sheo Surun Roy, the case was remanded, in order that the Principal Sudder Ameen might find whether his purchase of Mouzah Packoondah included the rights of the father Ram Suhaye, as well as of his sons.

In other and clearer words, whether, on the supposition that the sons' own rights had already been sold away from the judgment-creditor, the contingent interests of these sons in their father's share had or had not been sold at the same time.

The Principal Sudder Ameen has apparently misunderstood the order of remand, and has gone into the appellant's claim to sell the personal rights of his judgment-debtors in the three villages Packoondah, Moneah, and Pertabpore, in satisfaction of his decree. There was no necessity for this, and the question, as between the decree-holder and those who claimed to hold under a previous sale, would have been more properly entertained at the time of execution.

The Court's order was to consider Sheo Surun's claim to escape the appellant's decree *in toto*, on the ground that his purchase included the rights of both father and sons in Mouzah Packoondah. This point the Lower Court has altogether omitted to enquire into. As, however, we have all the evidence necessary to decide the question, we think it better to do so, in the hope of preventing further litigation between the parties.

There are two questions involved :—

(1.) Can a son's right to succeed by survivorship to a father's specific share of a property be subject to sale in execution of decree? and

(2.) In this particular case, did the "rights" of the son, which were sold to the respondents, include their rights to succeed to this share?

It is admitted that the shares of the sons, the judgment-debtors, were sold to the respondents long before the appellants got their decree, and that the only property left in the family is the share of Ram Suhaye, the father.

On the first issue, we are of opinion that such an interest is too remote to be the subject of sale.

Section 205 of the Code of Civil Procedure, specifies the various kinds of property which are liable to attachment and sale in execution of decree, but these must at the time belong to the defendant; there is no mention of contingent interests.

In the present case, the interest sought to be claimed as an asset of the judgment-debtors is the right to succeed by survivorship to Ram Suhaye's share in the ancestral estate. This is manifestly a contingency of the most doubtful kind. The debtors may pre-decease their father; nay—that father himself, supposing him to recover his senses, or his guardian for him if Ram Suhaye still remains insane, may dispose of the share, by sale, as the sons have already disposed of theirs. The share belongs to Ram Suhaye absolutely, and he may do what he likes with it. It is not a property which must, in the course of nature, descend to his heirs, but which may do so if Ram Suhaye chooses to retain it till his death.

In the case of Koonj Kooer *versus* Kummul Kooer (VI. Weekly Reporter 34) it was decided by a Division Bench of this Court that the rights of a so-called reversioner, that is, of one who would succeed as next heir if he were alive at the time of the death of a Hindoo widow, could not be sold in execution of decree.

The present case is much stronger. The Hindoo widow had only a life-interest in the property, whereas Ram Suhaye may deal with his share as he pleases.

We think, therefore, that the appellant's claim to have his judgment-debtor's contingent rights in Mouzah Packoondah sold in execution must be refused.

The same remarks as those already made in respect of Mouzah Packoondah apply to the sale of the sons' rights in Ram Suhaye's share in Mouzah Moneah.

In both these mouzahs, there is no interest remaining to the judgment-debtors which the judgment-creditor can sell.

This being so, it will be unnecessary for us to consider the second point raised in appeal further than to remark that the same argument would apply to both objections. If the sons have no rights that can be sold in the share of their father Ram Suhaye, it follows that the former sale of their "rights and interest" could not have included those rights.

There remains the mouzah of Pertabpore. And here we think that the Principal Sudder Ameen was wrong. This mouzah was undoubtedly the property, so far as their respective shares went, of the judgment-debtors, and, as such, might have been put up for sale, subject to any lien that might have been previously imposed upon it.

The Lower Court had nothing to do with the validity or otherwise of the zur-i-peshgee. The land, undoubtedly, belonged to the judgment-debtors, and should have been put up for sale, with notice that the respondent claimed to have a zur-i-peshgee lien upon it, leaving them to establish their claim if called upon to do so.

Our order on this appeal will, therefore, be that, as regards the claim to sell the debtor's contingent rights in the Mouzahs Packoondah and Moneah, the appeal is dismissed with costs.

And, as regards Pertabpore, the Principal Sudder Ameen's order is modified, that is to say, that the appellant may bring to sale his debtor's interests in that mouzah subject to any lien that may be proved to exist upon it. The Principal Sudder Ameen's finding as to the validity of the zur-i-peshgee will not be a judgment binding on the appellants, or prevent them or any one else from contesting the point, should they deem it advisable to do so.

On this portion of the claim the appellant will get costs.

The 25th July 1867.

Present :

The Hon'ble W. S. Seton-Karr and Dwarkanath Mitter, *Judges.*

Pre-emption—Mahomedan Law.

Case No. 717 of 1867.

Special Appeal from a decision passed by the Judge of Patna, dated the 16th January 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 12th February 1866.

Mussamut Ladun (one of the Defendants), *Appellant,*

versus

Bhyro Ram (Plaintiff), *Respondent.*

Baboo Tarucknath Sein for Appellant.

Baboo Poorno Chunder Shome for Respondent.

In a suit claiming a right to pre-emption, where it was found, as a fact, that the sale had not been completed, and that there had not been a cessation of the vendor's right, it was held that, whether under the ordinary principles which relate to contracts of sale, or under the principles of Mahomedan Law, no right could arise in favor of the pre-emptor.

The privilege of *shuffa* refers to cases in which the sale has been actually completed by the extinction of the rights of the vendor.

Seton-Karr, J.—THE facts found in this case are, in the Judge's language, that the sale was made on the 6th of September 1865 ; ten days afterwards, or on the 15th, the plaintiff claimed his right to pre-emption, but on the following day, the parties to the sale annulled the same by a petition to the Registrar, with whom the Judge says the deed of sale then lay for the purpose of registration, and no sale was carried out. It further appears that, at the time the petition was presented, registration had not been completed. There is nothing to show, nor is the fact found, that there had been any acceptance on the part of the vendee. Yet, on this state of facts, both the Lower Courts have upheld the plaintiff's right to pre-emption, holding that it accrued before what they term the cancelment of the sale, and apparently thinking that the arrangement between the parties, by which matters reverted to their original status, operated as a new sale in favor of the pre-emptor.

The first Court has alluded generally to passages of Mahomedan Law Books in support of its opinion, but without quoting those passages with precision or in detail. On appeal before us, after hearing the appellant, we called upon the respondent's pleader to support the decision of the Lower Courts. The Hedaya, Volume I., Book XVI., page 361, was quoted, but the doctrine there laid down refers only to parole sales effected without formal deeds. The passage in the 3rd Volume, Book XXXVIII., page 598, if anything, is *against* the respondent, for it is there laid down that the pre-emptor cannot claim his privilege if, *before taking possession*, the vendee resile from the purchase; and the privilege of *shuffa* subsequently declared to be established to the pre-emptor refers to cases in which the sale has been actually completed by the extinction of the rights of the vendor.

In the present case, whether we apply the ordinary principles which relate to contracts of sale, or whether we apply the principles of Mahomedan Law, the sale was not completed, and consequently no right can arise in favor of the pre-emptor. The

following passage from Baillie's Digest of Mahomedan Law, page 505, supports this view; "The seller and purchaser may "declare that the sale was invalid, or a "*tuljeea*, or with a condition of option to "the seller, and their declaration must be "accepted; which being the case, there is "no room for a claim of pre-emption, for it is "well known that, to found such a claim, it "is necessary that there be an entire cessa- "tion of the seller's right for a valid cause." And our views on this subject are further entirely in accordance with a case decided on the 12th of May 1864, by Justices Steer and Levinge in special appeal* No. 1304 of 1863. In the case before us, the whole reasoning of the Lower Courts is founded on error, and on an assumption that the sale had actually taken place, which, from the very facts found, clearly is not the case. On the facts really found, the language of the Judge that a sale was *made*, and that it was afterwards *annulled*, is clearly erroneous, and his deductions are not sound in law. Possession had not passed; registration had not been completed; the vendee had not accepted the purchase; the right of the vendor was not extinct; and the bill of sale had not been delivered. Under these circumstances, no right of pre-emption could possibly arise.

* *See* Sutherland's Reports for May 1864, p. 219.

The decisions of both the Lower Courts are, therefore, reversed as erroneous in law, the plaintiff's suit is dismissed, and this appeal is decreed with all costs and interest.

The 26th July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Abuse—Damages—Right of suit.

Case No. 125 of 1867.

Regular Appeal from a decision passed by Mr. A. Abercrombie, Judge of Dacca, dated the 21st February 1867.

Gour Chunder Puteetundee (Plaintiff), *Appellant,*

versus

Mr. A. L. Clay, Deputy Collector and Joint Magistrate (Defendant), *Respondent.*

Baboo Chunder Madhub Ghose for Appellant.

No one for Respondent.

Suit laid at Rupees 1,500.

An action will lie for damages on account of abuse received even though plaintiff's professional position and gains are not injured thereby.

Kemp, J.—This was a suit for damages, the plaintiff alleging that the defendant abused him, and thereby injured him in character and reputation, as well as in his profession as a mooktear.

The Judge finds upon the face of the plaint that the subject-matter of the plaint does not constitute a cause of action. The plaint was, therefore, rejected under Section 32, Act VIII. of 1859.

The Judge quotes a decision of the late Sudder Court, 18th March 1852, Peer Buksh Mooktear *versus* Principal Sudder Ameen of Rungpore.

The finding of the Judge is opposed to the decisions of this Court, and is clearly wrong. An action of this description will lie. The Lower Court will decide upon the extent of the injury done to the appellant. It does not follow that, because a man's professional position or gains are not injured by abuse received by him, that his feelings are not injured and outraged.

The decision quoted by the Judge has since been set aside, *vide* Weekly Reporter, Volume I., page 19, Moulvie Golam Hossein Khan, plaintiff, appellant. The Judge is referred to Volume VII., page 299, Weekly Reporter, Civil Rulings, and Volume VI., page 151.

The suit is remanded for trial.

The 26th July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Limitation—Reversioner.

Case No. 551 of 1867.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 13th February 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 8th August 1865.

Ram Dyal Gossain and others (Plaintiffs), *Appellants*,

versus

Kattyanee Debia and others (Defendants), *Respondents*.

Baboos Juggadanund Mookerjee and *Toolsee Doss Seal* for Appellants.

Baboos Issur Chunder Chuckerbutty and *Kishen Dyal Roy* for Respondents.

Adverse possession for 12 years against a Hindoo widow, which would bar her right of suit, is also a bar to a suit by the reversioner brought after the death of the widow.

Glover, J.—THIS was a suit to recover possession of certain property said to have been held by one Onnopoorna, the widow of Mothoora, to whom plaintiffs say they are nearest of kin and successors.

The defendant pleaded adverse possession for more than 12 years, as well as a superior title by inheritance.

The Judge reversed the decision of the first Court, which was in favor of the plaintiffs, on the ground that the defendant had been in possession for more than 12 years, and that the widow had never held any possession at any time.

It is urged in special appeal that the plaintiff's cause of action arose on the death of the widow, and that no length of previous dispossession suffered by her would bar the reversioner's suit if it were brought within 12 years of her death.

A Full Bench decision of this Court, dated the 7th April 1864, Gobind Dossee *versus* Sham Lall Bysack, Special Number, Weekly Reporter, 165, has laid it down that a widow fully represents the estate of her deceased husband, and that it was settled law that adverse possession which bars her bars the heirs also after her. The tendency of our Courts of late years has been to elevate the position of the childless Hindoo widow, and to make her represent the estate much more fully than was the case formerly.

As the Judge has found, as a fact, that Onnopoorna never had any possession of the disputed property, and that the defendants had that possession for more than 12 years, it follows, from the ruling above quoted, that the special appellants are barred by the widow's disqualification, and that this special appeal must be dismissed with costs.

The 26th July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges*.

Limitation—Breach of Indigo-contract—Clause 16, Section 1, Act XIV. of 1859—Instigator—Liquidated damages—Section 3, Act X. of 1836.

Case No. 521 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Purneah, dated the 29th November 1866, modifying a decision passed by the Sudder Ameen of that District, dated the 30th June 1866.

Meer Mohomed Kazem (one of the Defendants), *Appellant*,

versus

Mr. A. J. Forbes (Plaintiff), *Respondent*.

Mr. C. Gregory for Appellant.

Baboos Umurnath Bose and *Toolsee Doss Seal* for Respondent.

A suit by an indigo-planter against an instigator brought under Section 3, Act X. of 1835, is governed by the 6 years' limitation provided by Clause 16, Section 1, Act XIV. of 1859. An instigator can, under the former law, be made liable to the extent of the damage sustained; but a plaintiff in such a case cannot obtain liquidated damages calculated on the penal amount due by the ryots under their contracts, but must prove the amount of damage done.

Glover, J.—THIS was one of a number of cognate suits to declare the defendants liable to damages on the ground that they had instigated certain of the plaintiff's ryots to refuse to grow the indigo for which they had contracted. The damages were laid at 15 rupees for each beegah of land not cultivated.

The Court of first instance held that the instigation was not proved. But the Principal Sudder Ameen on appeal decided the other way, and made the defendant liable at the rate of 15 rupees per beegah.

The *first* point taken in special appeal, *viz.*, that of limitation, we overrule in accordance with a decision of this Court in a precisely similar case, dated 28th May 1866, Mahomed

Kazem, defendant, appellant, *versus* Mr. Forbes, plaintiff, respondent, 5 Weekly Reporter 277. It was there held, and the judgment was afterwards upheld in review after a long argument (*vide* 7 Weekly Reporter 401), that the six years' limitation applied. We are of the same opinion as the learned Judges who passed those decisions, and agree in the reasons given by them.

The *second* objection is that the Principal Sudder Ameen, instead of going upon the recorded evidence in the case, allowed his mind to be misled by the decision of other and similar cases in which special appeals had been made to this Court. We have no doubt that the Principal Sudder Ameen was wrong in this. He treated as evidence the general proof of instigation, to be found in other cases, instead of determining the case before him by the proof adduced by the complaining party. As, however, for reasons presently to be given, we think that the special appellant must succeed on another ground, which will render any further action of the Lower Appellate Court unnecessary, we content ourselves with noting the Principal Sudder Ameen's error for his future guidance, and do not remand the case to him for re-trial.

The *third* objection is that the Principal Sudder Ameen's decision giving damages at the rate of 15 rupees per beegah is unsupported by any evidence whatever, and is contrary to law. By Section 3, Act X. of 1836, we observe, an instigator can be made liable to the extent of the damage sustained; but a plaintiff suing under that Act cannot obtain liquidated damages, calculated on the penal amount due by the ryots under their contracts. The plaintiff in this case abandoned his claim to recover the amount of damage under Act X. of 1836, on account of the difficulty of proving the amount, and came into Court claiming the rate which was payable to him by the ryots who had broken their contracts. This, we think, he was not entitled to do, without proving that that sum represented the amount of loss sustained by him; and, as he has made no attempt in this case to prove what damage he has sustained, we think that his suit must fail. It is contended by his pleader that the other side in their cross-appeal to the Principal Sudder Ameen declared that no more than three times the amount of the indigo-advances could be claimed, and this he construes into an admission that the special appellants are ready to pay this sum. But, on turning to the record, we find that, in the cross-appeal, the present special appellant denied his liability altogether, and added that in any case, even if he were liable as an instigator, he could not be in a worse position than the ryots who had refused to cultivate, or be made to pay more than three times the advance made to them.

We think, therefore, that, as the special respondent admitted himself unable to prove the amount of damage done, and did not claim the 15 rupees per beegah as a measure of that damage, he must suffer the consequences of his laches, and lose whatever benefit he has derived from proof of instigation on the part of the special respondent.

The *fourth* ground of appeal need not be considered, it being involved in the third. We, therefore, decree this appeal, and reverse the decision of the Principal Sudder Ameen with costs. Special appeals Nos. 520, 522, and 523 are in all fours with this case, and are decided in the same way and for the same reasons.

The 26th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Inheritance.

Case No. 48 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Midnapore, dated the 24th of September 1866, reversing a decision of the Moonsiff of that District, dated the 28th March 1866.

Chytun Mytee and another (Defendants), *Appellants,*

versus

Lukhee Churn Putnaik (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Doorga Doss Dutt* for Appellants.

Mr. R. E. Twidale and *Baboo Mohendro Lall Shome* for Respondent.

A plaintiff who sued on inheritance for the recovery of lands in the possession, not illegal or forcible, of defendants, to the rents whereof it was held in a previous

suit, in which he intervened, that he had not been in the actual enjoyment, is bound to prove as well his title to the estate, as his lineal descent from, or relation in such degree of contiguity as would entitle him to part succession to, the original acquirer thereof. A descendant of a brother of the original acquirer, and a descendant not less than six generations off, is not entitled under Hindoo Law to a share of the property.

Jackson, J.—It seems to me quite clear that the decision of the Principal Sudder Ameen is erroneous. The plaintiff Lukhee Churn is the son of Kopil Putnaik, whom he alleges to have been grandson on the mother's side of one Noroo, and Noroo, he alleges, to have been lineally descended from Gobind, who is admittedly the direct ancestor of the defendants; and he sues to establish his right to a moiety of the estate which descended from Gobind, and which is in the hands of the defendants. The litigation commenced by the plaintiff intervening in an Act X. suit, which the defendants brought against certain ryots for the recovery of rents. The plaintiff intervened in that suit, and alleged himself to be in collection of the rents in question, but was held by the Collector not to be in the actual enjoyment of the rents; and he therefore brings this suit.

It appears to me that in such a suit as this, where the plaintiff does not allege illegal or forcible dispossession by the defendants, it is clearly his business to prove a title to the estate, and (in case the plea of limitation should be raised) to show that he exercised his right within the requisite period. It does not appear that any question of limitation was raised in this case. But the defendants throughout and strenuously denied that plaintiff had any title whatever to the property in question.

That being so, I think it was clearly necessary for plaintiff to prove that he was lineally descended, or else related in such degree of contiguity as would entitle him to a part succession to the original acquirer of the property. I find that he has not proved, nor does the Principal Sudder Ameen find him to have proved, anything of the kind.

The defendants have filed a pedigree of the family, by which it would appear that the plaintiff is a lineal descendant, not of Gobind, the original acquirer, but of another son of Brindabun, who was the father of Gobind.

I think it clear that, if that pedigree be correct, the plaintiff, as a descendant of a brother of the original acquirer, and a descendant not less than six generations off, would not be entitled by the Hindoo Law, nor is it contended that he would be entitled, to a share of the property. He does not attempt to show that his ancestor Noroo was descended from Gobind. He says that he was a member of the same Hindoo family; and, upon defendant's objection that Noroo was a mere cousin of Doolubram, their immediate progenitor, the Principal Sudder Ameen observes that that was only technical. It is needless to say that that observation is wholly incorrect, because the plaintiff would have to prove step by step his descent from the acquirer of the property. If he fails to do that, he fails altogether.

Then a great deal is said of plaintiff's possession and of his grandfather's possession, and evidence has been commented on, which went to show acts of ownership by Noroo, the great grandfather. It seems to me that, in a case of this description, such evidence as to possession would be useful and receivable by the Court merely as corroborative of the plaintiff's title and exercise of his rights.

I think, therefore, that, as no title whatever was made out in this case, the Moonsiff was right in dismissing the suit, and the Principal Sudder Ameen who reversed the decision was wrong. Therefore, the special appeal must be allowed with costs, and the plaintiff's suit dismissed.

Hobhouse, J.—I concur with my learned colleague. As I understand the case, it is in this wise.

The defendants in this suit sued under Act X. of 1859 to collect rents from certain ryots on the estate. In that suit the present plaintiff intervened, and said that he had a right to collect those rents. Then the question of fact was found against the plaintiff, *i. e.*, he was found not to be the person who had, as a matter of fact, collected the rents. His intervention was, therefore, set aside, and a decree given to the present defendants.

He then sued in the Civil Court to declare that he had a right to eight annas in the estate, and, therefore, of course, to collect so much of the rents of the estate. The only question then was whether he had or had not such a right. The Court of first instance found that he had not such a right. The Lower Appellate Court found simply that he had possession, but said nothing at all about the right.

It seems to me that the real point was whether he had or had not a right, and it has been very clearly shown by my learned colleague that he had no right at all. I concur, therefore, that this appeal must be decreed, and the original suit dismissed with costs.

The 26th July 1867.

Present :

The Hon'ble W. S. Seton-Karr and Dwarkanath Mitter, *Judges.*

Ex-parte decree—Reversal after re-hearing—Section 119, Act VIII. of 1859—Section 58, Act X. of 1859.

Case No. 52 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Backergunge, dated the 15th December 1866.

Huro Krishno Doss (Plaintiff), *Appellant,*

versus

Motee Chand Baboo (Defendant), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Doorga Doss Dutt for Respondent.

Suit laid at Rupees 13,850-13-11-6-2.

When a suit has been decreed against several defendants, and one of them, who was not present at the hearing, obtains a re-hearing, and files a written statement in which for the first time the objection is taken that the suit could not have been proceeded with, inasmuch as plaintiff had improperly joined two distinct causes of action against two different individuals, the Court is not justified in re-opening the whole case. Section 119, Act VIII. of 1859, does not contemplate the setting aside of that portion of the decree in such a case, which refers to the other defendants. Section 58, Act X. of 1859, treated as an authority by analogy in such a case, and Section 119, Act VIII. of 1859, interpreted.

Mitter, J.—THE appellant before us is the nephew or brother's son of one Brojo Rutton Doss Baboo, deceased. The latter had by his last will and testament, dated the 14th of Assar 1262, bequeathed a portion of his estate to the appellant, and the remainder to certain other parties mentioned therein. But the testator's estate being charged with some debts, the defendant, Motee Chand, his son-in-law, was appointed executor, with directions to hold it in trust for the appellant and his co-devisees until those debts were paid off. The appellant, alleging that Motee Chand had been guilty of various misconducts in the management of the estate, instituted this suit against him, praying for his removal from his office as executor, for obtaining an account from him of all his receipts and disbursements during the period of his executorship, and for recovering certain monies which, the appellant alleged, had been misappropriated by him whilst acting in that capacity. The appellant further prayed that the possession of certain churs, which Motee Chand had fraudulently made over to his wife, Petum Kooer, might be decreed to him with mesne-profits, and Petum Kooer was also made a defendant in the cause. Petum Kooer did not appear in the first instance, but Motee Chand did, and defended the action. On the 31st July 1866, the Principal Sudder Ameen gave a decree to the appellant against both the defendants. Motee Chand remained satisfied with this decree, but Petum Kooer appeared, and, on the 30th of April 1866, filed an application to the Principal Sudder Ameen, praying for a re-hearing of the case, upon the ground that the notice of suit had not been served upon her. This application was granted in August 1866, and Petum Kooer was permitted to file her written statement, which she did on the 30th September following. In this written statement, an objection was taken for the first time that the appellant's suit could not be proceeded with, inasmuch as he had improperly joined together two distinct causes of action against two different individuals. The Principal Sudder Ameen has held this objection to be good and valid, and has accordingly dismissed the whole suit of the appellant, reversing his former decree passed on the 31st July 1866. Against this judgment, the appellant has come up to us, complaining that, assuming the objection taken by Petum Kooer to be good and valid, the Principal Sudder Ameen had no jurisdiction on the ground thereof to reverse his former decree against Motee Chand, which decree had become final and conclusive according to law so far as he was concerned. On referring to the provisions of Section 119 of the Procedure Code, we find that that Section does not contemplate that, on an application being preferred by one out of several defendants, against whom

a judgment has been passed *ex parte*, the whole of the former decree, or, speaking more correctly, that portion of it which refers to the other defendants in the original suit, should be set aside. If it were otherwise, grave injustice might be done to the plaintiff. A plaintiff might succeed in obtaining a decree against a large number of defendants after undergoing considerable trouble and expense, and one of the defendants cast might afterwards come forward and get the whole decree reversed on the ground of a purely technical objection to the suit, as has been the case in the present instance. The appellant's pleader cited to us a case reported in the Weekly Reporter, Volume VII., No. 10, page 237. This case appears to us to be in point. It is true that this case was decided upon a construction of Section 58, Act X. of 1859; but, as the language of that Section and of Section 119 before alluded to is very nearly similar, we think ourselves fully entitled to treat it by analogy as an authority. The pleader for the respondent, Motee Chand, referred us to the provisions of Section 337, but we have no hesitation in declaring that that Section has nothing to do with the case now before us. The only difficulty we felt is with the words "shall appoint a day for proceeding with the suit," as used in Section 119. But we interpret these words to mean that a day is to be appointed for proceeding with the suit so far as the defendant who has applied to the Court under the provisions of that Section is concerned. In the preceding part of the sentence, it is said: "The Court shall pass an order to set aside the judgment." What is the judgment herein referred to? Assuredly, the judgment described in the very first sentence of the Section, *i. e.*, "the judgment passed *ex parte* against a defendant who has not appeared." If, therefore, the law gives power to the Court to set aside this judgment, and this judgment only, we do not see how the Court can proceed to try the "suit" with reference to the other defendants as against whom the judgment passed has not been set aside. A contrary construction, it appears to us, would lead to the most serious consequences. For instance, let us put the following case: A plaintiff recovers a decree against several defendants, one of whom only had not appeared at the time of hearing. The other defendants remain satisfied with the decree, and the plaintiff recovers from them a large portion of the claim decreed to him, either by voluntary payments on their part, or by enforcing his decree against them according to the mode prescribed by the law. The defendant, who had not appeared at the first trial, then comes forward and satisfies the Court that there are good grounds for allowing him to ask for the reversal of the *ex-parte* judgment passed against him. Would the Court be justified in re opening the whole case, even with reference to the defendants who had voluntarily, or by process of execution, satisfied a large portion of the decree passed against them? We do not think it would. Holding this view of the case, we reverse the judgment of the Lower Court so far as the defendant Motee Chand is concerned, and charge him with the full costs of this appeal.

The original judgment of the Principal Sudder Ameen against him will stand good.

The 27th July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Inheritance—Mitakshara Law.

Case No. 48 of 1867.

Regular Appeal from a decision passed by Baboo Nuroltun Mullick, Principal Sudder Ameen of Bhaugulpore, dated the 24th December 1866.

Pirthee Singh (Plaintiff), *Appellant,*

versus

Mussamut Sheo Soonduree and the Collector of Bhaugulpore, on behalf of the Court of Wards (Defendants), *Respondents.*

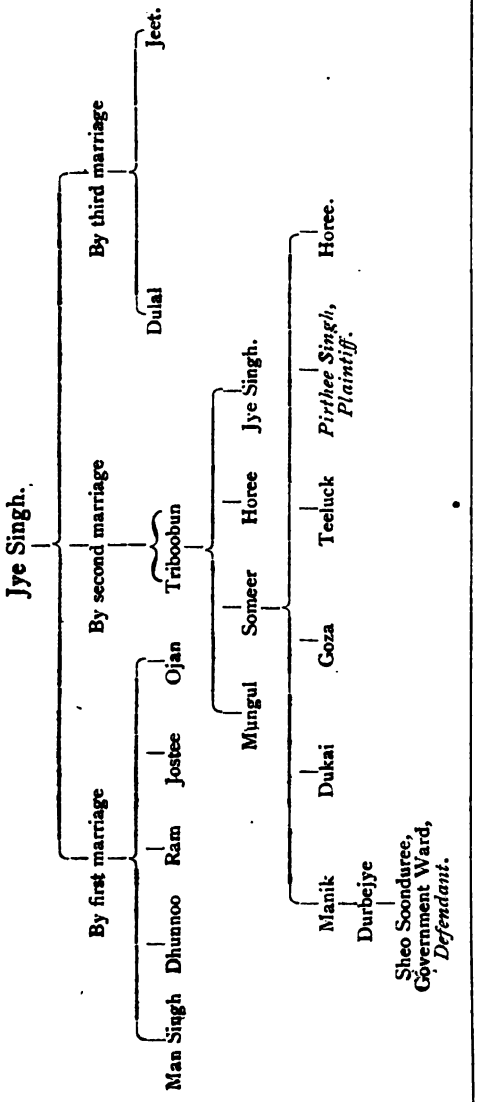
Mr. C. Gregory and *Baboo Onookool Chunder Mookerjee* for Appellant.

Baboos Kishen Kishore Ghose and *Juggadanund Mookerjee* for Respondents.

Suit laid at Rupees 8,365.

Hindoo families are governed ordinarily by the law of their origin, and not of their domicile. In the case of a Mitakshara family residing in Bengal, the presumption would be in favor of its being governed by Mitakshara law, until proof were given of its having adopted the law of its new domicile.

Glover, J.—THE following genealogical tree will assist the explanation of the pleadings in this suit:—



Pirthee Singh, plaintiff, sues to recover possession of Talook Sunkurea, a joint ancestral property, as heir by survivorship of his nephew Durbejye. His allegations are that the talook, previously held by his ancestors, as nankar, was settled by the Collector in 1840, with his father Someer, from whom it descended to his family; that he, Pirthee, as a son of Someer, enjoyed this property jointly, first with his brother Manik, and afterwards with his nephew Durbejye; that, on Durbejye's death during the Sonthal rebellion, he became by the law of inheritance the sole owner of the estate, Durbejye's daughter, Sheo Soonduree, being entitled only to maintenance.

Pirthee Singh adds that, the Court of Wards having taken possession of the estate as belonging to Sheo Soonduree, he has brought his suit to recover possession against both.

The defendant, Sheo Soonduree, put in a written statement, admitting the plaintiff's claim to the estate, and asking permission to compromise the suit on the basis of each taking an eight-annas share of the property, adding that the plaintiff was willing to consent to such compromise. Sheo Soonduree also objected to the action of the Court of Wards. She declared herself of full age, and married to a husband who was perfectly able to manage her property.

The Collector, as Court of Wards, defended the suit on the following grounds: (1)—that Pirthee Singh was not the son of Someer Singh; (2)—that, if he were the son, he was not legitimate; and (3)—that, by the custom of the family, the ancestral estates descended in the elder line, and that Sheo Soonduree was, therefore, entitled to the property left by her father Durbejye, of which she has been always in possession.

The Principal Sudder Ameen fixed the following issues:—

(1.) Is Pirthee Singh the son legitimate or illegitimate of Someer Singh? and

(2.) Does the law of primogeniture prevail in the family?

He left the first issue undecided (why it is not easy to conceive, as the disposal of it adversely to the plaintiff would have at once ended the case); and, on the second, found that, from the time of Jye Singh's son Triboobun, the family-property had always descended entire to the eldest son, and that the custom of primogeniture was, therefore, established. He found also that, *quoad* the succession, there was no difference between a son and a daughter, and decreed in favor of Sheo Soonduree.

His judgment proceeded on the ground that the tenure was essentially a ghatwalee one; that such tenures descended whole and undivided in the eldest branch of the ghatwal's family; and that there was proof on the record that the property had been throughout held by the eldest son, beginning

from Triboobun down to Durbejye, to the exclusion of the younger branches, and that the custom pleaded had, therefore, been established.

Pirthee Singh appeals, urging—

(1.) That there is sufficient proof that he is the legitimate son of Someer.

(2.) That the estate is not held as a ghatwalee tenure, but is an ordinary revenue-paying mehal settled with Someer in 1840; and

(3.) That there is no proof whatever of the custom alleged to prevail in Jye Singh's family.

Before going into the appellant's case, it will be as well to dispose of an objection made at the close of the argument by Baboo Kishen Kishore Ghose on behalf of the Court of Wards, to the effect that the estate in dispute being situate in what was formerly a Bengal zillah, *viz.*, Beerbhoom, and subject *quoad* matters of inheritance to Bengal customs, the plaintiff could not, under any circumstances, claim more than one-half of the estate left by Someer Singh, and that his suit for the whole was necessarily bad.

On this we observe that Pirthee Singh, who, in common with all the parties, is a resident of Zillah Bhaugulpore, in his plaint distinctly claims under the Mitakshara Law (which is admittedly the law of the family), for he describes himself as a member of the joint undivided family of Someer, living with the other members in commensality, and on no other ground could he claim by right of survivorship to succeed to the entire family-estate. Under the Bengal Law, Sheo Soonduree would be her father's heiress, and take an eight-annas share in the whole estate, Pirthee taking the other half; but, under the Mitakshara, she would be entitled to maintenance only, Pirthee taking the whole.

There can be no doubt that the plaintiff claimed under the law of his family, and no objection was ever taken to his ability to do so, until, as we have said above, it was started at the eleventh hour in appeal. Under such circumstances, it would be for the respondent to show very distinctly that the family of Someer had submitted themselves to the Bengal law of inheritance, and had given up their own. And, as there is no such allegation anywhere on the record, we think that the respondent's objection as to the extent of the plaintiff's claim may be at once overruled.

We come now to the question of "legitimacy." We have not had the advantage of the Lower Court's decision on this point, and must examine the evidence for ourselves. The respondents have filed a petition of cross-appeal under Section 348, objecting to the omission by the Principal Sudder Ameen of this most important issue.

The appellant examined several witnesses, amongst them the spiritual guide of the family and the priest who performed the marriage-ceremony between Someer Singh and Pirthee Singh's mother, and two kinsmen of Someer.

He also laid great stress on the admission in Sheo Soonduree's written statement that he was the legitimate son of his father Someer, and entitled, as such, to succeed to his property.

We do not consider that this statement of Sheo Soonduree can be received as evidence in this case. She is a ward of Government, and was not, therefore, capable of putting in any written statement binding either herself or her guardians. Personally, she has no *locus standi* in this suit, and can only be heard through her legally constituted guardians. If the appellant wished to benefit by her knowledge of the facts of the case, he should have called her as a witness, and have examined her in the usual way.

On behalf of the respondent, it is contended that the evidence in support of the marriage of Pirthee's mother to Someer Singh is altogether incredible; that the so-called officiating priest is proved by his own statements to have been an ignorant man unable even to repeat the muntras of marriage; that the woman herself is proved to have been of low origin, the niece of one of Someer's menial servants; that she never lived with Someer at his family-house at Gundowa, and was never treated by him as his lawful wife; and that there is abundant evidence to prove that Pirthee Singh was the son of one of Someer's many concubines, and that she was never married to him.

After going through all the evidence in this case, and hearing Counsel on both sides, we are of opinion that the marriage of the appellant's mother with Someer Singh is sufficiently proved.

The first witness, Jugobundhoo Gossain, is the appellant's gooroo, and his father was Someer Singh's gooroo. He was in a

position, therefore, to give valuable evidence from his intimate connection with the family. He states distinctly that Someer Singh married the appellant's mother in 1248 or 1249 B. S., and that he was present at that marriage, and he names several members of the family who were also present at the ceremony. This witness, we observe, was the gooroo of the deceased Durbejye, the father of the respondent, and indeed seems to have been more or less connected with the whole family. If he speaks truth, there can be no doubt that Someer did marry appellant's mother. His evidence is corroborated by that of Mohimanund Chuckerbutty, the Brahmin who performed the marriage-ceremony, and by that of Soojan and Durbar, who are kinsmen and relatives of the family.

The first of these witnesses has been much objected to on the ground of his admitted ignorance, for he himself allows that he does not know all the muntras of marriage. We do not see the force of this objection; for, as there are several forms of Hindoo marriage which are equally legal and binding, it is sufficient if there be proof that some one of these was gone through. Marriage, according to Hindoo custom, is rendered irrevocable by the "ceremony of gift," the gift of the woman, that is, to her intended husband by some member of her family qualified to make the gift; and there is clear evidence on the record that the woman was given away by her father.

But the proof of Someer's marriage to the appellant's mother does not rest solely on the evidence either of the spiritual guide or of the officiating priest. There are the depositions of Soojan Singh and Durbar Singh which corroborate that evidence. These witnesses are relatives of Someer Singh, and assert that they were present when the marriage took place. They could have no possible object in foisting an illegitimate son into the family-estate; on the contrary, it is but natural to suppose that they would do their best to keep him out unless they fully believed that his mother was married to their relative.

Then, there is the evidence of the woman's uncle Soojan Geeree. By itself, no doubt, it would not go for much, Soojan being an interested witness; but, taken with the rest of the evidence, it adds weight to the appellant's case.

We may add to this the evidence of a hostile witness—Narain Singh, examined for the respondent. This witness says first: "I know that Someer had one wife" (the mother of Manik); "if he had more wives, I would have known of it." He then says: "I cannot say whether the mother of the four sons of Someer (the appellant's mother; —of the four sons, Pirthee is the only survivor) was married to him or not;" and again, "Illegitimate children do not succeed to the property of their father; I should not eat with such children. I *can* dine with the plaintiff" (*i. e.*, the appellant).

It seems tolerably clear from this witness's evidence that he considered Pirthee Singh to be a legitimate son of Someer Singh. There can be no surer test of a Hindoo's feeling certain of any person's caste or position than his readiness to eat with him.

The evidence for the respondent is generally to the effect that Someer Singh kept many concubines, of whom Pirthee's mother was one, and that she always lived apart, and did not dwell in the family-house.

One of these witnesses, however, Bissen Dharee, admits that the plaintiff's mother was styled Chota Ranee, a term which would be ordinarily applied to a younger wife, and never to a concubine.

And of the other two, one was herself a kept mistress of Someer, and the other a cook who, on being pressed in cross-examination, admitted that his information as to Pirthee's mother's position in Someer's house was only hearsay.

We have, therefore, a strong body of evidence circumstantially detailed, and corroborated to some extent by the principal witness for the defence, to the fact that Someer Singh did marry the appellant's mother. Whilst the direct evidence against it is altogether of a negative kind.

But we are told that the circumstances of the case themselves disprove the marriage. Now, what are these circumstances? They consist in the alleged facts that the bride was a woman of inferior position in life, and that she was never allowed to reside in the family-house at Gondowa.

The first point may be conceded. The uncle of the woman was apparently a peadah in Someer Singh's service, but this of itself would be nothing. Ill-assorted marriages are common enough all over the world, and the parties to this marriage, it must be remembered, were inhabitants of the jungly hill-tracts of the Damun-i-koh, and Someer Singh, though called Rajah.

was, in reality, nothing more than a petty hill chieftain, ignorant and careless of the customs of the more civilized districts. He would be just the man to carry out his wishes in the matter of marriage in defiance of all questions of equality; at all events, mere disparity of birth can never be a sufficient reason for distrusting the evidence in support of the marriage.

The same remarks apply to the choice of a residence, and it may also be that Someer did not wish to bring his second wife, a person of inferior rank, into contact with his first, and that his keeping the two apart was to prevent family-quarrels.

That Pirthee Singh's mother was in after-years, and for a very long period, an inmate of the family-house in company with Manik's wife, there can be no question. It is said by the respondent (*i. e.*, the Court of Wards) that she was so received out of charity, but of this there is no proof whatever.

On the whole, therefore, we are disposed to consider it proved that Pirthee Singh was the legitimate son of his father Someer Singh.

We now come to the question of custom.

The Principal Sudder Ameen has held that the estate now in dispute was held by Jye Singh's family as a ghatwalee tenure; and that, as ghatwalee tenures descend in the elder line, he has treated certain evidence that one son only in each generation, amongst the many born to the family, was held out to the world as the owner, as conclusive proof that the estates of Jye Singh descended by custom from elder son to elder son, and that the younger branches of the family received nothing but a bare maintenance.

Now, we can find no proof whatever of this, and we may observe that very distinct proof, indeed, would be required to divert property from the regular line of succession.

In the first place, there is no proof that the tenure ever was a ghatwalee one. That it is not so, now admits of no doubt, for in 1840 the Collector of Bhaugulpore resumed the estate as invalid nankar, and made a settlement of it at the usual rates with the party then in possession, *viz.*, Someer.

To prove that the tenure (consisting, it must be remembered, of 105 mouzahs) was ghatwalee, the Principal Sudder Ameen has referred to a report by a former Judge and Magistrate of Bhaugulpore, Mr. Sutherland, made in the year 1819. This piece of evidence, if it were receivable, would have nothing to do with the present status of the estate, but it does not prove that the lands in dispute were ever ghatwalee even in Mr. Sutherland's opinion, for, after all, only 22 villages are set down in Belputia Tuppah as ghatwalee; the greater number of villages (124) are said to be nankar lands violently usurped by Someer and his uncles.

But, were it proved that the mouzahs now in dispute were at some previous date ghatwalee, with a rent reserved in the shape of police-services, it is quite clear that, since their resumption by the Collector in 1840, the nature of the tenure is altogether changed, and that they now form part of a regularly-settled mehal paying revenue to Government. The Principal Sudder Ameen is of opinion that "a tenure does not lose its original nature by the assessment of a Government revenue upon it," but this is a manifest fallacy. Rent-free lands, or lands held in requital of certain services, are altogether changed from the very nature of the case when rent is assessed on the one, and payment in cash demanded from the other, in lieu of services which the State has dispensed with.

The appellant can clearly derive no benefit in proving the custom, from the allegation that the tenure was a ghatwalee one.

And what other evidence is there of this custom of primogeniture?

One witness certainly does say that Someer succeeded to the chiefship on the death of his father to the exclusion of his brothers, and another speaks generally to the fact that, in his part of the country, eldest sons exclude younger ones.

This is the only evidence in support of the custom, whilst against it is the fact that the common ancestor and chief Jye Singh held nearly three times as many mouzahs as the plaintiff claims, a fact which can only be explained by admitting that the property had been divided amongst the other members of the family; and, if this be admitted, what becomes of the assertion that the whole estate descended always to the eldest son?

Then we have also an admission made by Someer himself before the Deputy Collector, that his uncles were in possession with him.

The Principal Sudder Ameen has endeavored to get over the effect of this damaging piece of evidence by supposing that the admission was made falsely by Someer to avoid the assessment of his villages, and, therefore, says the Principal Sudder Ameen, it is not binding. We need hardly express our entire disagreement with the Lower Court on this matter.

Lastly, when the resumption-proceedings were commenced in 1840, Someer, Soojan, Manik, Pirthee, Huree, Kishen, and Kultan, a nephew of Someer's, were all jointly made defendants without any objection being taken by Someer that he was the sole owner under the family-custom.

Taking all the evidence into consideration, we have no hesitation in declaring that no such custom as that advanced by the respondent is proved.

As, therefore, the appellant is declared to be the legitimate son of Someer, he is entitled as survivor in the joint undivided family, to get possession of the ancestral estate. His grand-niece, the respondent, will only be entitled to maintenance.

The Principal Sudder Ameen's decision is reversed with costs. These will, under the circumstances, be paid out of the estate at present in the hands of the Court of Wards.

The 29th July 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Judicial Commissioner in Non-Regulation Province—Registration Law.

Budhu Mahatoon, *Petitioner.*

Baboo Anund Chunder Ghose for Petitioner.

An appeal under Section 84, Act XX., 1866, from the order of a Deputy Commissioner in Chota Nagpore, must be made to the Judicial Commissioner who exercises the powers of a Zillah Judge in all the districts of that Division.

Deputy Registrar.—This is a petition under the Registration Law, Section 84, Act XX. of 1866.

The petitioner having presented for registration a mourosee pottah to the Sub-Registrar of Hazareebaugh, that officer refused to admit it to registry, and recorded his reason for the refusal as provided by law.

The petitioner then appealed to the Registrar of Hazareebaugh, who refused to direct the registry by the Sub-Registrar.

This petition is now presented to this Court in accordance with the proviso of Section 84, which lays down that, "when the officer presiding over the District Court shall *himself* as Registering Officer have made any order appealed against under this Section, the petition shall, within sixty days after the making of such order, be presented to the High Court."

The vakeel of the petitioner urges that the Registrar of Hazareebaugh is also the Deputy Commissioner; and, as he is the officer presiding over the district, the petition, as provided in Section 84, must be presented to the High Court, &c.

It is, however, open to question whether the Deputy Commissioner is the Presiding Officer over the district in the sense intended by the law, or the Judicial Commissioner, who, in fact, is in a Non-Regulation Province what a Judge is in a district. The Deputy Commissioner in all civil matters, answering simply to a Principal Sudder Ameen in a Regulation District, should the Judicial Commissioner be held to be the "officer presiding over the district," this petition is wrongly brought to the High Court.

Besides, it would appear that this petition was brought to the office after 5 P. M. on the last of the sixty days allowed by law; but, as the books had been closed, the mookhtear was referred to the Deputy Registrar for orders for its reception. The petition, however, was not brought to the Deputy Registrar until the day after; and, if the time lost in taking copies from the Lower Court be not allowed, it is out of time.

I beg to refer the matter for the orders of the Court.

Jackson, J.—It appears that the Judicial Commissioner of Chota Nagpore exercises the powers of a Zillah Judge in all the districts of that division. This Court is, consequently, the principal Court of Civil Jurisdiction in Chota Nagpore, and this application ought to have been made before that officer.

The 30th July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Witnesses—Report of, and deposition taken by, Ameen—Section 180, Act VIII., 1859.

Case No. 536 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Purneah, dated the 28th December 1866, reversing a decision passed by the Sudder Ameen of that District, dated the 21st May 1866.

Shah Nuthoo (Plaintiff), *Appellant,*

versus

Ghunessam Singh and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboos Unnoda Pershad Banerjee and *Anund Gopal Paleet* for Respondents.

Witnesses are to be weighed, not numbered.
The report of a Civil Ameen and the deposition taken by him are admissible as evidence under Section 180, Act VIII., 1859.

Kemp, J.—This was a suit for recovery of the possession of a ghat which the plaintiff averred was included in Mara Bound Hazeepore leased to him, but which defendant claimed as appertaining to Luchmeepore.

The first Court gave the plaintiff a decree. In appeal, the Principal Sudder Ameen, Mr. W. DaCosta, observes "that the witnesses cited by the parties depose for the parties respectively, but that there was ground for giving the testimony on one side, preference over the other, *viz.*, that plaintiff produced in Court but one witness, the other having been examined before the Ameen who could not legally be deputed to record evidence, and make enquiries into the fact of past possession, which was a point which required to be proved by evidence heard in Court." The Principal Sudder Ameen refused to give any weight to the report of the Ameen, and the evidence of the witnesses before that officer, and finding that plaintiff's one witness was outweighed in number by the defendant, he reversed the decision of the Court of first instance, and decreed the appeal.

The Principal Sudder Ameen appears to have decided upon the principle that the party who brings the larger number of witnesses must succeed, forgetting the maxim "*testes ponderantur non numerentur.*" The report of the Ameen and the deposition taken by him are admissible as evidence in this suit under Section 180 of Act VIII. of 1859. The Ameen was directed to enquire into the fact of possession, as well as title both of the plaintiff and of the defendant at the time of ouster, so that it was clearly within the scope of his duty to take evidence as to possession, past and present, up to date of alleged ouster.

The decision of the Principal Sudder Ameen is reversed. He will receive the report of the Ameen, and the evidence taken by him as evidence. Of course, the Ameen may be examined by either party with the permission of the Court, touching any matters referred to by him or mentioned in his report. The Principal Sudder Ameen, after weighing the evidence, not on the side of the defendant alone as he has done, but on both sides, will pass a fresh decision. Costs to follow the result.

The 30th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Execution—Limitation—Decree of High Court.

Case No. 142 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Tipperah, dated the 28th February 1867.

Ishan Chunder Chowdhry and another (two of the Decree-holders), *Appellants,*

versus

Jugodishuree Chowdhrain and others (Judgment-debtors), *Respondents.*

Baboo Sreenath Banerjee for Appellants.

No one for Respondents.

Following a previous judgment rules that 12, and not 3, years' limitation applies to decrees of the High Court, as being a Court established by Royal Charter.

Jackson, J.—This was an application to enforce a decree of the High Court, dated 30th June 1863. Application to execute was made to the Judge on the 27th June 1866. It appears that, in a copy of the decree supplied to the petitioner, the 13th of June had been entered by a clerical error instead of 30th. The Judge, therefore, with reason considering that the application was made after the expiration of three years, declared the execution to be barred. It is now represented to us that the error has been corrected, and that the decree really was a decree of the 30th. We should not on this ground be able to reverse the judgment of the Court below, because that judgment was right upon that point as the case stood. But then it has been ruled by a Division Bench of this Court in a case reported at page 94, VI. Weekly Reporter, that the limitation of three years does not apply to decrees of the High Court of Judicature, which is a Court established by Royal Charter, and that 12 years is the period of limitation.

On this point, therefore, the Judge's decision is erroneous, and must be reversed with costs. The petitioner will be allowed to execute his decree.

Hobhouse, J.—I concur.

The 30th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Execution—Notice—Limitation—Bona fide proceedings.

Case No. 18 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 23rd November 1866, reversing an order passed by the Principal Sudder Ameen of that District, dated the 4th April 1866.

Kisto Kant Bural (Judgment-debtor), *Appellant,*

versus

Nistarinee Debia and others (Decree-holders), *Respondents.*

Baboo Gopeenath Mookerjee for Appellant.

Baboo Roopnath Banerjee for Respondents.

The mere issue of notice in execution does not necessarily suffice. If the notice is not served, or if endeavours had not been made to serve it, that would indicate *mala fides* on part of the decree-holder, and enable the judgment-debtor to plead that no *bonâ-fide* proceedings had been taken within three years so as to bar the execution.

Jackson, J.—It appears to me that the Judge's finding in this case is insufficient. He merely says notice was issued. The mere issue of notice would not necessarily suffice. In this case the defendant challenges the proceedings, and states that the notice was not issued, or, if issued, was never served. If the notice had not been served, and if endeavours had not been made to serve it, that would indicate *mala fides* and not *bona fides* on the part of the decree-holder, and then the defendant would be enabled to state that no *bonâ-fide* proceedings had been taken within three years.

I think, therefore, that the case must go back to the Judge in order that he may find distinctly whether the notice having been issued had been served, or, if not served, whether proper and *bonâ-fide* endeavours had been made towards service. If he finds that in the affirmative, then the execution will be saved; if not, it will be barred.

Hobhouse, J.—I concur.

The 31st July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Chapter XX., Code of Criminal Procedure—Easement.

Case No. 639 of 1867.

Special Appeal from a decision passed by Moulvie Naziroodeen Khan, Principal Sudder Ameen of Dacca, dated the 28th December 1866, reversing a decision passed by the Moonsiff of that District, dated the 28th April 1866.

Gooroo Churn Goon and others (Defendants), *Appellants*,

versus

Gunga Gobind Chatterjee (Plaintiff), *Respondent*.

Baboos Chunder Madhub Ghose and *Ashootosh Dhur* for Appellants.

Baboos Hem Chunder Banerjee and *Bama Churn Banerjee* for Respondent.

Section 311 of the Code of Criminal Procedure and the other Sections of Chapter XX. of that Code refer to public thoroughfares, and not to private roads over which a right of way has been established.

The owner of a piece of land between a village and the public road, who allows his neighbour's cows to pass over it on the way to pasture, does not thereby create a right of easement over the land so as to deprive it of all value by rendering its cultivation impossible.

Glover, J.—We see no reason to interfere with the Principal Sudder Ameen's order in this case. The plaintiff, apparently, owns a piece of land, between a public road and the village, over which the cattle of his neighbours (and occasionally the neighbours themselves) have been accustomed to make short cuts to their own quarters. The land remained for some time uncultivated, but the owner now wishes to put it under crop, and sued to have the Magistrate's order, requiring the passage to be thrown open, reversed. The first Court dismissed the suit; but the Judge, on appeal, decreed the claim. There is a preliminary objection taken by the special appellant that no suit lay against such an order under Section 311 of the Code of Criminal Procedure. But that and the other Sections of Chapter XX. of the Code refer to public thoroughfares, and it is quite clear, from the words of the Magistrate's order, that he did not treat this as a public road, but as a private one over which a right of way had been established.

For the rest, the Judge has found as a fact on evidence that, although cows have been accustomed to stray over the land, and also at times men and women, there has been no such continuous and ancient user of the land by the public, as would entitle it to be considered a common or public roadway. Nor can it, we conceive, be contended that, because an owner of a patch of waste land, situated as this is, allows his neighbour's cows to stray over it on their way to pasture, that he thereby creates in them or in their owners a right of easement over the land, the practical effect of which is to deprive it of all value by rendering its cultivation impossible.

We reject the special appeal with costs.

The 31st July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges*.

Hibba-namehs — Evidence — Sections 13 and 17 (XVI., 1864), Registration Law.

Case No. 521 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Furreedpore, dated the 17th January 1867, reversing a decision passed by the Moonsiff of Muksoodpore, dated the 25th June 1866.

Bama Soonduree Dossia (Plaintiff), *Appellant*,

versus

Madhub Chunder Goohoo (Defendant), *Respondent*.

Baboos Sreenath Doss and *Bhugobutty Churn Ghose* for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

A *hibba-nameh* executed before Act XVI., 1864, came into operation, is admissible as evidence, though not registered. Section 13 does not apply to deeds executed before 1st January 1865, and Section 17 contains no penalty for non-registration.

Kemp, J.—This suit hinged upon a hibba-nameh. The issue clearly shows this, which is to this effect, "Whether the property in suit was actually made over to the plaintiff or not."

The Principal Sudder Ameen has refused to admit this hibba-nameh as evidence because it is not registered. He quotes Sections 13 and 17, Act XVI. of 1864, in support of his judgment.

It is admitted that the hibba-nameh was executed before Act XVI. of 1864 came into operation, or before the 1st January 1865.

Section 13 applies to deeds executed on or after 1st January 1865, and not to deeds executed before that date.

Section 17 contains no penalty for non-registration such as is contained in Section 13, and moreover this Section applies equally to documents which must be registered, if it is sought to make them admissible as evidence, as to documents the registration of which is optional. Section 17 simply enacts that, if documents executed before 1st January 1865 are brought for registration after 12 months have expired from their date, they shall not be accepted for registration; for a document executed, after 1st January 1865, the time allowed for registration is shorter, *viz.*, 4 months after date of execution. *See* Section 18.

We think that this document was admissible, and remand the suit for trial. Costs to follow result.

We may observe that the pleader for the special respondent admits that he is not prepared to support the judgment of the Lower Court.

Glover, J.—I concur generally in this decision.

The 31st July 1867.

Present:

The Hon'ble W. S. Seton-Karr and Dwarkanath Mitter, *Judges.*

Joint property — Separation in mess — Onus probandi.

Case No. 867 of 1867.

Special Appeal from a decision passed by the Judge of 24-Pergunnahs, dated the 17th January 1867, modifying a decision passed by the Second Principal Sudder Ameen of that District, dated the 7th April 1866.

Banee Madhub Mookerjee, heir of Wooma Debia, deceased (Plaintiff), *Appellant,*

versus

Bhugobutty Churn Banerjee and others (Defendants), *Respondents.*

Baboos Khettur Mohun Mookerjee and *Poorno Chunder Shome* for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

Mere separation in mess is not sufficient to rebut the presumption of joint-property arising out of a nucleus of joint-property.

Dwarkanath Mitter, J.—THE point raised before us in this appeal is that the Lower Appellate Court, having found that the husband of the special appellant and the defendants, respondents, were separate in mess, that fact alone is sufficient to throw the *onus* of proof on the defendants. We think that this contention is not sound in law: mere separation in mess is not sufficient to rebut the presumption of joint ownership which arises when there is a nucleus of joint-property either admitted by the party pleading sole acquisition or proved against him by his opponents. In this case, it is not denied that there was joint-property belonging to the parties, and the presumption arising from this fact can be no way rebutted by the mere fact of separation in mess. The special appeal is dismissed with costs.

The 31st July 1867.

Present:

The Hon'ble W. S. Seton-Karr and Dwarkanath Mitter, *Judges.*

Joint Hindoo family — Sale of property — Onus of accounting for consideration-money.

Case No. 985 of 1867.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of East Burdwan dated the 31st January 1867, modifying a decision passed by the Sudder Ameen of that District, dated the 27th January 1867.

Koonj Beharee Dutt and another (Plaintiffs), *Appellants,*

versus

Khetturnath Dutt and others (Defendants), *Respondents.*

Baboo Umbika Churn Banerjee for Appellants.

Baboos Bama Churn Banerjee and *Nubo Kishen Mookerjee* for Respondents.

The mere fact of the consideration-money for property sold by a member of a joint Hindoo family, having passed out of his hands, does not relieve him of the *onus* of proving the source from which the money came, or to rebut the presumption of joint-ownership.

Dwarkanath Mitter, J.—THE special appellant contends that the Lower Appellate Court has committed an error in law in discharging the special respondent from the onus of proving that the property was exclusively acquired by his predecessor, upon the simple ground that the consideration-money for the purchase passed out of his hands. We think that this contention is right. The respondent is bound to prove the source from which he says the money came, or in other words to satisfy the Court that the funds were really the exclusive funds of his predecessor. The mere fact of the money having passed through his hands is not sufficient to rebut the presumption of joint ownership in a Hindoo family possessing joint-property. We remand the case to the Lower Appellate Court to re-try it with reference to the foregoing remarks.

The 31st July 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Notice of Enhancement—Section 13, Act X., 1859—Auction-purchaser—Act VI. (B. C.) of 1862—Ryot's competency to object to legality of notice.

Case No. 214 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Purneah, dated the 22nd November 1866, reversing a decision passed by the Deputy Collector of that District, dated the 12th October 1860.

Lalla Singh (Plaintiff), *Appellant,*

versus

Mussamut Bibee Reazoonissa (Defendant), *Respondent.*

Baboos Greesh Chunder Ghose and *Debendro Narain Bose* for Appellant.

Mr. R. E. Twidale for Respondent.

Under Section 13, Act X., 1859, a ryot served with the notice of enhancement, which is silent about the ground of enhancement, is not liable to pay the higher rent.

An auction-purchaser is no exception to the rule by which every landlord is bound to ascertain the nature, extent, and conditions of his ryot's holding before he serves him with notice of enhancement. The necessary information may always be obtained by the landlord proceeding under Act VI. (B. C.) of 1862.

A ryot is competent to object to the legality of the notice, even in a suit in which he is plaintiff.

Dwarkanath Mitter, J.—THE special appellant in this case is a ryot having a right of occupancy. He instituted this suit to contest his liability to pay the enhanced rent demanded of him by his landlord, the special respondent, and the action is brought in the form of a complaint of excessive demand of rent as provided for by Sections 14 and 23 of Act X. of 1859. On the 4th of July 1866, this Court had remanded the case to the Lower Appellate Court, with instructions to re-try it with special reference to some additional evidence which had been offered by the special appellant, but improperly excluded by the Judge below; and also to investigate whether the notice of enhancement served upon the special appellant by the special respondent, under the provisions of Section 13 of the Act, was good in law or not. The Judge has now disposed of the case against the special appellant, holding simply that he has failed to make out a sufficient title to protect him from the claim for enhancement advanced by his landlord, and that the notice alluded to, though somewhat defective in detail and form, was good in substance. The special appellant has come up to us, urging several grounds; but, according to the view we have taken of the case, it is necessary for us to notice the first only. He complains that the notice served upon him is bad in law, because it does not specify the grounds upon which his rents are sought to be enhanced; and, on looking into that document, which is filed as an exhibit in the cause, we find that this contention is perfectly sound. It states merely that the special appellant should, in future, pay at the rate of 8 annas per beegah upon an area of 241 beegahs, which has been found by measurement to be in his holding, such a notice is in our opinion utterly bad in law. Section 13 of the Act states most clearly that no ryot described therein "*shall*

be liable to pay any higher rent" for the lands in his possession, unless a written notice shall have been served upon him, on or before a particular time also mentioned therein, "specifying the rent to which he will be subject for the ensuing year, and *the ground on which an enhancement of rent is claimed.*" Now, the notice before us is altogether silent about the ground of enhancement, and the special appellant, therefore, not having been served with a notice as described in the law, has every right to say in the language thereof that he "is not liable to pay any higher rent than the rent payable for the previous years." The Judge in the Court below says that, until the special appellant come forward to contest the notice on the allegation that he held a mowrosee jote of 225 beegahs, 9 cottahs, at a jumma of 19 rupees, 1 anna, 7 pie, "it is difficult to say how the zemindar could serve it otherwise." He means hereby, what is now contended before us by the respondent's pleader, that the respondent, being a recent auction-purchaser, it was impossible for him to know anything about the terms and conditions according to which the special appellant was holding his tenure; but we cannot see the force of such an observation. Every landlord is bound to enquire into and ascertain the nature, extent, and conditions of his ryot's holding, as also the grounds upon which he thinks himself entitled to demand an enhancement of rent according to the provisions of the law, before he takes the very first step with a view to such enhancement, or, in other words, before he calls upon the ryot by a notice in writing to pay enhanced rents from the commencement of the ensuing year; and we do not think that an auction-purchaser is an exception to this rule. Nor are we prepared to agree with the respondent's pleader that it is almost impossible for the landlord to acquire the necessary information; and if in any case the landlord finds any difficulty, he is always at liberty to obtain it by proceeding according to the provisions of Act VI. of 1862 passed by the Bengal Council. The respondent's pleader has also contended that, in a suit like this, in which the special appellant or ryot is the plaintiff, he has no right to raise any objection to the legality of the notice, which he can do only when he is a defendant in a suit brought against him for arrears of rent at enhanced rates. This contention is equally untenable with the preceding. Section 14 of the Act distinctly lays down that any under-tenant or ryot on whom the notice described in the preceding Section has been served is at liberty "*to contest his liability to pay the enhanced rent demanded of him, either by complaint of excessive demand of rent, or in answer to a suit preferred against him for recovery of arrears of that enhanced rent.*" If, therefore, according to the provisions of Section 13, he is "*not liable*" to pay any enhanced rent, unless he has been served with a notice as described therein, and the Legislature allows him the alternative of instituting an action of excessive demand of rent, or to defend an action brought against him for arrears at enhanced rates, we do not see any reason why he should be competent to object to the legality of the notice in the one case, and not in the other, the object in both cases being one and the same, *i. e.*, "to contest his *liability* to pay the enhanced rent demanded of him." Without going, therefore, into the other points raised before us in this appeal, we decree it with costs bearing interest at the rate of 12 per cent. per annum.

The 31st July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Appellate Court—Procedure.

Case No. 598 of 1867.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 24th December 1866, affirming a decision passed by the Moonsiff of Lushkerpore, dated the 22nd March 1866.

Shumbhoonath Chowdhry and another (Defendants), *Appellants,*

versus

Prokash Chunder Dutt and others (Plaintiffs), *Respondents.*

Baboos Greesh Chunder Ghose and *Mohinee Mohun Roy* for Appellants.

Baboo Debendro Narain Bose for Respondents.

An Appellate Court should take notice of all the specific objections argued, before it, and not content itself with recording a general assent to a first Court's finding.

Glover, J.—PLAINTIFFS in this case sued to recover possession of certain lands partly by inheritance, and partly by purchase. They alleged themselves to have been in joint possession of the land till the year 1264, when they were ousted by the defendant.

The defence was hostile possession since the year 1235 after partition, and a plea of limitation.

The Moonsiff considered that the plaintiffs had been in possession some time before 1264, and that they were, therefore, in time; on the merits, he found for the plaintiffs.

The Judge, on appeal, confirmed this decision, remarking that the evidence was meagre and unsatisfactory on both sides; but that, as the Moonsiff considered the plaintiff's witnesses respectable, he gave preponderating weight to their testimony, and dismissed the appeal.

It is contended before us that the Judge was bound to have decided the issue of limitation pleaded by the defendants.

We think that, this objection must be allowed. No doubt, the Judge does say at the end of his decision that, after full consideration of the evidence, he agrees with the Moonsiff, but he has not mentioned the fact that limitation was pleaded anywhere in the body of his judgment, although he admits that it was one of the points raised before him in appeal, and has not attempted to meet any one of the defendant's objections on this head.

We think that in a case of this sort, where the parties seeking relief have been admittedly out of possession for eight years, the Judge was bound to give his reasons for believing them to be in time, at all events to state that he had considered the arguments on the point, and had rejected them. In the present case, it is impossible for any one to say whether the Judge considered the question of limitation at all. It is much to be regretted that this want of clearness (if it be that the Lower Appellate Court did decide the point) should have necessitated further delay and expense; but on the record, as it stands, we do not feel justified in rejecting the defendant's appeal.

It will be time enough to do so, after the Judge has certified his reasons for agreeing with the Moonsiff that the plaintiffs were in possession till the year 1264. Costs will follow the result.

The 31st July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,

Judges.

Reversioner—Childless Hindoo Widow.

Case No. 494 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 3rd December 1866, affirming a decision passed by the Moonsiff of Soorujgurah, dated the 31st May 1866.

Lalla Chuttur Narain (Plaintiff), *Appellant,*

versus

Mussamut Wooma Koonwaree and others (Defendants), *Respondents.*

Baboos Debendro Narain Bose, Kalee Kishen Sein, and *Mohinee Mohun Roy* for Appellant.

Mr. R. E. Twidale and *Baboo Nil Madhub Sein* for Respondents.

HELD, following a Full Bench case cited, that a reversioner can maintain a suit during the lifetime of a childless Hindoo widow to set aside a deed of conveyance as inoperative on the death of the widow by whom it was granted.

Kemp, J.—THIS was a declaratory suit instituted by a reversioner under the provisions of Section 15, Act VIII. of 1859.

The object of the suit is to have a deed of conveyance by a childless Hindoo widow declared not to be binding beyond her life, inasmuch as it was executed for causes not amounting to a legal necessity under the Hindoo Law.

The Principal Sudder Ameen of Bhaugulpore observes that, as the plaintiff is a reversioner, he has no right to claim till the widow dies, as the result is unknown, whether the plaintiff will survive the widow or not.

He then very unnecessarily adds that, though he refrains, as he terms it, from going further into the case, he is quite opposed to the Moonsiff's finding regarding other

points, as that finding was inconsistent with the real facts of the case.

The current of decisions of this Court of late, commencing from that of the Full Bench dated the 7th April 1864, published in the Special Number of the Weekly Reporter, pages 165—167, has been to allow such suits.

It is clear that, if a reversionary heir had in all cases to wait until the death of the life-tenant before he could bring his declaratory suit, much of the evidence which would support his claim would be lost to him by the mere efflux of time, to say nothing of the possibility of the life-tenant committing such acts of waste as to endanger or perhaps to destroy the *corpus* of the property.

It has, therefore, been very properly held by the Full Bench in their decision quoted above that a reversionary heir, even during the lifetime of the widow, may sue to have it declared that a conveyance made by her was executed for causes not allowable, and, therefore, not binding beyond the widow's life.

By the same decision it is also ruled that a reversionary heir, during the lifetime of the widow, has his remedy to prevent waste on the part of the widow or other life-tenant, and that the Court will interfere if he can make out a sufficient cause for such interference.

The case must go back for trial. We observe for the guidance of the Principal Sudder Ameen that he was quite wrong in expressing any opinion on the merits of the case, when he was of opinion that the suit could not be maintained.

The 31st July 1867.

Present:

The Hon'ble L. S. Jackson and

C. P. Hobhouse, *Judges.*

Limitation—Execution of decree for possession and wassilat—Taking money out of Court—Keeping decree in force—Section 20, Act XIV., 1859.

Case No. 74 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 17th December 1866, reversing an order passed by the Principal Sudder Ameen of that District, dated the 12th May 1866.

Jogesh Prokash Gangolly (Judgment-debtor), *Appellant,*

versus

Kalee Coomar Roy and others (Decree-holders), *Respondents.*

Mr. R. T. Allan and *Baboo Tarucknath Dutt* for Appellant.

Baboos Romesh Chunder Mitter and *Sreenath Doss* for Respondents.

Execution of a decree in respect of possession of land keeps the decree in force, and saves the subsequent application to execute it in respect of wassilat.

The taking out, by a decree-holder, of money deposited in Court by his judgment-debtor is an effectual proceeding under Section 20, Act XIV., 1859, to keep the decree in force.

Jackson, J.—THERE are two questions raised in this appeal, first, whether the application made on the 5th January 1863, to execute the decree in respect of wassilat, is not barred by reason of the decree-holder having taken no previous steps to execute this decree in that particular.

The decree was one for possession of land with wassilat and costs. The decree was passed on the 3rd February 1857; possession of the land was taken in December of that year, and the costs were paid direct to the decree-holder, and certified to the Court by the decree-holder's petition, and this is further borne out by the return of the Nazir which states the same thing.

We have already decided in another case, where a similar objection was raised, that execution of a decree in respect of possession of land is a proceeding to keep the decree in force, and saves the subsequent applications in respect of wassilat. This objection, therefore, I think, must be overruled.

A second objection is, however, that the proceeding of the 7th January 1860, although within three years next preceding the application of 5th January 1863, is not an effectual proceeding, and we are referred to a decision of this Court, which is reported at page 49 of VI. Weekly Reporter. The learned Judges say: "The money that was "paid to the decree-holder in June 1862

"was a sum in deposit, the proceeds of a "previous sale in execution of this decree. "The act of taking out this money, which "really belonged to the decree-holder, can- "not, we think, be considered a proceeding "such as is contemplated in Section 20, "Act XIV. of 1859."

The facts of that case are not fully stated, but I should be led to suppose that the money so taken out was the proceeds of a sale which had taken place at some time previous, perhaps a considerable time previous. That money, which had been lying in Court at the disposal of the decree-holder when he chose to claim it, might have been taken probably long before, and the fact of his applying and taking it away at any period would not constitute such a proceeding as Section 20 requires. In this case the facts are quite different. It appears that, on the 3rd January 1860, the decree-holder applied for issue of notice of sale of the judgment-debtor's goods in order to the levying of costs. The judgment-debtor, to prevent the sale of his property, paid in the money which was taken out on the 7th January. The Judge's decision does not clearly show when the money was paid in, and Mr. Allan has asked that we should remand it in order to a finding upon that point. But the proceedings show so clearly that the money was really paid on the same day on which the decree-holder acknowledged the receipt that it is quite unnecessary to remand the case in order to a further finding upon this point by the Judge below.

I think, therefore, that the decree-holder is fairly in time, and that he ought to be allowed to execute the decree.

The special appeal will be dismissed with costs.

Hobhouse, J.—I concur.

The 31st July 1867.

Present :

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Staying execution of decree—Failure to give security—Jurisdiction—Section 4, Regulation XVI., 1797.

Case No. 309 of 1867.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Bhaugulpore, dated the 16th March 1867.

Debee Pershad (Purchaser of decree), *Appellant,*

versus

Umurthnath Chowdhry and another (Judgment-debtors), *Respondents.*

Baboo Luckhee Churn Bose for Appellant.

Mr. R. E. Twidale for Respondents.

When an appellant to the Privy Council applies to the High Court to stay execution of the decree on giving security, and action is taken by the Court on such application, a Principal Sudder Ameen has no authority, without the direction of the High Court, to make an order on an application to execute the decree, though the judgment-debtor should have failed to give security.

Decree-holder may be entitled, under Section 4, Regulation XVI. of 1797, to have his decree executed, on application to the High Court.

Jackson, J.—I THINK this appeal cannot be sustained.

Goureenath obtained a decree against Umurthnath. Umurthnath has appealed to Her Majesty in Council, and made application to this Court in 1865 to stay execution of the decree on giving security. The Court ordered a rule to be served on the opposite party to show cause, but he never appeared. In the meantime, it appears that the rights of Goureenath have been sold in execution of another decree, and purchased by the appellant. The appellant has now applied to the Principal Sudder Ameen to execute the decree, but the Principal Sudder Ameen has refused to do so. He now appeals to this Court, contending that, as the judgment-debtor has failed to give security, he is entitled to have his decree executed. He may

be so entitled on application to this Court under Section 4, Regulation XVI. of 1797, but the Principal Sudder Ameen had no authority to make any order without the direction of this Court. Therefore, the appeal must be dismissed with costs.

Hobhouse, J.—I concur.

The 31st July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Devise of property—Liability of heirs taking possession under decree of Court—Attachment for testator's debts.

Case No. 277 of 1867.

Miscellaneous Appeal from an order passed by Mr. H. S. Thompson, Principal Sudder Ameen of Backergunge, dated the 3rd May 1867.

Petum Koeree *alias* Moniah Bibee (Decree-holder), *Appellant,*

versus

Joy Kishen Doss Baboo (Judgment-debtor), *Respondent.*

Baboos Chunder Madhub Ghose and *Doorga Dass Dutt* for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

Where a testator devises his property among his heirs and kinsfolk to be kept under management in order to the payment of his debts, and a decree of Court enables the parties to take possession of their several estates, they will have to answer any suit of creditors according to their liability; but a Civil Court is not competent, without such suit being brought, to maintain attachment on the payment of these debts.

Jackson, J.—THE order of the Principal Sudder Ameen in this case appears to me to be wholly wrong.

The testator, no doubt, made a devise of his property to go among his several heirs and kinsfolk, and in the meantime to be kept under the management of one Motee Chand, in order to the gradual payment of his debts. By the order, first, of the Lower Court, and after the decree of this Court modifying that decision, the several parties entitled to take the estates have been enabled to take possession of them. Petum Koeree, being declared by this Court entitled to certain churs and to the dwelling-house, Motee Chand, who was appointed to the management of the estate, has been removed, and the parties are each entitled to take their several shares, and they will, of course, have to answer any suit of creditors according to their liability respectively to pay the debts still owing from the testator's assets.

But, as the creditors to whom these debts are owing are not before the Principal Sudder Ameen in this case, he is not competent to maintain the attachment on the payment of these debts. When any parties bring their suits against the heirs and representatives of the deceased testator, it will be time for him to act as circumstances require, and the law may allow.

The order of the Principal Sudder Ameen will be reversed with costs.

Hobhouse, J.—I concur.

The 1st August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Insufficient evidence of decree being kept alive—Reversal of order of execution—Section 4, Act II., 1855—Entries in Nazir's book.

Case No. 134 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 5th December 1866, reversing an order passed by the Moonsiff of that District, dated the 17th April 1866.

Nilkunt Chuckerbutty (Decree-holder), *Appellant,*

versus

Sheo Narain Koonwar and others (Judgment-debtors), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

No one for Respondents.

When a Lower Court, on insufficient evidence of a decree having been kept in force, orders execution, the Appellate Court should not summarily reverse the order, but should remit the case that the decree-holder may give further proof of the fact.

Under Section 4, Act II., 1855, a Court is entitled to refer to entries made by its own officer, the Nazir, and find thereon that a warrant had been issued in accordance with an application admitted to have been made.

Jackson, J.—It appears to me that the Judge's extremely summary decision in this case is wrong.

The decree bore date the 28th August 1862. It appears that the first petition to execute this decree was filed on the 20th January 1863. The Moonsiff, looking into the book kept by the Nazir of his Court, found entries in that book, which showed that, pursuant to the application above mentioned, a warrant for the arrest of the judgment-debtor was issued on the 29th January 1863, and it was stated that, in consequence of the judgment-debtor absconding, he could not be arrested. A second application, that immediately before the Court, was made on the 17th January 1866. The Moonsiff, considering that, under these circumstances, effectual proceedings had been taken to keep the decree in force within three years next before the application, ordered the decree to be executed. The Judge's decision is in these words: "Peadah's books are no evidence, and this "the Moonsiff ought to know. The order of "the Lower Court is reversed." If it were true that the peadah's books were no evidence, and that the Moonsiff had improperly allowed the decree to be executed merely on reference to these peadah's books, the Judge, observing that the decree-holder had probably been misled by the mistake of the Court below, ought to have remitted the case, in order that the decree-holder might give further proof of the fact stated in these books, and ought not to have summarily barred the plaintiff from all remedy upon his decree.

But the Judge appears to have forgotten the terms of Section 4, Act II. of 1855, which provides that "every Court shall take judicial notice of its own members and officers respectively, and of their deputies and subordinate officers or assistants." It seems to me quite clear that the Court was entitled to look into the books kept under the order of the Court by its own officer, the Nazir, and to refer to any entries made in such book; and that, where an application had been admittedly made by the decree-holder on the 20th of January 1863, the Moonsiff was quite warranted in finding upon the entry in his Nazir's book that the warrant had been issued in accordance with that petition. I think, therefore, that the decision of the Judge is erroneous, that the Moonsiff was right, and that his order should be restored, that of the Judge being set aside.

The petitioner will be allowed to execute his decree with costs.

Hobhouse, J.—I concur.

The 1st August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Section 15, Act XXIII., 1861—Application for execution—Correction of decree.

Case No. 287 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Jessore, dated the 8th March 1867, affirming on order passed by the Principal Sudder Ameen of that District, dated the 27th March 1866.

Bisheshur Roy Chowdhry and others (Judgment-debtors), *Appellants,*

versus

Bisheshur Bose (Decree-holder), *Respondent.*

Baboo Bungshee Dhur Sein for Appellants.

Baboo Hem Chunder Banerjee for Respondent.

Under Section 15, Act XXIII., 1861, if an application for execution corresponds with the terms of a decree, it should be admitted. If the decree needs correction, the Court executing cannot correct it; but it is for defendant to apply to the Court which made the decree.

Jackson, J.—This is a very clear case.

The Lower Court (the Court of the Principal Sudder Ameen), having to execute the decree of the High Court made on appeal, had no choice but to act in exact conformity with the terms of the decree. Section 15, Act XXIII. of 1861, provides that, an application being made for execution of a decree, the Court, if it be shown that the particulars given do not correspond with the original decree, may return the application or cause it to be amended, otherwise the application should be admitted. The particulars refer among other things (Section 212) to the amount of debt or damages due upon it *or other relief granted* by the decree. The

Court is not required to look, and cannot look, at the plaint or at the proceedings in the suit previous to decree with a view to correction of the decree. It was obviously the business of the defendant to apply to the Court which made the decree for the correction of it, if necessary. As he has chosen not to do that but to come to this Court on special appeal, I think we have nothing to do but to dismiss the special appeal with costs.

Hobhouse, J.—I concur.

The 1st August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Change of religion—Incapacity for management—Manager's neglect of duty—Appointment of other managers—Vedantists—Performance of ceremonies—Guardianship of Minor—Act XL. of 1858.

Miscellaneous Appeals from an order passed by the Judge of Backergunge, dated the 26th February 1867.

Case No. 281 of 1867.

Anund Coomar Gangolly, *Appellant,*

versus

Rakhal Chunder Roy and others, *Respondents.*

Baboos Romesh Chunder Mitter and *Nil Monee Sein* for Appellant.

Baboos Onookool Chunder Mookerjee and *Kalee Mohun Doss* for Respondents.

Case No. 282 of 1867.

Surosuttee Debee, *Appellant,*

versus

Rakhal Chunder Roy and others, *Respondents.*

Baboos Romesh Chunder Mitter and *Nil Monee Sein* for Appellant.

Baboos Onookool Chunder Mookerjee and *Kalee Mohun Doss* for Respondents.

A will that provides for an heir becoming disinherited on changing his religion does not apply to the case of a Hindoo becoming a Vedantist, nor does that form of Hindooism incapacitate him from being a manager.

Where a case is started, showing that elder sons are neglecting their duty as managers of an estate to the material injury of a minor son, the Judge is bound to institute inquiry.

Where particular persons have been appointed by will to be managers, and any of them become incapable of acting or refuse to act, it does not follow that others should be brought in their stead.

Where managers, by becoming Vedantists, are incapable themselves of performing ceremonies contemplated in the will, they may make over to any person concerned the requisite expenses for such ceremonies.

Where a testator makes due provision for the guardianship of his minor son, Act XL. of 1858 does not contemplate the interference of the Court in its summary jurisdiction.

Jackson, J.—This was an application to the Civil Court under Section 21, Act XL. of 1858, to recall a certificate granted under the Act, and to remove Rakhal Chunder Roy and Beharee Lall Roy from being managers on behalf of their minor brother Pearee Lall Roy. These three were the sons of one Raj Chunder Roy, who was formerly a vakeel of the Civil Court of Backergunge, and who died after making a will dated 14th Bysack 1268, and a codicil thereto dated the 26th Jeyt 1269. By the will he appointed his wife, together with a confidential servant of the family, and associated with them, on their coming of age, the two elder sons, to be guardians of the third son, and managers of the property during that third son's minority. The will was of great length, and laid down varied directions for the management of the property. The widow and the servant above mentioned renounced their functions as managers, and the managership consequently remained in the hands of Rakhal Chunder and his brother. They also became and acted as guardians of the minor under the appointment made in the will. The present application was made by Anund Coomar Gangolly, who is said to be the son-in-law of a brother of the testator. He seeks to have the brothers removed from the office of managers upon various grounds set forth in his petition. The mother has also made a separate application to have the brothers removed from the office of guardian, and to be appointed herself guardian in their place. Out of the several grounds stated in the application for removing the respondents, Baboo Romesh Chunder Mitter, who appears for the appellant, has selected four.

The *first* of these is that the respondents, by reason of having renounced the orthodox Hindoo religion, are incapable of remaining managers of the property.

The *second* is that they ought to be displaced by reason of their having violated the injunction of the testator that, after certain necessary expenses, the profits were to be placed in deposit until the youngest son arrived of age.

The *third* is that, whereas the testator intended to have four guardians of his minor son, the two brothers ought not to be left alone to carry out that office.

And, *fourthly*, that, whereas the will provides for the maintenance of certain worship and ceremonies, the elder sons, having given up orthodox Hindooism, are incapable of performing those ceremonies, and have, in fact, neglected to perform them, whereby the spiritual welfare of the minor son is prejudiced.

As to the *first* of these grounds, it appears to me that there is no foundation for it whatever. The will has not provided that the renunciation of religion, as far as the respondents can be charged with it, should cause their removal from the office of managers. It is stated, indeed, that the 23rd paragraph of this will provides that any one of the family who changes his religion should be disinherited. But it does not appear that the elder brothers, by reason of their having become Vedantists, have been disinherited or divested of their inheritance in any way; and certainly it does not appear that, by reason of their having adopted that form of Hindooism, they are incapable of being managers.

The *second* is doubtless a point on which material injury to the minor son might arise; and if the petitioners had in any way started a case showing that the managers were neglecting their duty in this respect, I think it would have been the duty of the Judge to institute some enquiry into the matter, because manifestly, if the intention of the testator was that the profit of all these shares should accumulate until the coming of age of the minor son, then it might very possibly happen that, on the two elder brothers dying before this minor had come of age, the minor would be entitled to succeed to the whole accumulations; and, therefore, if the profits were, contrary to the intention of the will, dissipated before he came of age, he would be seriously injured. But we have not been shown any foundation for the charge. It has been prominently stated in the petition that the brothers have driven about the public road in open carriages, and that expensive dresses have been purchased for the ladies of their family. But, in the absence of any information as to the circumstances of this family, it is impossible, I think, for us to say that, driving in a carriage for the purpose of taking exercise, or wearing a particular description of dresses, is extravagant or anything more than a fair and proper expenditure for persons of their position.

As to the *third* ground, it appears to me altogether untenable. The testator, no doubt, appointed his wife and servant, and subsequently the two elder sons, as they became of age, were to be associated in the management. There is nothing to indicate that, if any two or any one of the four persons appointed had been incapable of acting, or refused to act, other persons were to be brought in their stead. In this case the two persons named have renounced their functions.

The Court is, therefore, incompetent, I think, either to restore them, or to appoint any additional person, to act with the managers who are left.

Upon the *fourth* point, no doubt, the two brothers who had become Vedantists are incapable themselves of performing the ceremonies which the will contemplated; but it is stated, and it is not here disputed, that the brothers have offered and are willing to make over either to the mother or to the applicants in this case, or to any other person who is concerned, the requisite funds to pay the expenses of those ceremonies. It seems, therefore, quite unnecessary to make any order on this point, and the fact that they are themselves incapacitated for performing the ceremonies is certainly no ground for removing them from the office of manager. As far as these grounds go, therefore, I fail to see any reason for recalling the certificate.

Then as to the *second* appeal, which is on the part of the mother, who requires that the brothers should be removed from the office of guardian.

It appears to me that Act XL. of 1858 makes no provision, either for the removal of the brothers, or for the re-appointment of the mother as guardian. The father himself in his will made due provision for the duties of guardian; and, he having done so, Act XL. of 1858 does not contemplate that the Court in its summary jurisdiction should interfere. Section 7 only allows an appointment by the Court, "unless the father should have appointed a guardian."

I think, therefore, that both appeals must be dismissed with costs.

Hobhouse, J.—I concur entirely.

The 1st August 1867.

Present:

The Hon'ble W. S. Seton-Karr and Dwarkanath Mitter, *Judges.*

Jumma-wasil-baki papers—Section 43, Act II. of 1855—Section 4, Act X. of 1859.

Case No. 1005 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 14th March 1867, reversing a decision passed by the Deputy Collector of that District, dated the 3rd October 1866.

Ram Lall Chuckerbutty and another (Defendants), *Appellants,*

versus

Tara Soondari Burmonya (Plaintiff), *Respondent.*

Baboo Poorno Chunder Shome for Appellants.

Baboo Issur Chunder Chuckerbutty for Respondent.

Jumma-wasil-baki papers ought not to be regarded as anything else than "books proved to have been regularly kept in the course of business," and by Section 43, Act II. of 1855, they are "admissible as *corroborative*, but not as *independent* proof of the facts therein stated." They are consequently insufficient by themselves and without independent proof to rebut the presumption which arises under Section 4, Act X. of 1859, in favor of a defendant who has been found to hold lands at a uniform payment of rent for more than 20 years.

Seton-Karr, J.—In this case the Judge finds that the defendant had held the lands at an uniform rate of rent for a period of 22 years; but, as a reason for depriving the defendant of the presumption that thus naturally arises in his favor under Section 4 of Act X. of 1859, the Judge lays stress on certain jumma-wasil-baki papers which, for the first time, were admitted in the Lower Appellate Court.

The Judge does not record any distinct reason for admitting this evidence as he ought to have done. But still, waiving this, and assuming that the papers have been regularly admitted, the conclusion of the Judge that they were sufficient to rebut the presumption found in the defendant's favor is a conclusion not sound in law.

Jumma-wasil-baki papers ought not to be regarded as anything else than "books proved to have been regularly kept in the course of business," and these books, by Section 43 of Act II. of 1855, are "admissible as *corroborative*, but not as *independent* proof of the facts stated therein."

But in this case there is no independent proof adduced by the plaintiff of that which it was incumbent on him to prove in order to rebut the presumption found in favor of the defendant, and the jumma-wasil-baki papers consequently *corroborate* nothing, nor was the Judge legally justified in drawing from them the conclusions which he did draw.

In this state of things, there being no legal evidence amounting to independent proof, which would rebut the presumption found in defendant's favor, that presumption must now stand good; and in this view, striking out the evidence adduced by plaintiff as legally insufficient to sustain the decision, we must decree the case in defendant's favor.

This appeal is decreed with all costs, and the decision of the first Court is restored with all costs.

The 1st August 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Specific performance—Damages.

Case No. 688 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 15th January 1867, affirming a decision passed by the Moonsiff of that District, dated the 17th May 1866.

Pureeag Singh (Plaintiff), *Appellant,*

versus

Kheer Singh and another (Defendants), *Respondents.*

Baboo Nil Madhub Sein for Appellant.

Baboos Debendro Narain Bose, Kalee Kishen Sein, and *Rajender Nath Bose* for Respondents.

A suit for specific performance to sell land will so lie if the plaintiff neglects to enforce his rights for a long time (in this case three years) after his rights under the contract for sale accrued, and if he does not act up to a condition precedent to the sale to him. If he has any claim at all, it would be for damages against the person breaking the contract for loss sustained by the non-fulfilment thereof.

Glover, J.—This was a suit for specific performance of a bynanamah or contract to sell a certain property to the plaintiff. He now complains that the defendant No. 1 has

sold the land to defendant No. 2 in defiance of his bynanamah.

The first defendant, the vendee, pleaded that he was an innocent purchaser for value.

The second defendant, the vendor, denied that he had entered into any contract to sell.

Both Lower Courts dismissed the suit.

Plaintiff now urges specially that he pleaded fraud as between the vendor and vendee, defendants, which was not enquired into by the Lower Courts.

We see no reason to interfere in this case. It has been found as a fact by the Judge that the plaintiff did nothing to enforce the bynanamah for three years after the date fixed for carrying out the contract, and that he took no steps to refer the price of the land to arbitration, which was a condition precedent to the sale of the land to him. He also found substantially that there was no fraud on the part of the defendant No. 1, for he holds him to have been an innocent purchaser for value without notice.

Taking this circumstance into consideration, and the fact of the special appellant's own neglect to look after his interests for so long a period as three years after his right had accrued, we think that he has no title for a specific performance of the contract made between him and the defendant No. 2, or to oust a person who bought in good faith in ignorance of any such inchoate agreement between the two.

If he has any claim at all against the defendant No. 2, it would be for damages for any loss he may show himself to have sustained from the non-fulfilment of the bynanamah. He has clearly no claim against defendant No. 1.

The special appeal is dismissed with costs.

The 1st August 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Possession—Declaration of title.

Case No. 701 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 8th January 1867, modifying a decision passed by the Sudder Ameen of that District, dated the 3rd April 1866.

Gugun Chunder Ghose (Plaintiff), *Appellant,*

versus

Raj Chunder Kur and others (Defendants), *Respondents.*

Baboo Chunder Madhub Ghose for Appellant.

Baboo Hem Chunder Banerjee for Respondents.

A plaintiff, who sues only for declaration of title and confirmation of possession, has no right if he obtains such declaration to turn the defendant who was found to be in possession out of possession, but must bring a fresh suit for that purpose under Act X. of 1859.

Glover, J.—This was a suit for declaration of title and confirmation of possession in a shikmee talook said to have been purchased by one Shib Chunder Ghose at an auction-sale of the Government Khas Mehal, No. 6396.

The mehal was originally sold by Government for arrears of revenue and bought in. It was then given in farm to Ram Narain Ghose, in whose hands it is said to have remained till Government sold its rights to the plaintiff's vendor.

Plaintiff goes on to say that the defendant through his ryots instituted a suit before the Magistrate, and got an order declaring his possession as a co-sharer in the talook, and that this order has disturbed his (plaintiff's) possession, and thrown a slur upon his title.

The defendant claims to hold by purchase from one Jumoona, a co-sharer with Ram Narain Ghose in the estate.

Both Lower Courts found that the plaintiff was the owner of the land, and that the defendant's alleged purchase from Jumoona

was not proved; but the Principal Sudder Ameen disagreed so far with the finding of the first Court that, instead of giving the plaintiff possession, he held that the defendant, who was in possession, could not be ousted without a fresh suit being brought for the purpose.

In special appeal it is urged that the Principal Sudder Ameen, when he found the plaintiff's title to the land proved, and the defendants' false, should have removed the latter from possession, or at all events should not have confirmed them in it. His order should have stopped at proof of title.

We see no reason to interfere in this matter. The special appellant, who sued only for declaration of his title and confirmation of a possession which he alleged himself already to have, got all that he asked for; his title has been declared, and his possession as talookdar confirmed; but, as he did not ask for khas possession, or for the ejection of the defendant, who has been found by the Principal Sudder Ameen to be in actual possession of the land, he cannot have that relief afforded him in the present suit. It is urged in his behalf that, as the defendant denied his title, proof of that title is sufficient to show that the defendant has been all along a trespasser, and should be evicted. But it by no means follows that the defendant, albeit he is found to have no title under his purchase, has not got the right to remain on the land; he may, for anything to the contrary shown on this record, have already been in 12 years' occupation of the land paying rent to the former holders of the talook, and thus not liable to ouster, except under certain circumstances.

The special appellant, if he wishes to evict him and enter upon khas possession of his property, must do so in the regular way, and bring a suit for the purpose under Act X. of 1859. The present case has established the relationship of landlord and tenant between the parties, and the suit to eject can be brought in the Revenue Court.

This special appeal must be dismissed with costs.

The 2nd August 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble W. Markby, *Judge*.

Execution against the person or property—Women of Rank—Arrest—Small Cause Court—Sections 21, 201, and 207, Act VIII. of 1859—Sections 13 and 15, Act XXIII. of 1861—Section 15, Act XI. of 1865.

Reference to the High Court by Mr. J. S. Bell, Judge of the Courts of Small Causes at Sealdah and Howrah.

J. Davis and Co., *Decree-holders*,

versus

Mrs. M. A. Middleton, *Judgment-debtor*.

Exemption from arrest on process of execution under Section 21, Act VIII. of 1859, does not extend to all women of rank, but is limited to the women therein described, women, that is, "who, according to the custom and manners of the country, ought not to be compelled to appear in public."

Under Section 201 and other Sections cited of Act VIII. of 1859, a judgment-creditor has uncontrolled option whether he will proceed in the first instance against the person or the property of his judgment-debtor, and by Section 15, Act XXIII. of 1861, the Small Cause Court is bound to issue execution according to the nature of the application, if made in writing after the passing of the decree under Section 207, Act VIII. of 1859.

The Court may, at its discretion, refuse execution against the person and property at the same time, or against the person when, under Section 13, Act XXIII. of 1861, or under Section 19, Act XI. of 1865, application for immediate execution is made verbally at the time of passing the decree.

Case.—In execution of a decree for money, the judgment-creditor applied for a warrant against the person of the judgment-debtor; but, as she was a woman of rank, being a Captain's widow, the Court, with reference to the High Court's ruling of *27th February 1865, refused to issue process of arrest, and left it to the decree-holder to proceed against the property of the debtor. The decree-holder having renewed his application for a warrant against the body of his debtor, and desired a reference to the High Court under Act X. of 1867, I have the honor to request you will be good enough to obtain for me the opinion of the High Court on the following points:—

1. Whether all women of rank, European, Eurasian, or Native, are exempt from arrest on process of execution of decree?

* Rokeeny Soondery, Miscellaneous Appeal, *vide* Sutherland's Reports, Vol. 2, page 33.

2. If the High Court's ruling of 27th February 1865 applies only to Mahomedan and Hindoo women, who, under the provisions of Section 13, Regulation IV. of 1793, and Section 21, Act VIII. of 1859, are exempted from personal appearance in Court; whether it is discretionary with the Court, when the solvency of the debtor is out of doubt, to direct the decree-holder to proceed first against the property of his judgment-debtor?

The ruling of 27th February 1865 has not been fully reported. It runs thus: "It has been held by a majority of a *Full Bench that women of rank are exempted from arrest in execution of decrees." In the absence of the context, the manifest import of the words used justifies the inference that immunity from arrest in execution of decree has been conceded to all women of rank, for there is no limitation confirming the privilege only to Hindoo and Mahomedan women. We all know that a woman in the East is relegated to a much lower rank than she really holds in the West. Indeed, in India and all polygamous countries she is greatly degraded. It would, therefore, be anomalous to allow a woman of a lower rank in the social scale, by reason of her remaining secluded from the public gaze, to be privileged from arrest in execution of decree, while the European lady of an undoubted higher status, owing to her intermingling with civilized life, has to submit to the indignity of being arrested. No invidious distinction, I apprehend, was ever intended to be made between females of rank of any nation and creed.

*The Full Bench Ruling alluded to does not appear to have been made public.

With reference to the second question, I am of opinion that the terms of Section 19, Act XI. of 1865, are permissive, and the Court is at liberty, without regard to sex, to exercise a proper discretion in directing the issue of a warrant either against the person or property of a judgment-debtor. The attachment of the body of a judgment-debtor, when she happens to be a female of rank, is altogether unnecessary, as often as the solvency of the debtor is out of doubt. No injury can result to the judgment-creditor if he exercise due diligence in attaching her property, and the attachment of the person of a European female of rank, if allowable, should be the last resort when the effort to seize her property proves a failure.

The judgment of the High Court was as follows:—

Whatever may have been the decision of the Full Bench, with reference to Native ladies of rank, it cannot apply to a case like the present.

Section 21, Act VIII. of 1859, does not use the words "women of rank," but "women who, according to the custom and manners of the country, ought not to be compelled to appear in public."

We are of opinion that exemption from arrest on process of execution does not extend to all women of rank, European, Eurasian, or Native, but that it is limited to the women described in Section 21, Act VIII. of 1859.

The second question submitted to us by the Court of Small Causes is "whether it is "discretionary with the Court, when the "solvency of the debtor is out of doubt, to "direct the decree-holder to proceed against "the property of his judgment-debtor;" in other words, can the Court refuse to issue a warrant of arrest under such circumstances?

The application for the warrant to arrest in execution was originally made at the time the decree was passed under Section 19 of Act XI. of 1865. It was refused on that occasion, and subsequently the judgment-creditor renewed his application.

No special provision for execution of decrees obtained in Courts of Small Causes is made by the Act, except when the execution is applied for under Section 19. The case must, therefore, be governed by the general provisions of Act VIII. of 1859, which, by Section 47 of Act XI. of 1865, are extended to suits in Courts of Small Causes.

Section 201 of the Code of Civil Procedure provides that, "if the decree be for money, "it shall be enforced by the imprisonment "of the party against whom the decree is "made, or by the attachment and sale of his "property, or by both, if necessary."

By Section 207 the party desirous of issuing execution is to apply to the Court, and by Section 212 the application is to be in writing, and is to contain various particulars, amongst others "the mode in which "the assistance of the Court is required, "whether by delivery of property specifically "decreed, the arrest and imprisonment of the "person named, or attachment of his pro-"perty, or otherwise as the case may be."

By Section 15, Act XXIII. of 1861, "the "Court, on receiving the application containing the particulars mentioned in Section "212 of Act VIII. of 1859, shall enter a "note of the application, and the date on "which it was made, in the register of the "suit. If it shall be shown to the Court "that the particulars do not correspond with "the original decree, the Court shall either "return the application for correction to the "person making it, or shall, with the consent "of such person, cause the necessary correction "to be made. If the application be admitted, "the Court shall order execution of the "decree according to the nature of the "application." Then follow provisions which require special measures to be taken in certain cases as preliminary to the issue of the warrant; and Section 221 provides that, when all necessary preliminary measures have been taken, where any such are required, the Court, unless it see cause to the contrary, shall issue the proper warrant for the execution of the decree.

It appears to us that, upon these Sections, the judgment-creditor has an uncontrolled option whether he will proceed, in the first instance, against the person or the property of the judgment-debtor. That option is clearly given by Section 201; and by Section 15, Act XXIII. of 1861, it appears that the Court is bound, if the application be in due form, to admit it, and, when it is admitted, to order execution "according to the nature of the application." The only words which give any apparent discretion to the Court are in Section 221 of Act VIII. of 1859 which relate to the issue of the warrant which the Court is to issue, "unless it see cause to the contrary." Looking to the previous Sections, we do not think it was the intention of the Legislature to control by those words the option of the judgment-creditor. It would be very inconsistent if the Court, under Section 15, Act XXIII. of 1861, were bound to order the execution, and were not bound under Section 221, Act VIII. of 1859, to issue the warrant.

It is to be observed that such an arrest does not involve the necessity of the debtor's being sent to prison. Under Section 273, he must be taken before the Court, and any honest debtor, with funds at his command, can there obtain his discharge. There is, therefore, no danger of these provisions being used oppressively against solvent persons.

We are of opinion that the Court may in its discretion refuse execution against the person and property at the same time, and may also refuse execution against the person when, under Section 13, Act XXIII. of 1861, or under Section 19, Act XI. of 1865, application for immediate execution is made verbally at the time of passing the decree; but that, when, application is made after the passing of the decree by written application under Section 207, Act VIII. of 1859, the Court is bound to issue execution according to the nature of the application.

The 2nd August 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Section 16, Act X., 1859—Uniform rent for 20 years—Evidence of such uniformity.

Case No 461 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by Mr. C. E. Lance, Judge of Backergunge, dated the 19th December 1866, affirming a decision passed by the Deputy Collector of that District, dated the 28th June 1866.

Catherine Foschola (Defendant), *Appellant,*

versus

Huro Chunder Bose (Plaintiff) and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter, Unnoda Pershad Banerjee, and *Kalee Mohun Doss* for Appellant.

Baboos Chunder Madhub Ghose and *Hem Chunder Banerjee* for Respondents.

Section 16, Act X., 1859, does not require proof of actual payment of one rate of rent for 20 years; but that the rent has remained unchanged for that period.

Uniform rent for the 20 years preceding the suit ought not to be presumed upon evidence which only touches a portion of that period: on the other hand, it is not neces-

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sary to have evidence bearing directly on *every* one of the 20 years. It is sufficient, if the whole time is included within limits upon which the evidence bears, provided the evidence leads to the belief of uniform rent.

Phear, J.—In this suit for enhancement, the defendant relied mainly upon the provisions of Section 16 of Act X. of 1859. With regard to this head of defence, the Judge thought that the words of the Section require proof of *payment* of one rate of rent for 20 years immediately preceding the time of suit, and he was of opinion that the evidence adduced before him was not sufficient to prove such payment. He, accordingly, decided against the defendant's claim.

We think the Judge was wrong on this point: the rent may have remained unchanged during any number of years, although the actual payments in respect of rent may, from one cause or another, have been very unequal during the same time, or even nothing.

The case is remanded in order that the Judge may determine, with reference to the above remarks, whether the rent at which the defendant's talook is held has not been changed for the period of 20 years immediately preceding the commencement of the suit, and that he decide the suit accordingly.

We will add that the Judge ought not to presume a uniform rent for the 20 years preceding suit upon evidence which only touches a portion of that period. For instance, suppose the evidence to satisfy him that the rent had been uniform for 18 years before suit, he would be wrong in presuming from that alone that it must have been uniform for two more also, or in other words for 20 years in the whole. On the other hand, to support a finding of uniformity for any given number of years, it is not necessary that there should be evidence bearing directly on *every* year of that number; it is sufficient if the whole space of that time is included between limits upon which the evidence bears, provided that that evidence is such as to lead to the belief that the rent was uniform throughout the intervening period.

The pleader of the appellant has also objected that the Ameen employed to make a local enquiry was not a person who could be deputed for that purpose; but, as this objection was not made in either of the Courts below, we decline to entertain it now.

Remand accordingly.

The 2nd August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Hearing a defendant on a day other than that fixed for hearing—Evidence put in by such defendant after remand.

Case No. 708 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 17th January 1867, affirming a decision passed by the Assistant Collector of that District, dated the 31st July 1866.

Koonj Beharee Awustee (Defendant),

Appellant,

versus

Tarinee Kant Lahoree (Plaintiff),

Respondent.

Baboos Onookool Chunder Mookerjee and *Romesh Chunder Mitter* for Appellant.

Baboos Greeja Sunkur Mojoomdar and *Chunder Madhub Ghose* for Respondent.

To admit a defendant to be heard for the first time in a suit after it has been remanded, as if he had appeared on the day fixed for his attendance, is not such an irregularity as the Courts would be inclined to notice; and, if heard, the defendant is entitled to produce his evidence, and to ask the Court to consider it.

When a suit has been dismissed upon a preliminary point, and the decision on that point has been reversed by the Appellate Court, and the case goes down with a view to trial on its merits, evidence may properly be received even from defendants who had appeared, and *à fortiori* from a defendant who had not appeared.

Jackson, J.—This special appeal is not free from difficulty.

The plaintiff, Tarinee Kant Lahoree, sued several persons who held a talook under him for rent at an enhanced rate after notice. Some of the defendants appearing, the case was heard before Mr. Boxwell, an Assistant Collector of Mymensingh. He, in the first instance, decided that the notice required by law had not been duly served, and he consequently gave a decree at the rate which he found to have been formerly

paid by the defendants, but which appears to have been in excess of that which the defendants who appeared alleged to be the previous rate. Against that decision, both the plaintiff and the defendants, who had appeared before the Collector, appealed; and, on the plaintiff's appeal, the Judge, holding that the requisite notice had been duly served, reversed the decision of the Assistant Collector, and remitted the case to him for a new trial. Upon that, Koonj Beharee, one of the defendants who had not appeared on the first trial, appeared by his agent, and it was alleged on his behalf that he resided in the Province of Oudh, that he had no notice of the proceedings, and that his agent had had no notice, and the Assistant Collector was prayed to receive the written statement which he tendered, and also to take the evidence that he was ready to adduce. Upon that, the Assistant Collector ordered his written statement to be filed, allowed the documents which he produced to be also received and filed, and ordered summons to be issued for the attendance of his witnesses; but when the day of trial arrived, the Assistant Collector determined that he would not hear the evidence, either oral or documentary, adduced by this defendant. It seems that the documents or part of the documents that he produced had been already tendered to the Appellate Court at the first hearing of the appeal, and had been refused by that Court. The Assistant Collector was of opinion that, to allow those documents which had already been refused at the hands of one of the defendants to be put in by another defendant and co-sharer, would be, as he termed it, "playing with the case." He, therefore, went on to decide the suit without looking at the evidence tendered by this defendant, and he made a decree in favor of the plaintiff. Koonj Beharee appealed then to the Judge, and he objected that his evidence had not been heard, and asked for a reversal of the decision of the Collector. The Judge went into the question of whether or not the defendant had really had notice of the suit; and, being of opinion that the agent who had finally appeared might have appeared in the first instance, and apparently thinking that this allegation of non-service of notice was untrue, he threw out the appeal, and affirmed the decision of the Assistant Collector.

Koonj Beharee now appeals specially to this Court, on the ground that, as he was admitted to defend the suit when the case was remanded, the Court ought to have considered the evidence which he adduced. It is quite clear that the Assistant Collector, after the remand, allowed this defendant to appear and to be heard in answer to the suit, as if he had appeared on the day fixed for his attendance. It does not precisely appear for what reason, or under what provision of Act X., the Assistant Collector made this order. Apparently, he acted under Section 57. That Section does not exactly meet the case, because the day on which the defendant appeared was not apparently a day to which the hearing of the suit had been postponed under the last preceding Section, that is, Section 56. Section 56 again refers to Section 54, which states that, "if on the day fixed by the summons or proclamation for the appearance of the defendants, or on any subsequent day to which the hearing of the case may be adjourned prior to the recording of an issue for trial." Therefore, the subsequent day contemplated in all these Sections is the day for the adjourned hearing prior to the recording of an issue for trial. Certainly, as I have said, those Sections do not precisely meet this case, though it seems to me very doubtful whether it would be any undue straining of the terms of those Sections to apply them to the day which has been fixed for the trial of the suit after remand by an Appellate Court. Certainly, if there has been any irregularity on the part of the Assistant Collector in admitting this defendant to be heard under such circumstances, I think it is not one which the Courts would be inclined to notice. For it is always to be desired that parties should be fully heard; and where there is fair ground to suppose the defendant has really been debarred from appearing on the day first appointed, he ought to have every facility for filing his answer, and producing his evidence afterwards. I think, therefore, we should certainly not be disposed to interfere with the discretion of the Assistant Collector in allowing the defendant to appear at that stage, and to be heard. If he was to be heard, it follows irresistibly that he was entitled to produce his evidence, and to ask the Court to consider that evidence. In fact, the reason assigned by the Assistant Collector for refusing to receive the documents tendered has little force, because, when a suit has been dismissed upon a preliminary point, and the decision on that preliminary point has been reversed by the Appellate Court, and the case goes down

with a view to trial on the merits, it is usual to allow the parties to produce any evidence which is in their hands, and consequently evidence might properly be received even from defendants who had appeared, and *à fortiori* from a defendant who had not appeared. Now, this case was a suit for enhancement. A decree had been passed in favor of plaintiff only for rents at the rates previously paid. The question at issue therefore, and in which this defendant was particularly interested, was whether the plaintiff was entitled to enhance, and the trial upon that point was entirely a new trial, the previous decision having been annulled, and therefore, I think, that, upon these circumstances, the defendant was entitled to give in his evidence, and to ask for the Court's judgment upon it.

I think, therefore, that the Judge's decision ought to be set aside, and that the case ought to go back to the Lower Appellate Court, in order that it may consider the evidence adduced by the defendant, or, if necessary, remit the case to the Assistant Collector, in order that he may consider that evidence.

Hobhouse, J.—I have had the same difficulty as my learned brother in arriving at what I consider to be a correct decision in this case. But, upon the whole, I concur with my learned brother in the order of remand he has made. And I would add to the considerations on which he has made the order of remand another consideration. It seems to me that, if we leave the case as it at present stands, and if we do not in any way amend or alter the judgment of the Courts below, a decree has been given against the appellant specially as if he had been a party to the suit, and as if, being a party, every document that he had to adduce had been listened to and weighed; whereas, in truth, he has not been heard as a party to the suit. The suit has virtually been tried *ex parte* so far as he is concerned, and yet, as I said before, the decision has been arrived at as if he had been a party to the suit. This is manifestly unjust, and upon that consideration, also, I think that the case should go back to be tried upon its merits by the Court of first instance.

The 2nd August 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Declaration of title—Possession—Section 180, Act VIII., 1859—Evidence taken by Ameen—Re-formation of diluviated land—Clause 5, Section 4, Act XI., 1825.

Case No. 481 of 1867.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 17th December 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 30th July 1866.

Jannobee Chowdhrain (one of the Plaintiffs), *Appellant,*

versus

The Collector of Mymensingh and others (Defendants), *Respondents.*

Baboos Kishen Doyal Roy and *Shushee Bhoosun Sein* for Appellant.

Baboos Kishen Kishore Ghose and *Nuleet Chunder Sein* for Respondents.

In a suit for declaration of title and correction of a survey-map, on an allegation of possession, plaintiff is bound to prove possession before the Judge can inquire into the question of title.

The Judge is bound under Section 180 of Act VIII. of 1859 to take notice of, and pronounce an opinion upon, evidence taken by an Ameen as to possession.

Where plaintiff alleges that his and the defendant's villages were washed away, and have re-formed on the same site, and no third party claims the new formation as an increment to his estate, the question of title will have to be determined by Clause 5, Section 4, Act XI., 1825.

Loch, J.—The Judge states that plaintiff has failed to prove his possession; that the

evidence taken by the Ameen deputed to make a local investigation is no evidence, and that he does not believe the evidence of the witnesses examined in Court, and he concludes: "From the report of the Assistant Collector, "Mr. Boxwell, in original, in Luckhee Debia's "case, and the report of the Ameen and the "survey-maps, it is clear that, at the time "the cause of action arose, possession of "lands thus uncultivated and unfit for culti-"vation must have been merely nominal, "and it would be wrong to declare that a "right exists from the mere assertions of the "plaintiffs supported only by their weak "proof." The Judge then proceeds to the case of the defendants, and says: "For the "defence it is clear that the Government "bought part of Katowli, and enforced their "purchase and possession. They measured "in 1260 these churs as part of Katowli, and "leased them and received the rent, and "occupied and managed the land with the "land allowed to be Katowli. I consider the "right of the defendants to be preferable to "that of the plaintiffs."

The suit is brought by plaintiffs for a declaration of title, on an allegation of possession and for the correction of a survey-map. The plaintiffs are bound to prove their possession before they can, in a case of this nature, obtain a declaration of title. In disposing of the question of possession, the Judge has rejected the evidence taken by the Ameen, on the ground that it is no evidence, but Section 180 of Act VIII. of 1859 says: "The report and depositions shall be taken as evidence in the suit, and shall form part of the record." Such being the case, the Judge is bound to take notice of and pronounce an opinion on this evidence as to possession. Should plaintiff's possession at the time when the cause of action arose be proved, and considering the state of the chur at the time, this possession may consist, not only in receiving rents, but in appropriating the grass and jungle, the Judge will have to enquire into the question of title. The allegation of the plaintiff is that his village Jhunnaye and the defendant's village Katowli were entirely washed away, and have re-formed on the same site. As no third party appears to claim the newly-formed lands as an increment to his estate, the question of title will have to be determined by Clause 5, Section 4, Act XI., 1825. We remand the case to the Judge, to be disposed of with reference to the above remarks.

The 2nd August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Declaratory decree—Right to assess—Limitation.

Case No. 716 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 16th February 1867, reversing a decision passed by the Deputy Collector of that District, dated the 16th September 1866.

Ram Soondaree Debia Chowdhrain (Plaintiff), *Appellant,*

versus

Ram Pershad Sadhoo and others (Defendants), *Respondents.*

Baboo Nil Madhub Sein for Appellant.

Baboo Sreenath Doss for Respondents.

A decree of the High Court declaring plaintiff's right to assess rent upon land held by defendant as lakheraj is a binding decision between the parties on the question of title, even though incapable of execution by reason of lapse of time, and should not be excluded from consideration by the Deputy Collector.

Jackson, J.—In this case the plaintiff, who sued to enhance the rent of the defendant, and whose suit was remanded for trial by the Lower Appellate Court, comes up here in special appeal against so much of the order of remand as declares that the decree of the High Court between these parties bearing date the 16th April 1861 is not to be taken into consideration by the Deputy Collector in re-trying the case. The case has been remanded, it appears, for trial of the question whether the rent of the defendant has been unchanged since the Decennial Settlement. The decree of the High Court, which the Judge declares is not to be taken into consideration, was a decree declaring plaintiff's right to assess rent upon land held by the defendant as lakheraj. That decree, it appears, has not been enforced within three years from the date of its passing, and the Judge remarks upon that "the plaintiff's advantage under the High Court's decree became abrogated when by limitation the

execution of decree became impossible;" and, in support of that position, he refers to a decision of this Court, which is to be found at page 10, Act X. Rulings, V. Weekly Reporter. It appears to me that the Judge is not correct in saying that the plaintiff's advantage under the High Court's decree was abrogated. That decree was a decision which, although incapable of execution by reason of the lapse of three years, is nevertheless a binding decision between the parties on the question of title. The decision from the V. Weekly Reporter, it appears to me, has no bearing whatever upon the case. That decision was upon a very different state of facts. In that case there had been a long litigation between the plaintiff and defendant, or parties whom they represent, as to what the rent of a particular talook was. After many trials and appeals, the late Sudder Court decided in 1860 upon appeal that the rent was not that which the defendant alleged it to be, but in the meantime Act X. of 1859 had been passed; and, as the rent had not, in fact, been varied since the period of the Decennial Settlement, this Court held that the tenure was protected, because, notwithstanding the decree, the rent had been, in fact, unchanged since its creation. That case was quite dissimilar from the present. It appears to me that the Judge was wrong in directing the Deputy Collector to exclude the decree of the High Court from his consideration, and that whatever effect that decree can have should be allowed in considering the point, which is to be tried on the remand.

In this case the plaintiff is entitled to the costs of this special appeal, whatever the decision below may be.

Hobhouse, J.—I concur.

The 2nd August 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Oral Evidence—Limitation—Section 4, Act XIV. of 1859.

Case No. 661 of 1867.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 4th February 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 9th March 1866.

Wooma Soonduree Dossee (Defendant), *Appellant,*

versus

Biressur Roy (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboos Sreenath Doss and *Onookool Chunder Mookerjee* for Respondent.

Oral evidence cannot be adduced by a plaintiff who is barred by limitation in order to supplement the want of an acknowledgment in writing, which, under Section 4, Act XIV. of 1859, will prevent the ordinary rule of limitation from being applied.

Seton-Karr, J.—In this case I think that the decision of the Judge is erroneous in law, and that the plaintiff's suit ought to have been dismissed. The plaintiff produced as evidence of "a contract which had been reduced to writing" a bond on unstamped paper which he subsequently withdrew; and then endeavored to prove by oral evidence, and by an entry in the khata-books of the defendant that money was due to him. This he should not have been permitted to do; and, even granting that, on the non-production of any bond originally, it was competent to plaintiff to prove the existence of a debt by oral evidence, and by the books of the defendant, it would, in that case, be still clear that the plaintiff was barred by limitation.

The debt due by the defendant is stated by plaintiff to have originated in Kartick 1269, and this suit was not brought until more than three years afterwards, or in Aughran 1272. The plaintiff seeks to bridge over the interval necessary to bring the case within three years by oral evidence, but this he cannot be permitted to do.

By Section 4 of Act XIV. of 1859, a new period of limitation will not run, unless the person liable to pay the debt has "admitted the same by an acknowledgment in writing." Oral evidence cannot be allowed to supplement the want of such an acknowledgment. In ruling thus, we are following the case reported at page 46 of Volume VII. of the Weekly Reporter.

The case is barred by limitation, the suit is dismissed with all costs and interest, and

the decisions of both the Lower Courts are reversed.

Macpherson, J.—As it appeared from the plaintiff's own case that he had entered into a written agreement with the appellant's husband, and that the agreement was not properly stamped, the plaintiff was not entitled, and ought not to have been permitted to give oral evidence of the contents of that agreement.

As regards the entry in the defendant's books, the plaintiff can get no benefit from it, because, being unsigned, it cannot be treated as an acknowledgment of the debt, which, under Section 4 of Act XIV. of 1859, will prevent the ordinary rule of limitation from being applied.

I concur in the order proposed by Mr. Justice Seton-Karr.

The 2nd August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Allegation of fraud—Jurisdiction of a Civil Court in cases under Act X., 1859.

Case No. 3217 of 1866.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 24th September 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 13th December 1864.

Juggobundhoo Samunt (Plaintiff), *Appellant,*

versus

Gyanendur Nath and others (Defendants), *Respondents.*

Baboo Nil Monee Sein for Appellant.

Baboo Otool Chunder Mookerjee for Respondents.

An allegation of fraud made in a plaint, the plaintiff meaning thereby nothing more than the defendant's having obtained something to which, in the plaintiff's opinion, he was not entitled, does not give a Civil Court jurisdiction to interfere in a case under Act X., 1859.

Jackson, J.—When the case was before the Court on the last occasion, the Court remanded the appeal to the Zillah Judge, because it was of opinion that the Judge had wrongly declined jurisdiction. The Judge considered that the plaintiff sought merely to re-open the execution-proceedings in a case under Act X. of 1859.

He observed that the plaint contained a distinct allegation of fraud, and that fraud, if proved, would enable the Civil Court to interfere and to give the parties relief. It now really turns out that what the plaintiff meant by fraud was nothing more than the defendant's having obtained something to which, in the plaintiff's opinion, he was not entitled.

It is evident that, if that be fraud, a door will be open to raise in the Civil Courts a question as to every thing done in suits under Act X. of 1859.

The plaintiff held a jote under the zemindar. The zemindar sued him in the usual way for an arrear of rent. Having got a decree, the zemindar next petitioned that, in satisfaction of that decree, the jote itself might be put up for sale. With this petition the Collector's Court complied, and the jote was sold, the zemindar himself being the purchaser. It appears that, either before the sale or after, a claim was preferred by some third party, who alleged that 18 beegahs of land belonging to him had been improperly included in the sale. This claim was allowed, and the 18 beegahs of land were released. The sale was otherwise affirmed. The late owner of the jote now states that, under color of this sale, the zemindar, as purchaser, has got possession of a certain quantity of lakheraj land belonging to the jotedar. But he has not given proof of any single circumstance which can amount to fraud. Manifestly if, on the sale of his tenure and the decree-holder going to take possession of what he had bought, the jotedar found that he was being deprived of some portion of his lakheraj land, he might have applied to the Collector, who would have had power to set it right. That Act X. provides in such cases no right of appeal to a dissatisfied defendant, is a matter with which we have nothing to do; and it will give no jurisdiction to the Civil Court to entertain a question which ought to be disposed of by the Revenue Courts, if anywhere. It is now manifest that there really was no fraud in the matter, and that the plaintiff has brought into Court a suit which he is unable to sustain.

I think, therefore, that the suit was properly dismissed, and that this special appeal must be also dismissed with costs.

Hobhouse, J.—I concur.

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The 3rd August 1867.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble C. P. Hobhouse, *Judge*.

Boundary-suit—Map—Admission—Evidence.

Case No. 24 of 1867.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 4th of October 1866, affirming a decision of the Principal Sudder Ameen of that District, dated the 30th August 1864.

Gordon Stuart and Co. (Defendants), *Appellants*,

versus

Beejoy Gobind Chowdhry (Plaintiff), *Respondent*.

Baboo Nilmoney Sein for Appellants.

Baboo Mohinee Mohun Roy for Respondent.

If the defendants in a boundary-suit accepted in a former suit a particular map as correct, their acceptance is legal, though not conclusive, evidence against them in the boundary-suit, and is tantamount to an admission, and stands upon a very different footing from the decree in the first suit.

Peacock, C. J.—THE case has been tried upon the merits. The only question is as to the quantity of land to be apportioned to the respective parties as belonging to their respective villages. This depends upon the boundaries of those villages. The Judge says that the map made in the other suit has already been accepted by the parties as correct. That map defines the boundaries of the villages. The Judge was correct in apportioning the accretions according to those boundaries.

We cannot in special appeal reverse the Judge's judgment so far as it depends upon a question of boundary, which is a mere question of fact. If the defendants, Messrs. Gordon, Stuart, and Co., in a former suit accepted the particular map as correct, their acceptance is legal evidence against them in this suit, though not conclusive. It is tantamount to an admission, and stands upon a very different footing from the decree in that suit.

The judgment is accordingly affirmed with costs.

The 5th August 1867.

Present :

The Hon'ble W. S. Seton-Karr and Dwarkanath Mittra, *Judges*.

Mortgage—Lien—Priority.

Case No. 62 of 1867.

Regular Appeal from a decision passed by the Officiating Additional Principal Sudder Ameen of East Burdwan, dated the 23rd December 1866.

Messrs. Erskine and Co. (Plaintiffs), *Appellants*,

versus

Dhun Kishen Sein and others (Defendants), *Respondents*.

Mr. R. T. Allan and *Baboo Bungshee Dhur Sein* for Appellants.

Baboos Kishen Succa Mookerjee, Sreenath Doss, and *Bhowanee Churn Dutt* for Respondents.

Suit laid at Rupees 8,564.

A, indebted to *B*, binds himself to *B*, by deed, not to alienate his rights in certain property until his debt to *B* had been satisfied. *A* subsequently gives a putnee of that property to *C*. After the creation of such putnee, *B* sells to *D* the rights and interests of *A* under *A's* deed to *B*. HELD that *D* has no right in a suit against *C* to set aside the putnee, as such putnee had been created prior to *D's* purchase, and as the lien which *B* possessed had not passed to *D*.

Seton-Karr, J.—THE plaintiffs sued to set aside a putnee of two mouzahs, and to obtain khas possession of the same.

The facts out of which the present contention arises, as bare facts, are very little in dispute, but the position of the parties and the rights accruing to them out of that position have been both contested before us.

It seems that the defendants Nos. 4 to 8, being Okhoy Dutt and others, were indebted to the defendants Nos. 9 to 12 in the sum of 20,800 rupees; and on the 9th of Magh 1261, or the 21st of January 1854, a razeenamah and a safeenamah were filed by the parties, whereby the Dutts bound themselves not to transfer by gift or sale, or otherwise alienate a certain zemindaree known as Lot Biddea until the debt due to defendants 9 to 12, *viz.*, the Roys, had been satisfied. Failing this, a decree was to issue, and be executed accordingly. On the 20th of Pous 1266, or some years after the razeenamah

and safeenamah in question, the Dutts granted a putnee of two mouzahs of the Lot Biddea to the defendants Dhun Kishen Sein and others, Nos. 1 to 3, who are the real and substantial defendants in the present action. It has not been contended either in the Lower Court or before us that there was anything fraudulent and collusive in the putnee in question, though it is contended that, under the terms of the razeenamah, the Dutts had no right to create the putnee, and that the Seins should take nothing.

Then, on the 4th of Assin 1271, or sometime in September 1864, the defendant No. 13 purchased, at a sale in execution of decree, the rights of the Dutts, debtors in the suit which had been compromised, but in which execution was taken out failing the compromise, and then he transferred the same immediately afterwards to Messrs. Erskine.

On going to take possession, the plaintiffs found the defendants Nos. 1 to 3 in possession of their putnee, and so they have brought this suit to cancel the same, and to obtain khas possession of the mouzahs.

On this state of things, and on the action as brought, the Principal Sudder Ameen has held that the plaintiffs have no right to enforce the terms of the razeenamah, and to set aside the putnee created after the above deed; that the putnee was created long before their purchase; that they have acquired the rights of the debtors, and not those of the creditors; that the lien created under the razeenamah belongs to the creditors Nos. 9 to 12; that these latter, had they chosen, might have sued to set aside the alienation caused by the putnee, and to sell the property as it existed at the time of the razeenamah, but they did not; and that, all things considered, the plaintiffs bought nothing but the rights of the Dutts as they were in 1864 or 1271. Holding these views, the Principal Sudder Ameen dismissed the case.

In appeal before us, Mr. Allan, admitting that the plaint is not artistically framed, nor the action properly laid, still contends that he has a right to relief from the Civil Courts in his present action, on the following grounds:—

1st.—That his clients are the holders of decree No. 49, which is still unsatisfied.

2nd.—That, by the terms of the decree which was to be carried out if the razeenamah were violated, which decree his clients have purchased, the defendants Nos. 4 to 8 were interdicted, from alienation, and the other defendants Nos. 1 to 3 could take no beneficial interest by their putnee.

3rd.—That, if the defendants insist on retaining their putnee, they are bound to pay off the debt due to Messrs. Erskine as mortgagee and pledgee in the room of the original creditor.

It is quite certain that the plaint, as framed in this suit, did not disclose any such cause of action, nor did the plaintiffs therein ask for the relief which Mr. Allan now asks for, nor could we, under any view of the case, declare the putnee void, or give the plaintiffs khas possession as prayed for in the plaint.

At the same time, the third issue framed by the Principal Sudder Ameen did in some measure raise this question now before us. That issue is as follows:—

"Whether the decree, in execution of which Lot Biddea was sold, contained the condition that the said lot could not be transferred until the decretal debt was first satisfied: if so, can the putnee tenure created by the debtor-defendant stand good in law?"

It is not contended by the respondents before us that the creation of the putnee is not one of those alienations against which the razeenamah and safeenamah were intended to guard. And from the record it is clear that in September 1864 several decree-holders simultaneously attached the property, which was sold for the debt due on decree No. 49, in which the plaintiffs purchased, as well as for that due on decree No. 106, and it is also certain that the proceeds of the sale were distributed rateably among the various creditors, who all, more or less, took steps to attach and realize, though for some cause, which is not very clear, the decree in No. 49 was not satisfied either wholly or in part.

On the case as it stands, the question for our decision, on all the points raised by Mr. Allan, is, concisely put, whether his clients can be regarded as having a lien on the property alienated, and whether they can compel the putneedars either to give up their putnee, or to pay off the decree which barred all alienation before such payment.

In the course of arguments, the following cases have been quoted on both sides:—

Sudder Dewanny Adawlut Reports for 1859, page 345.

Sudder Dewanny Adawlut Reports for 1858, page 1206.

Weekly Reporter, Volume III., page 65.
Ditto, Volume IV., page 32.
Ditto, Volume I., page 316.
Ditto, Volume VI., page 13.

Miscellaneous Rulings.

And also two cases not printed, the one decided by Sir Charles Jackson and Kemp, JJ., on the 14th of January 1863, special appeal No. 156 of 1861; and the other by Bayley and Campbell, JJ., on the 23rd May 1863, special appeal No. 1157 of 1861.

The cases quoted from the decisions of the late Sudder Court are not in point. Of the decisions of the High Court, that reported in Volume IV., page 32, Civil Rulings, seems somewhat to favor Mr. Allan's contention, while those of 1863, not printed, are decidedly in favor of the respondents. The other cases do not help us much in settling the question.

Mr. Allan's position, in addition to the informal character of the plaint, is still further embarrassed by the fact that, in contravention of the terms of the razeenamah and safeenamah, his clients purchased, not only the property of the debtors, but the property of those who had been sureties for the debt. By the compromise, it had been provided that the property of the debtors should first be put up for sale, and then, if that proved insufficient, the property of the sureties should be sold. Thus, if the terms of the razeenamah and safeenamah have been substantially violated by the defendants who created the putnee, a similar disregard of the terms thereof has been shown by Mr. Allan's clients in purchasing the property put up to sale by defendants Nos. 9 to 12.

On the whole, after much consideration of the facts and arguments, I am inclined to the opinion that the decision of the Principal Sudder Ameen ought to be upheld, and that we ought not to grant the relief now prayed for in the present appeal. The defendants Nos. 9 to 12 really put up to sale, and Messrs. Erskine bought, the rights and interests of the debtors as they stood at the time of the sale, and the plaintiffs have no right to look for anything more than what was then attached and sold. The plaint was not that of a party who was seeking to enforce a lien which had been possessed by the judgment-creditor, and had passed to the plaintiff; and though mention was made of the improper alienation in the plaint, and though the point was raised in some shape before the Lower Court, I yet think that, looking to the position of all the parties, and to the course of the decisions on these controverted questions, Messrs. Erskine cannot be now said to stand in the shoes of the judgment-creditors.

The case quoted from Volume IV., Weekly Reporter, page 32, is one of considerable complexity, and the facts do not appear to be identical with the facts in the case before us. In that case the Judges held that the sale in execution actually passed to the plaintiffs the property which was mortgaged, because the plaint had asked for the actual realization of the mortgage and for a declaration of right to redeem.

Had the present suit been laid in the above form, the defendants might, perhaps, have set up a different defence, and they would have known clearly what they were called on to meet, while we have no means of ascertaining in the present suit whether any, and, if any, how much of the decree has been paid off, or why it has not been satisfied.

The case decided by Bayley and Campbell, JJ., on the 23rd of May 1863 seems exactly in point with the present case. There a creditor, who had a lien on certain properties, sold the rights and interests of his debtor, and bought them himself. When he wished to take, not only the rights and interests of the debtor, but rights alienated and in the possession of another, the Court held that he could not succeed without previous enforcement of mortgage, but that he would not be prejudiced if he chose to proceed against properties alienated after his lien, for any unsatisfied balance of his money.

The present case seems to me on all fours with the above.

The case decided by Sir C. Jackson and Kemp, JJ., is also in favor of the respondents, though the facts are not exactly the same.

It is true that Messrs. Erskine's case may be somewhat hard, and that the creation of the putnee was against the terms of the compromise. But the maxim "caveat emptor" would apply to their case, and I cannot think that they are now legally in any position but that in which the debtors were in 1271.

I am unable to say that the decision of the Lower Court is legally wrong; and, as I cannot see my way to granting the plaintiffs the relief which they now require, I would dismiss this appeal with costs.

Mittra, J.—I concur generally.

The 5th August 1867.

Present :

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Limitation—Section 77, Act X. of 1859.

Case No. 479 of 1867.

Special Appeal from a decision passed by Mr. H. S. Thompson, Principal Sudder Ameen of Backergunge, dated the 11th January 1867, affirming a decision passed by Baboo Brojokishore Sein, Moonsiff of that District, dated the 10th April 1866.

Prosunno Moyee (Defendant), *Appellant,*

versus

Ram Komul Sein and others (Plaintiffs), *Respondents.*

Baboo Roopnath Banerjee for Appellant.

Baboo Bama Churn Banerjee for Respondents.

When the object of a suit is directly to set aside an order passed under Section 77, Act X. of 1859, the limitation of one year applies; but, when a party sues on a general right to real property, 12 years' limitation applies.

Bayley, J.—DEFENDANT is special appellant. The only plea pressed before us is that this suit should have been brought within one year from the date on which the order was passed against plaintiff under Section 77, Act X. of 1859.

The rule of law is that, when the object is directly to set aside an order passed under Section 77, Act X. of 1859, the limitation of one year applies, but that there is no such restriction when a party sues, as plaintiff does here, on a general right to real property, to which 12 years' limitation applies. In this view we dismiss this special appeal with costs.

The 5th August 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Joint Hindoo family—Presumption of joint estate (Strict proofs to rebut)—Auction-purchaser.

Case No. 643 of 1867.

Special Appeal from a decision passed by Mr. A. Hope, Judge of Sarun, dated the 31st December 1863, reversing a decision passed by Moulvie Itrut Hossein Khan, Principal Sudder Ameen of that District, dated the 29th November 1864.

Lalla Sreedhur Narain (one of the Plaintiffs), *Appellant,*

versus

Lalla Modho Pershad and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboos Unnoda Pershad Banerjee, Romesh Chunder Mitter,* and *Mohesh Chunder Chowdhry* for Appellant.

Baboos Onookool Chunder Mookerjee and *Greesh Chunder Ghose* for Respondents.

Character of "strict proofs" which an auction-purchaser of the rights of one member of a joint Hindoo family can be expected to give in order to rebut the presumption in favor of joint estate in a joint Hindoo family.

Glover, J.—THIS was a suit to recover certain property by right of inheritance.

The circumstances are fully detailed in this Court's order of remand, dated 4th July 1866 (VI. Weekly Reporter 70); and the only question to be decided is the nature of Beharee the judgment-debtor's right in the property sold: in other words, were the mouzahs in question the separately acquired property of the elder brother Beharee, or did they belong to the family?

The High Court considered that, in trying this issue, the Judge below had not thrown the *onus* on the right party; that the presumption in a joint Hindoo family being that all the property was likewise joint, the

defendants, who put forward the special plea of separate acquisition by Beharee, were bound to prove it in the strictest manner.

The case was remanded accordingly.

The Judge has now re-considered his judgment after calling for further evidence, and has again come to the conclusion that the lands in dispute were the separately acquired property of Beharee, and were rightly sold in execution of the decree against him.

The plaintiff again appeals specially to this Court, urging that the evidence on which the Judge has found the property to have belonged separately to Beharee falls far short of the "strictest proof" required by the order or remand, and that the Judge's decision is nothing more than a re-capitulation of his former reasons—reasons which were held by this Court to be insufficient.

The new documentary evidence consists of a petition of Beharee Lall, a list of property signed by him, and a security-bond executed by his brother Binda Lall. The two former documents could be no direct evidence in favor of Beharee Lall's separate right, nor afford any presumption that the property dealt with in the name of one member of a joint-family did not belong equally to all.

The security-bond is relied upon to show that the family *quoad* the property now in suit was not joint; but the fact is that Binda Lall only pledged certain moveable property as security for his brother Beharee, so that the document after all proves nothing against the allegation that the family was in all respects joint and undivided.

Besides these documents, there is the evidence of two witnesses who depose that the property belonged to Beharee Lall, and was purchased by him, and that, from the date of his purchase, it remained in his possession.

Now, if the words of the remand-order are to be taken to mean that direct proof of the separate ownership of Beharee should be given by showing that the purchase-money was his alone, and that he alone received the rent of the land, the defendants' case must necessarily fail, or they are not in a position to give such evidence.

They are strangers, purchasers at an auction-sale without notice that any one, save Beharee, had any claim to the property. Beharee is now a plaintiff in this case, siding with his brother and opposing their claim; and the evidence (*i. e.*, the account-books of the estate) necessary to show who were the owners of the property is not in their power, but in that of their adversaries.

The utmost they could do was to show by documents admittedly executed by Beharee that he had always held himself out to the world as the sole owner of the property, and to prove by oral testimony that Beharee was the party who purchased the land and received its profits.

If, then, the words "strictest proof" are to be taken as meaning the strictest proof possible to the defendants under the circumstances of their position, we think that what they have given would be a sufficient carrying out of the High Court's order of remand.

We quite admit the force of Mr. Allan's argument for the appellant, and have no doubt of the correctness of the long current of decisions which establishes the presumption in favor of joint-estate in a joint Hindoo family; but, if the order of remand can be construed as we think it ought to be, the decision of the Judge below on the question of separate ownership by Beharee Lall becomes one of fact on evidence with which there is no interference possible in special appeal.

We think that the Judge laid an undue importance on the fact that the defendant waited nine years without objecting to the possession of Sadipore by the auction-purchasers; but, as he states distinctly in his judgment that he arrives at his conclusion on the evidence adduced on the remand taken with the evidence before given, his ruling on this point is of no importance.

The special appeal must be dismissed with costs.

The 6th August 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Plaint — Sections 26 and 29, Act VIII., 1859.

Case No. 284 of 1866.

Regular Appeal from a decision passed by Baboo Gunga Churn Shome, Principal Sudder Ameen of Sarun, dated the 18th May 1866.

Bishen Sahaye Singh (one of the Defendants), *Appellant*,

versus

Beer Kishore Singh and others (Plaintiffs), *Respondents*.

Baboo Debendro Narain Bose for Appellant.

Mr. R. T. Allan for Respondents.

Suit laid at Rupees 6,500.

A plaint, which is unnecessarily prolix, or argumentative, or which contains irrelevant matter, ought to be rejected by the Court to which it is presented, or ought to be returned to the plaintiff for amendment.

A plaint, which contains a prayer that the defendant may be criminally prosecuted for forgery, should be rejected.

Mere argument is (under Section 124 of Act VIII. of 1859) inadmissible even in a written statement.

THE plaintiffs sued to set aside a deed of sale of a two-annas share in a certain mouzah (bearing date the 7th of January 1862, corresponding with the 21st of Pous 1269 Fuslee), which deed they described as false and fraudulent.

The defendant Bishen Sahaye maintained the genuine character of the deed; but the Principal Sudder Ameen gave the plaintiff a decree, and recorded that the plaintiffs, if so minded, might proceed in the Criminal Court against the defendants.

In appeal we have heard both parties. But we have not thought it necessary to call on the appellant to reply to the respondents, who, in our opinion, utterly failed to support the judgment of the Lower Court, or to show us any grounds for supposing the deed to be false or fraudulent.

The deed of sale is of recent date. It was executed at the station of Motihari, in the district of Chumparun, and was duly registered. It is deposed to by several witnesses who give a clear and connected account of the execution, and of the payment of the consideration-money, and of the reasons for the sale.

It is true that oral evidence of this kind requires to be carefully scrutinized, and to be considered in connection with all the probabilities of the case. But the reasons assigned by the Principal Sudder Ameen for discrediting this evidence are frivolous and unsatisfactory; for example, he states (as facts tending to discredit them) that the witnesses made discrepant statements, not in the number of rupees, but in the number of annas in the consideration-money, and as to the exact day of registration.

Mr. Allan for the respondents, the plaintiffs, dwells on the absence of the Mooktear Gujraj Singh, at whose house in Motihari the deed is said to have been drawn out. But the appellant shows that he twice endeavoured to procure the attendance of this person without effect; and the plaintiffs might themselves have subpœnaed him, and otherwise have enforced his attendance in Court if they thought the appellant was intentionally keeping him out of the way.

That the deed should be executed at Motihari, where neither of the parties reside, is not surprising. Both parties, we are told, reside in the district in different villages, and the sudder station offers to such parties facilities both for registration and execution. But, admitting that the evidence to the execution and payment of consideration discovers no higher commendation than that it is precise, and that it goes to prove the points which the defendant wished to prove, the probabilities drawn from the conduct and position of the parties are altogether in favor of the genuineness of the deed.

A *patowa* lease, that is, a lease in the nature of an usufructuary mortgage, had been granted by the plaintiff for four annas of the mouzahs in dispute, to Messrs. Hill, indigo-planters in the neighbourhood. This lease had been granted on the 8th of November 1856, or in 1264, and was to run to 1273.

On the 9th of February 1863, or rather more than a year after the sale which is now impugned, the plaintiffs are shown to have granted to the above gentlemen a fresh lease, not indeed of four annas, but of two annas of the village, and the new lease was to run from 1271 to 1285.

The defendant shows that he also granted a lease of the remaining two annas of the village, being the share which he had purchased from the plaintiffs, about the same time or on the 3rd of February 1863; and he argues that these facts are strong corroborations of the sale to him by the plaintiff, inasmuch as there would be no reason why the plaintiffs, who had given Messrs. Hill a lease of the four annas, which lease had not expired in 1271, but was to run on to 1273, should give a fresh lease of a similar portion of the property before the expiry of the first lease.

It seems to us that the only rational solution of the fact is that the plaintiff had, previous to the expiry of the first lease or in 1269, parted with one-half of the property,

and that Messrs. Hill then procured from the purchaser a lease for two annas, and a renewal from the original proprietor of two annas more, thus making up the whole four annas of the mouzahs.

The explanation given by the plaintiffs' witnesses of this remarkable fact is that Messrs. Hill wore out the plaintiffs, by their importunities, and forced them to give a lease. This explanation is childish and absurd.

The Principal Sudder Ameen appears to have felt the difficulty created by the plaintiffs' conduct in this respect; but he gets over it by saying that it is not sufficient to outweigh the other improbabilities. A true perception of the rights of the case might have led him to the conclusion that this one fact gave strength and consistency to the direct evidence, and that the improbabilities existed only in imagination, and had no substance.

There are other points in the case which make in the defendants' favor.

The plaintiffs argue that, if the deed were genuine, they would have signed the same themselves, and would not have signed by the pen of Kunjun Sahoo. But it is shown that they were in the habit of executing other deeds in the same way and by the pen of one person.

The mortgage-deed of the 5th of Magh 1266 to Anarkoli, the mother of the defendant, and the mooktearnamah of the 2nd of April 1858, are executed in the same manner. The *patowa* deed of 1856 is also executed by one person, Ram Narain, for himself and others. Only in a deed, dated 14th of March 1865, do the plaintiffs all sign in their own persons.

The plaintiffs lay stress on the deed of mortgage to Anarkoli, which, they say, is in their hands, and was produced by them, and not by the defendant. But, as the plaintiffs still retained their right in a part of the property, it is not surprising that the mortgage-deed should remain with them. There is a visible alteration in the indorsement on the said deed, the month of Chyet 1268 having been substituted for some other date; and this alteration makes the document wholly worthless for the purpose for which it was put in evidence by the plaintiffs.

The defendants have given evidence to show that this deed of mortgage was paid off at the time of the sale, or on the 7th of January 1862; and the plaintiffs have not shown how or when otherwise this debt was paid off by them.

The motive alleged by the plaintiffs for the forgery of the deed is not proved, and is improbable. It is simply alleged that the defendant and Messrs. Hill have concerted measures to defraud the plaintiff. If this were really the case, no importunity on the part of Messrs. Hill would have succeeded in wresting a second lease from the plaintiffs when the first lease had yet two years to run. And the plea of any misunderstanding with Messrs. Hill rests on nothing except petitions to the Magistrate against Messrs. Hill of no later date than 1844 and 1845—petitions which are no possible evidence in this suit to which Mr. Hill is not a party.

The first lease admittedly granted by the plaintiffs to Messrs. Hill in 1856 shows clearly that any difficulties which had previously existed had been adjusted satisfactorily.

The defendants have, in fact, shown abundant cause why the plaintiffs' suit should never have been decreed. Motive for a fraud so daring and bare-faced is altogether wanting on the part of the defendants; while, on the other hand, it is perfectly easy to conceive why a person, situated as the plaintiffs are, might wish to turn round and repudiate his own act and deed.

It is wholly impossible for us, at this stage, to accede to Mr. Allan's request that the case be remanded for the evidence of the plaintiffs and defendants, and for that of Messrs. Hill to be recorded. No doubt, the case could not be properly tried without examining the plaintiffs; and it is incomprehensible to us that they should not have been examined. But they allowed the case to be decided without tendering themselves as witnesses, and they have failed to prove even a *primâ-facie* case. Under such circumstances, we have no power to remand the suit.

Before concluding, it appears to us to be necessary to remark at some length upon the plaint which has been placed upon the record in this case.

The plaint is of such a nature that no Court which paid the smallest attention to the provisions of the Code of Civil Procedure could have admitted it upon its files. It is drawn in defiance of the directions of the Code, and contains nearly every fault which a plaint can have, being most unnecessarily prolix, argumentative, and full of matter which is wholly irrelevant.

Section 26 of Act VIII. of 1859 is as follows: "The plaint shall be distinctly "written in the language in ordinary use in "proceedings before the Court, and shall "contain the following particulars:—

"1. The name, description, and place of "abode of the plaintiff.

"2. The name, description, and place of "abode of the defendant, so far as they can "be ascertained.

"3. The relief sought for, the subject of "the claim, the cause of action, and when it "accrued; and, if the cause of action accrued "beyond the period ordinarily allowed by "any law, for commencing such a suit, the "ground upon which exemption from the "law is claimed."

Section 29 enacts that, "if the plaint do "not contain the several particulars herein- "before required to be specified therein, or "if it contain particulars other than those "required to be specified, whether relevant "to the suit or not, or if the statement of "particulars be unnecessarily prolix, or if "the plaint be not subscribed and verified as "hereinbefore required, the Court may re- "ject the plaint, or, at its discretion, may "allow the plaint to be amended."

How far have these directions been attended to?

The suit is brought simply for the purpose of obtaining a declaration that a certain deed which purports to have been executed by the plaintiffs is a forgery, and not binding upon the plaintiffs.

The first paragraph of the plaint is to the following effect:—

"Suit for setting aside a fraudulent and "fabricated deed of sale, purporting to have "been executed on the 7th January 1862, "corresponding with Pous 1262 Fuslee, *and* "*for causing the defendants to be tried for* "*forgery;* laid at Rupees 6,500, being the "consideration-money covered by that deed. "The cause of action has accrued from the "month of December 1863, when the plaint- "iffs became cognizant of the forgery." Now, if the plaint had gone no farther than this, it would have contained all that was necessary, and would have been framed in accordance with the directions of the Code of Civil Procedure, except in so far as concerns the words "and for causing the defendants to be tried for forgery:" for we must make this exception as it is certainly a novel idea that, in order to have a man prosecuted for forgery, it is necessary to institute a civil suit. But, even if the whole plaint had consisted only of the one paragraph just quoted, it ought to have been rejected, or to have been returned that it might be amended by striking out all reference to criminal proceedings. This paragraph, however, is merely the introduction, and is in length only about a thirteenth part of the whole plaint.

We proceed to give some extracts from what follows:—

"It appears from a copy of the fraudulent "and fabricated deed of sale that the defend- "ant No. 1 has made the plaintiffs declare "in it the fact that, out of the consideration- "money amounting to Rupees 6,500, the "putowa (or mortgage) money due to Henry "Hill and Co., amounting to Rupees 548-4, "are kept in deposit, and Rupees 5,951-12 "are received in cash to meet the demand of "Mussamut Anarkoli Koer, and defray other "necessary expenses; but this Clause (in the "deed) *is the result of the foulest device.* "If the putowa-money, Rupees 548-4, due "to Henry Hill, were payable out of the "usufruct of putowa property, then what was "the use of selling the property? It would "be absurd to suppose that anybody would "sell his estate to satisfy a putowa debt. As "for the debt due to Mussamut Anarkoli Koer, "it was paid by the plaintiffs out of their "own money: the said Clause in the deed of "sale is the *result of the foulest device,* and "has been introduced in it to carry out a "fraudulent design."

The whole of this is mere argument, and would (under Section 124) be inadmissible even in a written statement in which more latitude is allowed than in a plaint. How much more inadmissible is it in a plaint which under Section 29 ought to contain *nothing* save the particulars specified in Section 26? The plaint continues:—

"It is usual to have deeds of sale attested "by known and trustworthy persons, but "this deed of sale has been attested by "eight persons including the writer, all of "whom are residents of different and dis- "tant villages. It would be improbable to "suppose that people of different villages "would assemble at a particular place for no "other reason than to attest (a deed). This "circumstance alone is sufficient to show "that the deed of sale in question is a fabri- "cation.

"Of the marginal witnesses and the wri- "ter of the said deed Ram Protab Lall si

"one who *is under the influence of defend-*
"*ant No. 1*, and the putwaree of Mouzah
"Boronenha which is leased out to him (de-
"fendant No. 1). He, the said Ram Protab
"Lall, *has already deposed on behalf of de-*
"*fendant No. 1's father* Lall Bahadoor Lall
"of Boronenha, *is the son of one Sree Lall,*
"*whose attestation as a witness is to be*
"*found in a fabricated bond* dated 1st Fal-
"goon 1269 F. Sheopersad Roy of Hurnath
"is *the son of one Doorga Roy's brother,*
"*who has already deposed for the father of*
"*defendant No. 1.* Gujraj Sing, the writer,
"is also one who has *already deposed for*
"*the father of defendant No. 1* in a suit
"which Oomrao Sing had brought against
"him (defendant No. 1's father). In such
"a state of things, it is clear that the wit-
"nesses named above consist of dependents
"and servants of the defendant and his father.
"These are the persons *who act the part of*
"*mendacious witnesses whenever it is neces-*
"*sary:* they are produced in Court and
"examined whenever it is deemed expedient
"to do so; the deed and document in ques-
"tion have been *fabricated in collusion with*
"*them.*"

This again is a mere statement of evidence and argument, and an attempt to throw dirt beforehand upon those who, as the plaintiffs presumed, would be called to prove that they had executed the deed, and who would, when in Court, be open to cross-examination in a proper way.

Further on is to be found what can only be looked upon as gratuitous abuse of the proprietor of an indigo-factory in the neighbourhood against whom numerous charges of fraud are made.

"This very defendant, Bishen Suhoye Singh,
"having *colluded with the proprietor of the*
"*indigo-factory at Suraha, an old enemy*
"*of plaintiffs, and one who has, from the*
"*very beginning, been devising, mischievous*
"*plans to defraud* them, the plaintiffs, of their
"lands, *fabricated* two bonds for Rs. 200,
"each purporting to have been executed by
"these plaintiffs in his favor on the 28th
"Srabun 1270. * * * * This circum-
"stance clearly shows that all the witnesses
"are men under the influence of Bishen
"Suhoye Singh. Bishen Suhoye Singh, rely-
"ing on the submissive character of these
"men, fabricated the deed of sale in question
"and three bonds *at the instigation of the*
"*proprietor of the indigo-factory at Suraha*
"*between whom and the plaintiff there exist*
"*a chronic enmity.*

"The fact is, that various disputes have
"been existing between the proprietor of the
"indigo-factory at Suraha and the plaintiffs,
"and their *mooris* from a period antecedent
"to this, as will appear on a reference to
"a number of papers which exist in sup-
"port of this statement. *The proprietors*
"*of the indigo-factory have from the very*
"*beginning been concerting measures*
"*to defraud the plaintiffs* of their estate;
"but, on matters being carried before and
"tried by judicial functionaries, their at-
"tempts have proved abortive. The said
"Saheb has forcibly caused a (deed of)
"putowa to be executed through the pen of
"one Kunchun Sahoo alone. *Bishen Suhoye*
"*Singh is an (bahumkar) accomplice,* or one
"who is interested in the success of the fac-
"tory. The proprietor of the indigo-factory
"has caused bonds and a deed of sale to be
"fabricated by his *elakadar* and *bahumkar*
"Bishen Suhoye Singh with intent to defraud
"the plaintiffs of their lands. All witnesses
"consist of defendant's friends, *accomplices* of
"Bishen Suhoye Singh."

It is almost incredible that, after all these charges against Mr. Hill, he was not made a party to this suit, and was not even examined as a witness; nor was there any proof given of the truth of any one of the charges made against him.

The plaint ends with the prayer "that
"the Court will be pleased to take the par-
"ticulars above adverted to into its kind
"consideration, and, after listening to the
"arguments and instituting the necessary
"inquiries, set aside the said deed, *try the*
"*defendant (criminally),* and award the
"plaintiffs their costs from the defend-
"ants."

We have deemed it our duty to go at length into the details of the plaint, and to point out its numerous defects, because it appears to us to be necessary that this Court should do its utmost to check the obstinate and perverse disregard of the provisions of the Code of Civil Procedure which many of the subordinate Courts evince. In the present instance, the plainest and simplest directions of the Code have been wholly neglected. Neither as a plaint, nor as a written statement, ought such a document as this plaint ever to have been allowed to be placed upon the files of any Court.

We have now only to pronounce our decision that the judgment of the Lower Court be reversed, and that the suit of the plaintiffs be dismissed with all costs in all Courts.

The 6th August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Act XIX. of 1843—Registered and unregistered Kobalas—Fraudulent sale.

Case No. 670 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 22nd January 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 30th June 1866.

Mussamut Butoolun (one of the Defendants), *Appellant,*

versus

Mussamut Ozeerun (Plaintiff) and another (Defendant), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Greesh Chunder Ghose for Respondents.

Act XIX. of 1843 gives the preference, generally speaking, to a subsequent *kobala* which is registered over a prior one unregistered. To avoid its operation, plaintiff must show that the vendor not only sold and parted with his rights in the property, but actually made over possession to him.

If, however, the second sale was illusory, proving fraud on the part of the vendor, it would not stand in the way of plaintiff's right.

Jackson, J.—It appears to me that the decision of the Principal Sudder Ameen in this case does not dispose of the whole cause. It would have been a sufficient judgment if the case had been only between the plaintiff and his vendor, and if there had been no question between the prior unregistered and the subsequent registered kobala. But, as the case stands, generally speaking, Act XIX. of 1843 gives the preference to the subsequent registered kobala. In order to avoid the operation of that law, the plaintiff would have to show that the vendor had not only sold and parted with his rights in the property, but had also made over possession to him. If it were so under several decisions of this Court, the operation of Act XIX. would be avoided, and the plaintiff would succeed.

Then a further question arises in this case. It seems to have been alleged by plaintiff that the second transaction—the sale to the defendant Butoolun and others—was really a sham, an illusory sale got up merely for the purpose of defeating the plaintiff's title under his prior purchase. Of course, if that allegation were established, that would also entitle the plaintiff to a decree, because there would be then fraud on the part of the vendor, and the subsequent vendees which would not be allowed to stand in the way of plaintiff's right.

I think, therefore, that the suit must be remanded to the Lower Appellate Court, in order that it may determine, *first*, whether possession passed to the plaintiff under his bill of sale, and, if so, that he ought to get his decree; *secondly*, if necessary, what the character of the second sale really is, whether it was *bond fide* as to the defendant Butoolun and others, or a mere collusive trick in order to defeat the plaintiff's rights. If the latter allegation be proved, of course, the plaintiff will be equally entitled to succeed.

The Court of first instance refers to the subject of possession, and says it is not probable that the plaintiff could have got possession. He appears to have overlooked the allegation in the defendant's written statement, which distinctly shows that the plaintiff has somehow or other got into possession. It will be important to ascertain what the character of that possession was, whether it was a possession acquired by the plaintiff under his bill of sale, or a subsequent and collusive possession which he had surreptitiously obtained by the means of other parties, lessees.

Hobhouse, J.—I concur.

The 6th August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Sale in execution—Setting aside of decree.

Case No. 917 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 31st January 1867, affirming a decision passed by the Moonsiff of that District, dated the 21st February 1866.

Pearee Monee Dossee and another (Plaintiffs), *Appellants,*

versus

The Collector of Beerbhoom and another (Defendants), *Respondents.*

Baboo Bhogobutty Churn Ghose for Appellants.

Baboos Kishen Kishore Ghose, Mohendro Lall Seal, and *Umurnath Bose* for Respondents.

A sale in execution of a decree for costs is not cancelled, when that part of the decree which made the plaintiff answerable for the costs is set aside.

Jackson, J.—THE plaintiff sued to have the sale of his property set aside. The sale had taken place in execution of decree for costs at the suit of Government. That part of the decree which made this plaintiff answerable for those costs was afterwards set aside, and they contend that the sale ought to fall. A case decided by a bench of this Court is directly against the plaintiff's contention (VII. Weekly Reporter, page 312). This decision, which has been cited by Baboo Kishen Kishore Ghose, who appears for Government, and in which we entirely concur, is conclusive upon the point.

The pleader for the special appellant sought to bring before us an unauthenticated manuscript copy of a decision said to have been made in this Court in 1865. Such a case cannot, I think, be received in opposition to a reported case.

The special appeal must be dismissed with costs, a separate set of costs being awarded to the purchaser-defendant.

Hobhouse, J.—I concur.

The 6th August 1867.

Present :

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Limit of minority in the case of Mahomedans.

Case No. 918 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 25th January 1867, reversing a decision passed by the Moonsiff of Seetakoond, dated the 14th May 1866.

Abdool Oahab Chowdhry and others (Defendants), *Appellants,*

versus

Mussamut Elias Banoo and others (Plaintiffs), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellants.

Baboo Gireeja Sunkur Mojoomdar for Respondents.

In the case of Mahomedans, not subject to the Court of Wards, the limit of minority is at least 16 years.

Jackson, J.—THE special appeal in this case is, that the Principal Sudder Ameen, who heard the appeal below, has found that limitation does not apply to the case of the plaintiffs, inasmuch as they sued within three years after attaining their majority which he interpreted to mean the age of 16, and the special appellant contends that, in the case of Mahomedans not being subject to the Court of Wards, the limit is 15 years. He is unable to refer to any rule of law or any decision which fixes the limit of minority in cases of such Mahomedans at 15 years : whereas the clear principle of Mahomedan Law itself is that 16 years shall be the limit, unless in certain specified cases within which the present case does not fall.

I myself entertain a strong opinion that, since the passing of Act XL. of 1858, in the case of all Hindoos and Mahomedans not subject to the Court of Wards, the period of majority at which disqualification ceases is the full age of 18 years. There are some rulings of this Court to the contrary; and, if the necessity arose, I should be inclined to refer this question for the decision of a Full Bench. But there is nothing whatever to show that the limit should be 15 and not 16 years. I think, therefore, that the special appeal should be dismissed with costs.

Hobhouse, J.—I concur with my learned colleague that the proper limit in this case is at least 16 years.

The 7th August 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Usufructuary mortgage.

Case No. 92 of 1867 under Act X. of 1859.

Regular Appeal from a decision passed by Moulvie Ali Hossein, Deputy Collector of Bhaugulpore, dated the 26th February 1867.

The 7th August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Admitting review without notice—Section 378, Act VIII., 1859.

Cases Nos. 178 and 179 of 1867.

Miscellaneous Appeals from an order passed by the Judge of Bhagulpore, dated the 22nd January 1867, reversing an order passed by the Sudder Ameen of that District, dated the 24th July 1865.

Mussamut Golaboo and others (Judgment-debtors), *Appellants,*

versus

Ram Dyal Singh and others (Decree-holders), *Respondents.*

Baboo Nil Madhub Sein for Appellants.

Baboo Mohinee Mohun Roy for Respondents.

A proceeding admitting a review, without notice to the opposite party, as required by Section 378 of the Code of Civil Procedure, is wholly vitiated by such defect, and not binding on that party.

Jackson, J.—THE decision of the Judge in this case appears to me to be in direct conformity with a precedent of this Court, to be found at page 91, VI. Weekly Reporter, and the senior of the learned Judges, who remanded this case to the Court below, was the Judge who sat with me on that occasion. And whatever error there may at first have been in the proceedings of the Court below in this matter, in entertaining an objection not then raised before it, has doubtless been cured by its being properly raised now. It appears quite clear that the execution of decree had become barred by limitation previous to the application in November 1862, that it was rejected on that ground in January 1863. It appears to me that the subsequent proceeding, admitting a review of that order in the absence of the opposite party, was not merely an irregularity, but a proceeding which was wholly vitiated by that defect, and in no way binding on the judgment-debtor. Section 378 of the Code of Civil Procedure is express, no review of judgment shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree of which a review is solicited. No order, therefore, obtained upon a review in the absence of the opposite party, could be for a moment upheld against a manifestly valid and correct decision that this decree had already been barred by limitation. The revival of it, therefore, was plainly a dishonest and unwarrantable proceeding, and the Judge was right, I think, in reversing the decision of the Court below.

The appeals are dismissed in No. 179 with costs, in the other case without costs, as the respondent does not appear.

Hobhouse, J.—I concur.

The 7th August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Case No. 208 of 1867.

Sale in execution—Objection disallowed—Appeal—Sections 223, 246, 247, 364 of Act VIII., 1859, and Section 11, Act XXIII., 1861.

Miscellaneous Appeal from an order passed by the Judge of Mymensingh, dated the 23rd February 1867.

Narain Acharjee Chowdhry (Judgment-debtor), *Appellant,*

versus

Mr. E. Gregory (Decree-holder), *Respondent.*

Mr. R. V. Doyne and *Baboos Mohinee Mohun Roy* and *Mohinee Mohun Burdhun* for Appellant.

Messrs. J. T. Woodroffe and *C. Gregory* for Respondent.

Where the holder (*G*) of a simple money-decree, who is at the same time a mortgagee, applies to a Civil Court to sell mortgagor's property in execution of the said decree, such property having previously been sold in execution of *K's* decree and purchased by *N* (*G's* claim upon it being at the same time notified), and in his (*G's*) application inserts the name of *N*, and calls him a judgment-debtor in the room of the heir and representative of the deceased debtor; and the purchaser comes in and denies that he is a judgment-debtor or liable, and asks for the release of the property, and the Judge disallows his objection:

HELD that, if the Judge's order was made after investigation, then, under Section 246 of Act VIII., 1859, an appeal is barred. If it was an order refusing to investigate the objection, then the appeal is barred either by Section 247 or by Section 364, unless allowed by Section 11, Act XXIII. of 1861.

HELD also that the objector was not a party to the suit, and that he was not entitled to appeal under Section 11.

Section 223, Code of Civil Procedure, can have no bearing on this case.

Jackson, J.—IT appears to me that the law does not allow an appeal in this case.

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It seems that Mr. Gregory lent a considerable sum of money to Mehdi Ally, and took a mortgage of a portion of his landed estate. Desiring, afterwards, to recover that money, he instituted a common suit in the Civil Court of Dacca upon the bond, and recovered in that suit a simple money-decree. The Judge considers that, by some operation of a decision of the Chief Justice and myself to be found in the VI. Weekly Reporter, page 13, the simple money-decree had been converted into a decree upon a mortgage. That is a misapprehension of the Judges, for our decision went solely upon the circumstance that Gregory was at the same time a mortgagee and a decree-holder. However, Mr. Gregory, being such decree-holder and mortgagee, applied to the Judge of Mymensingh, where the decree had been sent for execution, and in which district this property is situated, to sell the mortgagor's interest in the property in satisfaction of the balance due upon Mr. Gregory's decree. That share of the property had been previously sold in execution of decree of Kali Narain Chowdhry, and had been purchased by this appellant Narain, Gregory's claim upon it being at the same time notified. Mr. Gregory, in his application to the Court for execution, inserted the name of the purchaser Narain in the 2nd and 7th columns of the tabular form in which application to execute a decree is made in the Mofussil Courts. He called him a judgment-debtor in the room of Mirza Ali, the heir and representative of the deceased debtor Mehdi Ally, and he indicated the purchaser as one of those against whom he sought execution. The purchaser, having received notice of this application, came in and presented a petition, in which he denied that he was judgment-debtor, or that he was liable to pay the amount of Mr. Gregory's decree. He recited the fact of his own purchase of that property in Kali Narain's execution, and he asked the Court to release the property from attachment.

The Judge evidently understood this objection to have been preferred under Section 246 of the Civil Procedure Code, and he proceeded to consider it. In considering the objection he states: "It would be impossi-"ble to decree that Gregory had no right to "the surplus proceeds, because it was not "equitable that the purchaser should hold "the property released from Gregory's lien, "and then to decree that Gregory should not "enforce his lien, because that property had "been bought by this objector." The Judge forgets that the mode for the mortgagee to assert his rights is by a separate suit. He proceeds to say: "The objection is disallowed." It is not clear, whether he means to say, "I think the objection is ground-"less, and that the decree-holder's claim to "sell the property must prevail," or to say that "it is not a case arising under Section "246." But manifestly it was either an order upon the merits of the objection, or it was an order refusing to investigate that objection. If it was an order made after investigation, then clearly by Section 246 the appeal is barred: if it was an order refusing to investigate that objection, then I think the appeal is barred either by Section 247 or by Section 364, unless the appeal is given by Section 11 of Act XXIII. of 1861.

Then it is necessary to consider whether the appellant can be looked upon in the light of a party to the suit so as to be entitled to appeal under Section 11. It appears to me that he is not. He is not a personal representative of any of the parties to the suit, but he has acquired, by a sale of the Court in execution of another man's decree, some property which the decree-holder (the plaintiff in this suit) sought to bring to sale.

Mr. Doyne, in the course of his argument, referred to alienations made *pendente lite*, with the view of showing that the purchaser was involved in the debtor's liability, and thus became a party to the suit, and I confess I was taken by surprise by his reference to Section 223. That Section can have no bearing upon this case. It relates to execution of decrees for immoveable property; and, if this had been a suit directly to get possession or one to bring under the operation of the mortgage, this particular property, then unquestionably the alienation of it during that suit, would have been subject to Section 223, and that party who obtained the decree would have been entitled to immediate possession of it. But this was a mere money-decree.

Thus arises the question which I put to Mr. Doyne how, in such cases, when there has been no preliminary attachment or injunction under the Code, property which was in the uncontrolled disposition and power of the defendants, and has been alienated before decree, could be followed in the hands of the purchaser without a suit being brought for that purpose. That question was not answered. But I think the appeal in this case is clearly barred by the several Sections which I have quoted.

The 7th August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Admitting review without notice—Section 378, Act VIII., 1859.

Cases Nos. 178 and 179 of 1867.

Miscellaneous Appeals from an order passed by the Judge of Bhagulpore, dated the 22nd January 1867, reversing an order passed by the Sudder Ameen of that District, dated the 24th July 1865.

Mussamut Golaboo and others (Judgment-debtors), *Appellants,*

versus

Ram Dyal Singh and others (Decree-holders), *Respondents.*

Baboo Nil Madhub Sein for Appellants.

Baboo Mohinee Mohun Roy for Respondents.

A proceeding admitting a review, without notice to the opposite party, as required by Section 378 of the Code of Civil Procedure, is wholly vitiated by such defect, and not binding on that party.

Jackson, J.—THE decision of the Judge in this case appears to me to be in direct conformity with a precedent of this Court, to be found at page 91, VI. Weekly Reporter, and the senior of the learned Judges, who remanded this case to the Court below, was the Judge who sat with me on that occasion. And whatever error there may at first have been in the proceedings of the Court below in this matter, in entertaining an objection not then raised before it, has doubtless been cured by its being properly raised now. It appears quite clear that the execution of decree had become barred by limitation previous to the application in November 1862, that it was rejected on that ground in January 1863. It appears to me that the subsequent proceeding, admitting a review of that order in the absence of the opposite party, was not merely an irregularity, but a proceeding which was wholly vitiated by that defect, and in no way binding on the judgment-debtor. Section 378 of the Code of Civil Procedure is express, no review of judgment shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree of which a review is solicited. No order, therefore, obtained upon a review in the absence of the opposite party, could be for a moment upheld against a manifestly valid and correct decision that this decree had already been barred by limitation. The revival of it, therefore, was plainly a dishonest and unwarrantable proceeding, and the Judge was right, I think, in reversing the decision of the Court below.

The appeals are dismissed in No. 179 with costs, in the other case without costs, as the respondent does not appear.

Hobhouse, J.—I concur.

The 7th August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Case No. 208 of 1867.

Sale in execution—Objection disallowed—Appeal—Sections 223, 246, 247, 364 of Act VIII., 1859, and Section 11, Act XXIII., 1861.

Miscellaneous Appeal from an order passed by the Judge of Mymensingh, dated the 23rd February 1867.

Narain Acharjee Chowdhry (Judgment-debtor), *Appellant,*

versus

Mr. E. Gregory (Decree-holder), *Respondent.*

Mr. R. V. Doyne and *Baboos Mohinee Mohun Roy* and *Mohinee Mohun Burdhun* for Appellant.

Messrs. J. T. Woodroffe and *C. Gregory* for Respondent.

Where the holder (*G*) of a simple money-decree, who is at the same time a mortgagee, applies to a Civil Court to sell mortgagor's property in execution of the said decree, such property having previously been sold in execution of *K's* decree and purchased by *N* (*G's* claim upon it being at the same time notified), and in his (*G's*) application inserts the name of *N*, and calls him a judgment-debtor in the room of the heir and representative of the deceased debtor; and the purchaser comes in and denies that he is a judgment-debtor or liable, and asks for the release of the property, and the Judge disallows his objection:

HELD that, if the Judge's order was made after investigation, then, under Section 246 of Act VIII., 1859, an appeal is barred. If it was an order refusing to investigate the objection, then the appeal is barred either by Section 247 or by Section 364, unless allowed by Section 11, Act XXIII. of 1861.

HELD also that the objector was not a party to the suit, and that he was not entitled to appeal under Section 11.

Section 223, Code of Civil Procedure, can have no bearing on this case.

Jackson, J.—IT appears to me that the law does not allow an appeal in this case.

It seems that Mr. Gregory lent a considerable sum of money to Mehdi Ally, and took a mortgage of a portion of his landed estate. Desiring, afterwards, to recover that money, he instituted a common suit in the Civil Court of Dacca upon the bond, and recovered in that suit a simple money-decree. The Judge considers that, by some operation of a decision of the Chief Justice and myself to be found in the VI. Weekly Reporter, page 13, the simple money-decree had been converted into a decree upon a mortgage. That is a misapprehension of the Judges, for our decision went solely upon the circumstance that Gregory was at the same time a mortgagee and a decree-holder. However, Mr. Gregory, being such decree-holder and mortgagee, applied to the Judge of Mymensingh, where the decree had been sent for execution, and in which district this property is situated, to sell the mortgagor's interest in the property in satisfaction of the balance due upon Mr. Gregory's decree. That share of the property had been previously sold in execution of decree of Kali Narain Chowdhry, and had been purchased by this appellant Narain, Gregory's claim upon it being at the same time notified. Mr. Gregory, in his application to the Court for execution, inserted the name of the purchaser Narain in the 2nd and 7th columns of the tabular form in which application to execute a decree is made in the Mofussil Courts. He called him a judgment-debtor in the room of Mirza Ali, the heir and representative of the deceased debtor Mehdi Ally, and he indicated the purchaser as one of those against whom he sought execution. The purchaser, having received notice of this application, came in and presented a petition, in which he denied that he was judgment-debtor, or that he was liable to pay the amount of Mr. Gregory's decree. He recited the fact of his own purchase of that property in Kali Narain's execution, and he asked the Court to release the property from attachment.

The Judge evidently understood this objection to have been preferred under Section 246 of the Civil Procedure Code, and he proceeded to consider it. In considering the objection he states: "It would be impossible to decree that Gregory had no right to "the surplus proceeds, because it was not "equitable that the purchaser should hold "the property released from Gregory's lien, "and then to decree that Gregory should not "enforce his lien, because that property had "been bought by this objector." The Judge forgets that the mode for the mortgagee to assert his rights is by a separate suit. He proceeds to say: "The objection is disallowed." It is not clear, whether he means to say, "I think the objection is groundless, and that the decree-holder's claim to "sell the property must prevail," or to say that "it is not a case arising under Section "246." But manifestly it was either an order upon the merits of the objection, or it was an order refusing to investigate that objection. If it was an order made after investigation, then clearly by Section 246 the appeal is barred: if it was an order refusing to investigate that objection, then I think the appeal is barred either by Section 247 or by Section 364, unless the appeal is given by Section 11 of Act XXIII. of 1861.

Then it is necessary to consider whether the appellant can be looked upon in the light of a party to the suit so as to be entitled to appeal under Section 11. It appears to me that he is not. He is not a personal representative of any of the parties to the suit, but he has acquired, by a sale of the Court in execution of another man's decree, some property which the decree-holder (the plaintiff in this suit) sought to bring to sale.

Mr. Doyne, in the course of his argument, referred to alienations made *pendente lite*, with the view of showing that the purchaser was involved in the debtor's liability, and thus became a party to the suit, and I confess I was taken by surprise by his reference to Section 223. That Section can have no bearing upon this case. It relates to execution of decrees for immoveable property; and, if this had been a suit directly to get possession or one to bring under the operation of the mortgage, this particular property, then unquestionably the alienation of it during that suit, would have been subject to Section 223, and that party who obtained the decree would have been entitled to immediate possession of it. But this was a mere money-decree.

Thus arises the question which I put to Mr. Doyne how, in such cases, when there has been no preliminary attachment or injunction under the Code, property which was in the uncontrolled disposition and power of the defendants, and has been alienated before decree, could be followed in the hands of the purchaser without a suit being brought for that purpose. That question was not answered. But I think the appeal in this case is clearly barred by the several Sections which I have quoted.

As far as we can see, the Judge's decision was wrong; but, if the law has thought fit to forbid appeals in such cases, and to refer parties to a regular suit to establish their rights, that is a matter with which we have no concern.

We can only dismiss the appeal with costs.

Hobhouse, J.—I concur.

I think that, so far as the investigation is concerned, no doubt this investigation is treated, as well by the Judge himself as by the objector, as an investigation under Section 246, that it was disallowed under that Section, and that, therefore, no appeal lies to this Court. Even if it could be said that the Judge treated the present appellant as a party to the suit, I think that then the Judge would wrongly have treated this appellant as such party; and that, therefore, even if he had been so treated, no appeal would have lain to us under the provisions of Section 11, Act XXIII. of 1861.

I, therefore, concur with my learned colleague in dismissing this appeal.

The 7th August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Decree for possession—Colorable as opposed to proceedings to keep the decree alive.

Case No. 230 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Bhaugulpore, dated the 2nd February 1867, reversing an order passed by the Sudder Ameen of that District, dated the 6th April 1866.

Tabbur Singh and others (Judgment-debtors), *Appellants,*

versus

Motee Singh and others (Decree-holders), *Respondents.*

Baboo Nil Madhub Sein for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

A decree for possession of land and wassilat was made in 1845; but the decree-holder, though annually praying for execution, never applied to the Court to be put into possession, and in 1864 issued a notice to the judgment-debtors.

HELD that his proceedings were merely colorable proceedings, the notice of execution not being a *bond-fide* notice, and that they were not sufficient in law to keep the decree alive.

Jackson, J.—IT appears to me that the decision of this Judge in the case is altogether unreasonable and unwarranted, and must be set aside. He at first came to the conclusion that the judgment-creditor had taken no proceedings to keep his decree in force. Subsequently, on the publication of the Full Bench Ruling at page 98 and the subsequent pages, VI. Weekly Reporter, the Judge admitted a review of his former decision, and then recorded this judgment: "I am of "opinion the proceedings exhibit a reasonable "anxiety on the part of the decree-holder to "execute the decree since 1862, the decree-"holder has annually prayed for execution; "and, on the 16th April 1863, notice was "issued to the judgment-debtors, but eight "persons had demised, and two only ac-"knowledged on service of notice.

"The notice of 1864 is, in my opinion, a "*bond-fide* notice; and, though suspended at "the house of the judgment-debtors, is un-"der High Court precedent of the 6th Sep-"tember 1866, page 97, Weekly Reporter, "Volume VI., sufficient to keep the decree "alive. The appeal is decreed; each party "to pay their own costs under the circum-"stances." And then the Judge adds: "The former order of this Court, dated 23rd "July 1866, is thus set aside."

It appears that the decree in this case was made in 1845. It was a decree awarding to the plaintiff possession of land with wassilat, and it seems that, down to this date in 1867, the plaintiff has never taken possession of the lands decreed to him. To say that, under these circumstances, the plaintiff had exhibited a reasonable anxiety, and that he had annually prayed to have his decree executed, appears to me to be childish. Can there be a doubt that, if he had intended to carry out his decree to enforce it, he might, 20 years ago and more, have had possession of his land? Clearly he has desired to do nothing of the sort: he has preferred to leave the land in the hands of the defendants to accumulate an inordinate claim for wassilat against them, and the proceedings which he has taken throughout have been merely colorable proceedings. I have no hesitation in expressing this opinion upon the facts as they appear and are not disputed. The Judge

says that the notice of 1864 appears to be a *bond-fide* notice. He uses the words *bond fide*, but it is perfectly clear to me that he uses the words *bond fide* as distinguished from fraudulent or dishonest. The objection of the judgment-debtor, as laid before him by the pleader, pointed out what the correct meaning of *bond-fide* proceedings was, that it was something opposed to a merely colorable proceeding to save the time. If the Judge had kept that distinction in view, and really exercised his mind upon the subject whether these proceedings were anything more than colorable, it is impossible that he could have come to any conclusion in favor of the judgment-creditor. This was clearly a case in which the plaintiff has displayed culpable negligence, he has either slept upon his rights, or else has postponed execution, with a view to prefer an unfair and unreasonable claim against the judgment-debtor, and in either case he is not entitled to the assistance of the Court.

I would only add that this is not a case of a money-decree. Where a man has got a decree for money, he is obliged to take steps either by the arrest of his debtor, or by proceeding against his goods, in order to realize the amount, and a decree-holder in such proceedings is obliged to watch his opportunity.

But, in case of a decree for immoveable property, it is quite clear that the *bond-fide* step, and one which may be immediately taken, is to apply to the Court to put him in possession of the land. That has never been done to this day.

I think the decision of the Court below must be set aside with costs.

Hobhouse, J.—I had considerable hesitation in coming to the same conclusion as my learned colleague upon this point. But now that it has been pointed out to me that the decree, which was of the year 1845, was a decree for possession, I think it is impossible to say, as a point of law, that the mere issue upon certain judgment-debtors of the notice of execution is a sufficient *bond-fide* proceeding in execution of that decree. What this proceeding seems to me to have been is merely this: the man seems to have thought, "Well, I can get possession of this at any moment; but, if I do not take some sort of proceeding, I shall be stopped," and therefore he takes what are, in reality, a series of colorable proceedings, extending from the year 1845 up to the present time. These proceedings do not seem to me in law sufficient proceedings to keep the decree alive.

The 8th August 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Limitation—Money-claim for dower—Lien on property for the same—Different causes of action—Res adjudicata.

Case No. 415 of 1866.

Regular Appeal from a decision passed by Moulvie Sujawut Hossein Khan, Principal Sudder Ameen of Patna, dated the 22nd February 1866.

Mussamut Wafeah (Defendant), *Appellant,*

versus

Mussamut Saheeba (Plaintiff), *Respondent.*

Mr. C. Gregory and *Moonshee Ameer Ali* for Appellant.

Mr. R. E. Twidale and *Moulvie Syud Murhumut Hossein* for Respondent.

Suit laid at Rupees 25,000.

The widow of a Mahomedan sues his heirs to recover the amount of dower payable to her on the dissolution of the marriage, which occurred on death of the husband in 1239 Fuslee—HELD that, if the plaint merely amounts to a money-claim, the suit is barred by the Act of Limitation.

A claim for the money-amount of a dower, and a claim to establish a lien on specific property in respect of that amount, constitute two distinct causes of action, and a plaint which sets up the first claim simpliciter cannot be treated as if it set up the latter.

Where a widow, who had taken possession of her husband's property, was ejected by means of a suit in which her defence raised no right of lien for dower, in which suit an absolute decree of right was given to his heirs, the right of lien, as between her and them, is a *res adjudicata.*

Phear, J.—THE plaintiff in this case is the widow of one Shaikh Mahomed Torab, deceased, and she is now suing his heirs "to recover Rupees 25,000, being the "amount of dower payable on the dissolu- "tion of marriage to the plaintiff by her late "husband," *minus* a certain amount now relinquished.

The dissolution of the marriage occurred on the death of the husband in the month of Rumzan 1239 Fuslee; and, therefore, if the plaint merely amounts to a money-claim (and there is nothing on the face of it to make it appear to be anything else), the suit is clearly barred by the Act of Limitation.

But we have been referred to the judgment of a Division Bench of this Court, reported in VIII. Weekly Reporter, page 51, Civil Rulings, by which it appears that a suit to recover money due as the amount of

dower may be construed to be a suit to enforce the *right of lien* upon the property of the husband in respect of dower, even although the plaint makes no sort of mention of a lien or charge on the property upon which it is supposed that the lien is to be established. We entirely agree with the learned Judges who tried that case that a claim for the money-amount of dower and a claim to establish a lien on specific property in respect of that amount constitute two entirely distinct causes of action; and for this reason we cannot concur in the apparent conclusion at which those learned Judges arrived, namely, that a plaint which sets up the first claim simpliciter may be treated as if it really set up the latter.

But, assuming that we are at liberty to take the plaint in the present case, as a plaint seeking enforcement of a right of lien upon the husband's property, the facts bearing on this point are as follows: On the death of the husband, his widow, the present plaintiff, took possession of property which had apparently been his during his lifetime, and she retained that possession until his heirs (the present defendants) brought a suit against her to eject her. In that suit, her defence was that part of the property in question was her own; and that, although the remainder had been her husband's, still she had purchased it under a bye-mokasa. Her present claim of lien for dower would have afforded her ample ground of defence, for it is admitted that the property now sought to be reached is identical with that which was then in suit; but he did not for some unexplained reason take this ground at that time. The result of that suit was adverse to her, and the present defendants obtained possession under and by virtue of the decree then given.

It is now argued, on the authority of the case which we have already quoted, that the ousting of the plaintiff from possession by the present defendants, under color of that decree, constituted a disturbance of her exercise of the right of lien for dower, such as to give her a good cause of action in this suit; and that, if so, she has come into Court within time. We cannot accept this view of the plaintiff's rights. With regard to the case cited above of Janee Khanun, it is sufficient to say that the judgment in ejectment, under which that lady was turned out of possession, *expressly reserved any right to the property which she might have in respect to dower:* it was consequently not an unqualified decree in favor of her opponent. *Whereas*, in the case before us, the decree in ejectment obtained by the heirs, the present defendants, was an *absolute decree of right* in them as against the present plaintiff; and it was given in a suit in which she might or ought, if she ever relied upon it, to have raised as a defence the very right of lien now desired to be set up as a substantive claim on her part, and never did so. Therefore, as between these parties, the right of lien is a *res adjudicata*.

For the above reason we think that, even if the plaint could be construed as a prayer to establish and realize a lien for dower on the part of the plaintiff against the property of her late husband, it cannot now be entertained. We have, however, already said that we do not think it can be treated as anything other than a simple money-claim, and that, as such, it is barred by lapse of time.

In this view the judgment of the Court below is wrong. We, accordingly, reverse it with costs.

The 8th August 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Will—Joint Hindoo family.

Case No. 379 of 1867.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 29th December 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 12th December 1864.

Teen Cowree Dossee and others (Defendants), *Appellants,*

versus

Hureehur Mookerjee (Plaintiff), *Respondent.*

Baboos Onookool Chunder Mookerjee, Unnoda Pershad Banerjee, and *Pearee Mohun Mookerjee* for Appellant.

Mr. M. Modhosoodun Dutta and *Baboos Romesh Chunder Mitter, Kishen Succa Mookerjee,* and *Umbika Churn Banerjee* for Respondent.

Letters of administration with copy of will annexed may be equivalent to probate, but neither is of itself sufficient to prove a will the genuineness of which is contested.

Glover, J.—THE plaintiff in this suit purchased at a Sheriff's sale the rights and interests of one Gobind Chunder in a certain putnee-talook, and as purchaser claimed

from the elder brother of Gobind Chunder, one Kisto Chunder, an eight-annas share of the property, alleging it to be joint-estate of the family.

The case was originally decided by the Judge adversely to the plaintiff; and, on special appeal to this Court, there was a remand (24th August 1866, Trevor and Kemp, JJ.) for further enquiry, *first*, on the question of limitation, and, *secondly*, as to the source from whence the purchase-money came.

The Judge below has now found for the plaintiff, holding that the dictum of the High Court prevented his re-trying the question of the genuineness of Gobind Chunder's will; and that, accepting the will as genuine, there could be no doubt that the property was joint, and no limitation would run.

With respect to the source of the purchase-money, the Judge found no proof that Gobind Chunder had provided the funds; but that, being joint with his brother Kisto Chunder, he was entitled to a half-share of the property.

The defendant appeals specially against this decision, urging that there was nothing in the order of remand which prevented the Judge from trying the genuineness of Gobind Chunder's will; that the High Court were mistaken in supposing that probate of the will had been taken out; but that, even if it had been taken out, that would not be a bar to the Civil Court's investigation.

The objection appears to us sound. The remand-order did not (and indeed could not, for the appeal was a special one) decide as to the genuineness of the will. It merely said that proof by the plaintiff as to the source from whence the purchase-money came, and proof that the brothers were living in commensality, would be strong evidence in the plaintiff's favor, when considered, "together with the will of which probate had been taken out." There was nothing in this order prohibiting enquiry into the genuineness of the will. The Judge's mistake, no doubt, arose from the use of the words "probate had been taken out."

Now, in the first place, there is no proof that probate of the will has been taken out. To clear up the point, the Court sent for the papers from the Original side, but did not find from them that probate was granted to any one. Letters of administration, with copy of the will annexed to the application, appear to have been given to the widow on the renunciation of the executors named in the will; but, even if it be admitted that such letters of administration were equivalent to probate, there was no judicial finding that the will was a true one, and no proof in solemn form as required by law.

This Court in its remand-order appears to have thought that probate had been granted; but, though it so held, it did not from that circumstance declare the genuineness of the will settled; it only directed the Judge to consider the probate as an element of proof in the plaintiff's case.

The question between the parties turns in a very great measure upon the genuineness or otherwise of Gobind Chunder's will. If it be genuine, we use the word in its most comprehensive form, then Kristo Mohun's signature on it is a strong piece of evidence that the property in dispute was joint, and belonged to both brothers.

The Judge who, on the first occasion, held that the will was not established, has altered his opinion on what he considers the *vis major* of this Court's authority.

This, as we have already observed, was a mistake, and the case is now just where it was when originally remanded.

It must go back again for the Judge to find as to the genuineness or otherwise of the will and of Kisto Chunder's signature thereto, and the Judge will, take his finding on this point as an element in the evidence of the joint possession of both brothers.

Costs will follow the result.

The 8th August 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Mahomedan Law—Pre-emption.

Case No. 367 of 1866.

Regular Appeal from a decision passed by the Judge of Sylhet, dated the 27th June 1866.

Nusrut Reza (Plaintiff), *Appellant,*

versus

Umbul Khyr Bibee and others (Defendants), *Respondents.*

Baboo Romanath Bose for Appellant.

Baboo Toolsee Dass Seal for Respondents.

Suit laid at Rupees 25,000.

The right to pre-emption is very special in its character, and is founded on the supposed necessities of a Mahomedan family arising out of their minute sub-division and inter-division of ancestral property; and, as the result of its exercise is generally adverse to public interest, it will not be recognized by the High Court beyond the limits to which those necessities have been judicially decided to extend.

Phear, J.—We think that the Judge was quite right on the evidence in holding that the plaintiff's allegation of joint-tenancy in the lands of which he seeks to have it declared that he has a right of pre-emption is not made out.

We also think the Judge was right in his view as to the applicability of the decision of this Court in Ejnash Kooer *versus* Sheikh Amzudally, 2 Weekly Reporter, page 261, Civil Rulings. The right to pre-emption is very special in its character. It is founded on the supposed necessities of a Mahomedan family, arising out of their minute sub-division and inter-division of ancestral property; and, as the result of its exercise is generally adverse to public interest, it certainly will not be recognized by this Court beyond the limits to which those necessities have been judicially decided to extend.

The appeal is accordingly dismissed with costs.

The 8th August 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Attachment—Sale—Section 285, Act VIII. of 1859.

Case No. 491 of 1867.

Special Appeal from a decision passed by Mr. C. E. Lance, Judge of Backergunge, dated the 15th January 1867, affirming a decision passed by Moulvie Someenooddeen, Sudder Ameen of that District, dated the 24th January 1866.

Shurutoollah Merdha (Defendant),

Appellant,

versus

Georoo Churn Dass (Plaintiff), *Respondent.*

Baboos Romesh Chunder Mitter and *Kalee Mohun Dass* for Appellant.

Baboos Unnoda Pershad Banerjee and *Sreenath Dass* for Respondent.

The attachment of immoveable property by a Court other than that which passed the decree before the decree has been sent to it for execution vitiates the sale subsequently made of that property, as not being made in strict observance of the procedure prescribed by Section 285 of Act VIII. of 1859.

Phear, J.—We are of opinion that the decree of the Lower Appellate Court is right, although we think the special appellant has shown good grounds for impeaching the reasoning which the Judge gives as the basis of it.

The validity of the title of each party depends solely upon the sale to him by the Court, and not at all upon anything which preceded the sale. Now, it has been held by this Court in the case which is reported in VII. Weekly Reporter, page 485, Civil Rulings, that a sale of immoveable property in execution of a decree, which property is situated beyond the jurisdiction of the Court making the decree, will not be good unless it has been made in strict observance of the procedure prescribed by Section 285 of Act VIII. of 1859. It is obvious that the defendant's sale was not so made, for the attachment of the property (the necessary condition precedent to sale, because the Court has nothing to sell, except that which is attached by it) was effected by the Dowlutpore Court before the decree had been sent to it for execution. In accordance, therefore, with the decision above quoted, which we follow, we hold that that attachment is not sufficient to support the subsequent sale. Consequently the defendant has no title to oppose to the *primâ-facie* case of the plaintiff, and the decree of the Appellate Court must stand. The appeal is dismissed with costs.

The 8th August 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Usufructuary mortgage—Jurisdiction.

Case No. 3151 of 1866 under Act X. of 1859.

Special Appeal from a decision passed by Mr. H. R. Maddocks, Judge of Bhaugulpore, dated the 14th September 1866, affirming a decision passed by Moulvie Syud Ali Hossein, Deputy Collector of that District, dated the 8th May 1866.

Rutton Singh and others (Defendants), *Appellants,*

versus

Greedharee Lall (Plaintiff), *Respondent.*

Messrs. R. T. Allan and *C. Gregory* for Appellants.

Baboos Debendro Narain Bose and *Chunder Madhub Ghose* for Respondent.

A suit to cancel a zur-i-peshgee, by which the lessee was to receive the usufruct as interest for his advance, and to repay the principal by the rent reserved, is of the nature of an usufructuary mortgage, and as such cannot be brought under Act X. of 1859, but is cognizable only by the Civil Courts.

Glover, J.—This was a suit under Act X. of 1859 to cancel a lease on account of breach of its conditions. The plaintiff, it appears, took an advance of Rupees 1,400 from the defendant, giving him a zur-i-peshgee lease for nine years, at a yearly rent of Rupees 160; the rent to be applied to the repayment of the advance. There was a stipulation attached to the lease that no portion of the land should be let to an indigo-factory; and that, if it were so let, the lease should be voided.

The plaintiff's case was that the defendant had granted a sub-lease concealing, or at least without mentioning the prohibition, and that the sub-lessee had given a portion of the land to an indigo-factory, and had so involved the original zur-i-peshgeedar in a breach of covenant involving forfeiture of his lease.

Both Lower Courts held the lease to be cancelled by the breach of its conditions.

Various objections are taken in special appeal, which it will be unnecessary for us to enter into, as we are clearly of opinion that the plaintiff's suit was improperly brought under Act X. of 1859, and was cognizable only in the Civil Court.

The lease which the plaintiff seeks to cancel was an ordinary zur-i-peshgee, by which the lessee was to receive the usufruct as interest for his advance, and to repay the principal by the rent reserved. It has been frequently held by this Court that such an arrangement is an usufructuary mortgage. And it has been ruled in the case of Mahomed Ali, defendant, appellant, *versus* Batook Deo Narain Singh, plaintiff, respondent (1 Weekly Reporter 52), that a suit to set aside such a lease cannot be brought in a Collector's Court, unless the terms of the lease distinctly provide for such a course of procedure in the event of a breach of any of its conditions.

In this case, moreover, the lessee does not pay any part of the rent to the proprietor, but reserves it to clear off the amount advanced as zur-i-peshgee.

We, therefore, allow this special appeal, and reverse the decisions of the Courts below, with costs on the special respondent. He has his remedy for any breach of the conditions of the lease in a civil suit.

The 8th August 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

User (Evidence of).

Case No. 703 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 30th January 1867, reversing a decision passed by the Moonsiff of Burjorah, dated the 3rd May 1866.

Toolsee Doss Kobeeraj and others (Defendants), *Appellants,*

versus

Bhyrub Lall Tewaree and another (Plaintiffs), *Respondents.*

Baboo Rajendernath Bose for Appellants.

Baboo Nil Madhub Sein for Respondents.

In a suit for a declaration of the right of user over the water of a tank, which right was denied, the finding of the Lower Appellate Court from the evidence of witnesses adduced by plaintiff, that plaintiff had used the water for many years, was not open to special appeal, such evidence being sufficient to prove a continuous and uninterrupted user on part of the plaintiff.

Glover, J.—This was a suit to declare plaintiff's right of user over the water of defendant's tank for the purposes of irrigation, a right which the defendant denied.

The Principal Sudder Ameen has found it "satisfactorily proved by the evidence of "the witnesses called by the plaintiff, and "by the report of the Ameen who held the "local enquiry that the plaintiff's land was "irrigated by the water of the disputed "tank." He gave plaintiff a decree accordingly, reversing the decision of the first Court.

It is urged in special appeal that the Principal Sudder Ameen's finding does not go far enough to benefit the plaintiff, who must prove a prescriptive title.

The Principal Sudder Ameen, we observe, relies on the evidence of witnesses to prove the plaintiff's case. Of these witnesses, one deposes that the water had been used to irrigate the plaintiff's fields from time immemorial; another that it had been so used ever since he could remember;

a third that he had seen it so used for the last 10 or 15 years. We think that this would be evidence of a custom, and that it was not of that vague and uncertain character which would prevent the Principal Sudder Ameen from relying on it as proving a continuous and uninterrupted user on the part of the plaintiff.

If this be so, the Principal Sudder Ameen's finding as to the degree of credibility attachable to the evidence is one of fact with which we cannot interfere in special appeal.

The appeal is, therefore, rejected, and the special appeal dismissed with costs.

The 8th August 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Enhancement of dependant talookdar's rent—Section 15, Act X., 1859.

Case No. 699 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 23rd January 1867, affirming a decision passed by the Assistant Collector of that District, dated the 29th September 1866.

Nubo Kishore Bose (one of the Defendants), *Appellant,*

versus

Pandul Sircar and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter, Hem Chunder Banerjee, and *Gopal Loll Mitter* for Appellant.

Baboo Otool Chunder Mookerjee for Respondents.

A dependant talookdar's rent is not liable to enhancement, unless it can be shown to have changed since the perpetual settlement, and he must be proceeded against under Section 15 (not 17) of Act X., 1859.

Kemp, J.—This was a suit for enhancement of rent after service of notice under Section 13. The grounds of enhancement as per notice are those which Section 17, Act X. of 1859, contemplates, and the defendant, special appellant, is treated as an occupant ryot. Now, the plaint clearly admits that the defendant, special appellant, is a talookdar, and the ground of enhancement as per plaint is that 24 rupees was the rent recovered up to 1268 by the plaintiff; but that, in a rent-suit in 1269, the defendant had declared that his jumma was 11 rupees, and not 24 rupees as recorded in the quinquennial papers, and therefore that defendant by his own statements had admitted that the jumma of the talook had varied since the perpetual settlement.

Now, it is clear that, on this plaint, admitting its recitals to be correct, the defendant is a dependant talookdar, and that his rent is not liable to enhancement, unless the plaintiff can show that the rent had been changed since the perpetual settlement, Section 15, Act X. of 1859.

Instead, therefore, of suing the defendant under Section 15, the plaintiff proceeded against him under Section 17, treating him as an occupant ryot. The Judge, in a very meagre and unsatisfactory decision, finds that the defendant denied in a former Act X. suit for rent that he held the talook at all, and that, therefore, it does not lie in his mouth now to say that the talook existed from the time of the perpetual settlement. This is a gross mistake on the part of the Judge. In the suit for the rent of 1269, the defendant did not deny the existence of his talook; what he did state was this, that the plaintiff in this suit had given the wrong kismut, that the jumma of his talook was 11 rupees, and not 23, as stated in the punjsala, and that his title in the talook had passed to a third party by gift.

The plaintiff's suit in its present shape will not lie. He must sue the defendant as a dependant talookdar, and not as an occupant ryot, and he will have to prove all the conditions which Section 15 requires before he can enhance the rent of the defendant's talook, or, if the talook has been transferred, of the present talookdar.

The appeal is decreed, and the plaintiff's suit dismissed with costs of both Courts bearing interest.

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The 8th August 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Trustees or managers under Act XX., 1863—Misfeasance, &c.—Right of suit—Wokf or Endowment.

Case No. 428 of 1866.

Regular Appeal from a decision passed by Baboo Nurottum Mullick, Principal Sudder Ameen of Bhaugulpore, dated the 23rd August 1866.

Bibee Kuneez Fatima (Plaintiff), *Appellant,*

versus

Bibee Saheba Jan and others (Defendants), *Respondents.*

Mr. R. E. Twidale and *Moonshee Ameer Ali* for Appellant.

Mr. R. V. Doyne, Baboos Unnoda Pershad Banerjee, Romesh Chunder Mitter, Opendur Chunder Bose, and *Dwarkantah Sein* for Respondents.

In the case of a public endowment transferred to trustees, managers, or superintendents of such lands under Act XX., 1863, any person or persons interested (and the interest need not be a pecuniary one) in the religious establishment, in its worship or service or in its trusts, has a right of suit, after leave obtained from a Civil Court against such trustees, &c., for misfeasance, or breach of trust, or neglect of duty.

Grants to an individual in his own right, and for the purpose of furnishing him the means of subsistence, do not constitute a wokf or endowment.

Kemp, J.—THE object of this suit is to obtain a declaration that certain properties which have from time to time been alienated by the defendant, Syud Shah Enaet Hossein, the brother of the appellant, to the co-defendants, are endowed, and as such not alienable. The plaintiff further claimed the sum of two hundred rupees per annum as maintenance, and which sum she avers is a charge upon the endowed property. The suit is valued at Rupees 68,736-1.

It is stated in the plaint that these lands were granted before the British administration by Emperors and Nazims to the plaintiff's ancestors as "mudad mash" to meet the khankah expenses such as are incurred in feeding and supporting indigent students, beggars, travellers; that Syud Enaet Hossein, defendant No. 7, succeeded to the appointment of motawullee, or sujjadnusheen, as it is termed in the plaint, of the endowment, and has dealt with the properties in a manner wholly inconsistent with the purposes for which they were endowed and in breach of the trust reposed in him.

The written statements of the principal defendants who derive title from the defendant No. 7 are briefly to this effect, that the plaintiff, being a person wholly uninterested in the properties alleged to be endowed, is not in a position to bring this suit; that she has never been in the receipt of any portion of the produce of these estates as maintenance or in any other shape; that the lands in dispute are not "wokf" or endowed lands; that the alienation of these lands is perfectly valid; and that this suit has been brought at the instigation of Syud Shah Enaet Hossein, defendant No. 7, who, after selling the properties for a valuable consideration, is now fraudulently endeavoring to get them back again into his possession on the plea that they are endowed, and, therefore, not alienable.

The Principal Sudder Ameen states that, as the object of the suit is not to have the management of the endowed properties vested in the plaintiff, but that they may remain intact for the purposes for which they were originally dedicated; and, as the plaintiff has an interest in the matter in litigation, she is in a position to bring this suit.

On the main issue, whether the properties in dispute are "wokf" or not, the Principal Sudder Ameen observes that no royal grants have been filed; that copies of sunnuds purporting to be in confirmation of previous royal grants have been filed; but, as the originals have not been produced or their absence satisfactorily accounted for, these copies cannot but be looked upon with grave suspicion; that, admitting for argument's sake that they are *bonâ fide*, it is very questionable whether they can be held to constitute valid wokfs.

Regarding the manner in which the properties in dispute have hitherto been dealt with, the Principal Sudder Ameen observes that there is strong evidence to show that these properties were never considered as endowed by any of the descendants of the original grantee.

The suit of the plaintiff was dismissed with costs.

The main grounds of appeal are:—

1st.—The sunnuds prove that the lands in dispute are wokf, the sunnuds granted by Nazims being of equal efficacy as those granted by Emperors.

2nd.—That, as the resumption-proceedings dated 27th January 1838 show that the original sunnud granted by the Emperor was

destroyed by fire, the non-production of it has been sufficiently accounted for.

3rd.—That, at the time of the institution of the resumption-suit, all the sunnuds in original, or attested copies of the same, which were then in the possession of the sujjadnusheen, were filed in that suit, and have, therefore, come into the power of the Government officials; copies and copies of copies have been obtained and filed, which have been improperly rejected by the Lower Court.

4th.—That the acts of previous sujjadnusheens cannot vitiate the "wokf," especially as this suit is brought for the purpose of declaring those acts to be invalid.

5th.—That the plaintiff has proved her claim to the maintenance as a charge on the endowed property.

The defendants put in a cross-appeal under the provisions of Section 348 of the Code of Civil Procedure, to the effect that, unless the plaintiff can prove that she is entitled to maintenance as a charge on the properties in dispute, she has no "locus standi," and her suit and appeal ought to be dismissed without entering into the question of whether the properties are endowed or not.

We take the cross-appeal of the defendant first.

There is no evidence that the plaintiff is entitled to, or ever received, any maintenance from the properties in dispute. The witnesses she has examined state in a general way that she was supported by Enaet Hossein, defendant No. 7, her brother, in common with other destitute female members of his family. The grants of the lands in dispute make no mention of any provision for the maintenance of the plaintiff or any other member of the grantee's family, and it appears to us very clear that this plea of a right to maintenance has been set up in order to give support to the right to bring this suit on the part of the plaintiff. Even admitting, for the sake of argument, that the lands in dispute are "wokf" or endowed lands, it is very clear that they are not public endowments; for, had they been so, they would certainly have come under the management and control of the revenue authorities under Regulation XIX. of 1820. By Act XX. of 1863, the Board of Revenue and the Local Agents were relieved from the duties imposed upon them by Regulation XIX. of 1820. All endowed properties were under Act XX. of 1863 transferred to trustees, managers, or superintendents of such lands, and the responsibilities of the Board of Revenue and Local Agents ceased and determined.

In the case of disputes occurring on vacancies in the offices of trustee, manager, or superintendent, any person interested in the establishment to which such endowed properties belonged, or in the trusts relating thereto, is at liberty to apply to the Civil Court to appoint a trustee, manager, or superintendent.

Local committees of management, who are to perform the duties hitherto performed by the Board and Local Agents, are appointed under the Act, and the trustees, managers, or superintendents have to furnish regular accounts of the receipts and disbursements connected with the trust to these committees. Suits may be instituted in the Civil Court under the Act against trustees, managers, or superintendents, or against any member of a committee appointed under the Act, for any misfeasance or breach of trust, or neglect of duty, by any person or persons interested in the religious establishment, or in the performance of the worship or service thereof, or in the trusts relating thereto, and the interest required in order to entitle a person to sue need not be a pecuniary one, any person having a right of attendance, or having been in the habit of attending at the performance of the worship or service of any mosque, temple, or religious establishment, or of partaking in the benefit of any distribution of alms, shall be deemed to be a person interested, and therefore entitled to sue; but, previous to instituting such suit, an application must be made to the Civil Court for leave to institute such suit, and the Court is to determine whether there are sufficient *primâ-facie* grounds for the institution of the suit; and if, in the judgment of the Court, there are such grounds, leave shall be given for its institution.

Now, in the case before us, the endowment, if endowment at all, was a private one. It never came under the superintendence of the Board or Local Agents, and therefore Act XX. of 1863 does not apply to it.

The plaintiff has wholly failed to prove that she has any interest whatever. There is no service or worship at which plaintiff may be said to have a right of attendance. Nor has the plaintiff proved any right of partaking in the benefit of any distribution of alms. Her present suit, which is, as far as we can judge from the acts and conduct of the parties, instigated by her brother, the defendant Enaet Hossein, is inadmissible,

and ought to have been dismissed without going into the merits of the case. But, as the Principal Sudder Ameen has done so, and the case is highly valued and may be appealed to a higher tribunal, we enter upon the merits.

Six copies or copies of copies of grants have been filed by the plaintiff, the originals of which purport to have been granted by Nowab Serajoodowlah and Nowab Nuzumooddeen Ali Khan, soobahs of the provinces of Bengal and Behar. The year of the grant is not given in any of the grants, but the month and year of the reign of the Nowab are given; to wit, 10th Shawul, 3rd Juloos, 27th Rumzan, 7th Juloos, and so on. The terms of these sunnuds are similar. We shall, therefore, confine our remarks to the sunnud purporting to have been granted by Nowab Serajoodowlah, Shah Koolee Khan Bahadoor, Haibut Jung, Nazim of Bengal and Behar, dated 10th Shawul, 3rd Juloos, that is to say, in the third year of the reign of the said Nazim. Our remarks on this sunnud apply to the other sunnuds.

This sunnud is addressed to the motsooddees, chowdhrees, and canoongoes of Pergunnahs Bhagulpore, Colgong, and Chye in the province of Behar. It recites that it would appear that certain villages, the names of which are given, and which are described as istmoraree, or permanently settled and aymah, or land held either rent-free or subject to a small quit-rent, had devolved by right of inheritance upon Syud Mahomed Meer, a descendant of Mukdoom Shah Ahmed Peer, who had held the same from former times on a mokurruree jumma under sunnuds from former Emperors and Nazims; that the said grantee, *i. e.*, Syud Mahomed Meer, had a large family to support, and had to defray the expenses of a "khankah"* for travellers and the benighted, for students, and mendicants who beg at his door; that the said grantee found it difficult to discharge all these duties which involved considerable expense; that, in consideration of this, the villages detailed in the grant were given to him at a fixed annual jumma of Rupees 896. The abwabs and other cesses hitherto levied upon the grantee were remitted, and the aforesaid jumma, which had all along been paid, was declared to be fixed. It was further recited that the grantee, after paying the said jumma, was to enjoy the profits of the property, to support himself therewith, and to pray for the grantor.

* *Note.*—"A khankah is a monastery, or a place where religious mendicants of the Mahomedan religion temporarily reside." *See* Wilson's Glossary of Indian terms.

Now, it is very clear that this is not a grant constituting a "wokf." There is no dedication of the properties solely to the worship of God, or to any religious or charitable purposes. The grant recites that the grantee and his predecessors have hitherto held the lands at a jumma of Rupees 896, which jumma is declared to be fixed at that rate henceforth. In consideration of the charitable disposition of the grantee, and the expenses which he apparently voluntarily incurred in supporting poor students, in giving alms to mendicants, and food and shelter to travellers, the grantor remits the payment of abwabs and other cesses, which in the days of the Nowab Nazims were a heavy impost, and directs the officers of tehsil to refrain from exacting the same from the grantee. For this indulgence, the grantee was requested to give the grantor the benefit of his prayers. The grantee was to enjoy the profits, after paying the jumma fixed, *viz*, Rupees 896. In short, the grants were grants to an individual in his own right and for the purpose of furnishing the means for the subsistence of the grantee, and nothing further.

It is also clear that, even allowing that the copy of the sunnud is admissible as evidence, it is one which is simply confirmatory of a former sunnud, and the terms of the former sunnud are recited in the copy of the latter sunnud; the absence, therefore, of the original royal firman is immaterial; if the confirmatory grant do not contain terms which constitute an endowment, it is clear that the royal firman did not do so, and *vice versâ*.

The Government in 1838 enhanced the jummas of some of the estates in the possession of the grantees, and made a settlement with them with respect to the other estates. The Government gave up its claim to enhance the jummas, not because the lands were wokf or endowed lands, but because they were not liable to enhancement of jumma.

It may be said that it is not necessary that the sunnuds should contain the term wokf, if the tenor and meaning of the grants be to that effect. But in these sunnuds there is no dedication or endowment of the properties, nor any terms which can be construed as creating a wokf. We quite agree with the Principal Sudder

Ameen that the former proprietors of these estates have dealt with them in a manner wholly inconsistent with the fact of their being endowed properties, for we find that the defendant Enaet Hossein made over the management of these properties to his son by a deed of tumleeknamah, in which no mention is made of their being endowed properties, and the son mortgaged and otherwise dealt with the properties as properties of which he had the uncontrolled and unreserved power of alienation.

It also appears that Enaet Hossein, to defraud his creditors, made over the properties to his wife in lieu of dower by a colorable deed of "bye mokasa." In short, the conduct of Enaet Hossein has been fraudulent throughout. He first attempted to mask his properties from his creditors, and now that they have passed from his hands in satisfaction of decrees against him or for payment of his just debts, to third parties for a valuable consideration, he has put forward the plaintiff, his sister, to bring this suit under a false averment that she is entitled to maintenance as a charge on the properties, and that the properties are endowed, and, as such, cannot be alienated.

The appeal and suit of the plaintiff are dismissed with costs of both Courts bearing interest at the rate of 12 per cent.

The 8th August 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Bond—Absence of endorsement—Payment (Proof of).

Case No. 876 of 1867.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 26th February 1867, reversing a decision passed by the Additional Principal Sudder Ameen of that District, dated the 29th August 1866.

Kalee Doss Mittra (Defendant), *Appellant,*

versus

Tara Chand Roy (Plaintiff), *Respondent.*

Baboos Anund Gopal Palit and *Mohendro Lall Seal* for Appellant.

Baboo Bama Churn Banerjee for Respondent.

A stipulation in a bond that all payments should be endorsed on the back thereof, and that all other pleas of repayment would be futile, does not estop the defendant from proving by other means that the debt, or part of it, has been satisfied.

Seton-Karr, J.—This case must go back to the Judge. The Judge committed an error in law in holding that it was not necessary to enquire into the genuineness of the receipt put forward by the defendant, because the bond contained a stipulation that all payments should be endorsed on the back thereof, and that all other pleas of repayment would be futile. There is no doubt that the defendant is not estopped in law by any such stipulation, from proving by other means that the debt, or part of it, has been satisfied.

Our decision is in conformity with an opinion expressed at page 44 of the Sudder Decisions of 1853, and with the ruling of the Judges in Volume III. of Weekly Reporter, Miscellaneous Rulings, page 23, in which, apparently, the facts of the case were the same.

The Judge will go into the evidence of the receipt, and he will also take into his consideration the cross-appeal said to have been raised by the defendant, special appellant, as to his costs. Case remanded accordingly.

The 8th August 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Resumption—Trust for charitable purposes.

Case No. 2649 of 1866.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 23rd July 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 31st March 1863.

Rajah Leelanund Singh Bahadoor (Defendant), *Appellant,*

versus

Ishuree Nundun Dutt Jha and another (Plaintiffs), *Respondents.*

Messrs. I. W. B. Money and *R. E. Twidale* for Appellant.

Mr. R. V. Doyne and *Baboo Juggadanund Mookerjee* for Respondents.

The resumption of lands by Government, and the making a fresh settlement of the resumed lands without any allusion to their being held in trust for charitable purposes prior to the resumption-proceedings, are not

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conclusive proof that there was no such trust. The only question decided by the Government in resuming was that those who claimed the land as lakheraj had not been able to prove that the land was held under any such religious or charitable trust as would debar Government from resuming.

Macpherson, J.—We think that this special appeal ought to be dismissed.

The Lower Court has carried out the order of remand, and, there being sufficient evidence to support the plaintiff's case, we, sitting on special appeal, cannot interfere with the findings of the Lower Court.

There is no doubt that Rajah Leelanund suffers from what amounts to gross fraud on the part of the plaintiff, Ishuree Nundun Jha, but we can do nothing to assist him now.

Mr. Money for the appellant contended that the order of remand of the 4th April 1866 related specially to the resumption-proceedings, and the mode in which the property has been held and dealt with subsequent to the resumption-proceedings. But it appears to us that the reference made in the judgment to the Beerbhoom papers and the circumstances under which a sezawal came to be appointed shows that what the Court said was intended particularly to indicate that, without further evidence as to the points referred to, there was not sufficient proof as to there having been a trust for the idol prior to the resumption-proceedings.

Mr. Money further contended that, inasmuch as Government resumed the property in 1838 and 1841, and made a fresh settlement with the plaintiff, Ishuree Nundun Jha, no allusion being made in the settlement to the existence of any endowment, this showed that no endowment did, in fact, exist at the time, and that, by reason of the settlement with him, Ishuree Nundun Jha got the title to the land absolutely free from all trust. We are of opinion, however, that this is not a correct view of the law. The fact of the estate being declared not to be lakheraj does not affect the principal question at all. The only question decided by the Government officer in resuming the land was, that those who claimed the land as lakheraj had not been able to prove that the land was held under any such religious or charitable trust as would debar Government from resuming it. The resumption-proceedings did not relate to any question of trust as regards Ishuree Nundun Jha and the endowment of which he was the shebait. It is found now that the lands were held on a trust prior to the resumption-proceedings, and there is nothing to show that they are not liable to that trust. The appellant has no better title to the property, the subject of this suit, than Ishuree Nundun Jha himself would have had if the appellant had never purchased it. We think, therefore, that the appellant holds it subject to the original trust.

The appeal is dismissed, but the plaintiffs will pay their own costs in all the Courts.

The 8th August 1867.

Present :

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Certificate (under Act XXVII. of 1860)—Debts.

Case No. 315 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 19th March 1867.

Mussamut Bhugobutty Kooer, *Appellant,*

versus

Bholanath Thakoor, *Respondent.*

Mr. R. T. Allan and *Baboo Nil Monee Sein* for Appellant.

Mr. R. V. Doyne and *Baboo Mohesh Chunder Chowdhry* for Respondent.

The sole question in an application for a certificate under Act XXVII. of 1860 is the title to collect the debts due to the estate of the deceased, and it is not a matter for the Judge's consideration whether there are any, and what, debts due to the estate. The effect of such certificate is that it is conclusive of the representative title against all debtors to the deceased, and affords full indemnity to all debtors paying their debts to the person to whom the certificate has been granted.

Jackson, J.—The case before us is, strictly speaking, an application under Section 3, Act XXVII. of 1860, by Bholanath Thakoor

and others for a certificate enabling them to collect debts due to the estate of Oodun Thakoor, deceased. It appears to be not disputed that, with reference merely to Hindoo Law, and to the ordinary course of succession among Hindoos under the Mitakshara, these persons would be entitled to be considered the representatives of this Oodun Thakoor. Bhagiruthee Dey entered opposition to the grant of this certificate to the persons above named upon the ground, as I now understand it, that there was no such thing as an estate of Oodun Thakoor, the said Oodun having given the whole of his estate, by will or a document called an ikrarnamah or tukseemnamah, to Chundrabuttee, whose personal representative Mr. Allan's client claimed to be. It appears that, by the document in question, a life-interest in this property was granted to Chundrabuttee, and that, after her death, it was to go to one Girdharee Lall, the adopted son by the *kritima* form of Oodun Thakoor; that Oodun Thakoor died, and Chundrabuttee took the estate under the terms of the devise, and that Girdharee Lall died in her lifetime. Chundrabuttee continued in possession of this estate, and is only lately dead.

Now, it is quite clear that these two parties brought before the Zillah Judge a question very much wider than that properly raised by the original application. They proposed to the Zillah Judge to decide, and the Zillah Judge was led into deciding, which of the two parties was preferably entitled to all the property which had belonged to Oodun Thakoor, and which was disposed of on the ikrarnamah. The Judge has gone into that question very fully, and has given his conclusion upon the subject.

It seems to me necessary to declare that the Judge's decision upon this point was beyond his competency in this case; that the sole question which he had before him was to determine the title to the certificate to collect debts due to the estate of the deceased Oodun Thakoor; that, beyond that, his decision was wholly inoperative, and ought not to be used on any future occasion to the advantage or disadvantage of any person concerned.

Mr. Allan contended in this case that there were no debts, and could be no debts due to Oodun Thakoor, or claimable by his personal representative. Upon that point, it is only necessary to refer to two decisions of this Court to be found at page 20, V. Weekly Reporter, and page 12, VIII. Weekly Reporter, in which it is held that it is not a matter for the Judge's consideration whether there are debts, or what may be the amount of debts due to the estate of the deceased person, but that he is only to determine the title to the certificate, and to grant a certificate accordingly. It may be that the person who obtains such certificate obtains an entirely barren title, and that he would derive no benefit from it whatever, but that is his affair. I am inclined to think it would be convenient if the law provided that all applications for certificate should state that there are debts due to the estate, and that the Judge should satisfy himself that there are grounds for making the application. But, as held in the two cases I have referred to, it appears to me that the Act does not provide any such power, and that it is not for the Court, as the law stands, to enquire into it. Now, in the case before us, the Judge has granted to the respondents a certificate to represent the estate of the deceased Oodun Thakoor. The effect of that certificate will be that it is conclusive of the representative's title against all debtors to the deceased, and shall afford full indemnity to all debtors paying their debts to the person in whose favor the certificate has been granted. I think it only necessary to say in reference to the appeal that Mr. Allan has not succeeded in showing us that the lady whom he represents has the better right than the respondents have to that certificate. That is the whole question for our decision in this case as I understand it, and I therefore think that, with the declaration above stated as to the legitimate effect of this order, the appeal ought to be dismissed with costs.

Mitter, J.—I concur.

The 8th August 1867.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Execution of a decree—Adjustment out of Court—Evidence on the point—Arrest in execution—Sections 200, 201, 206, Act VIII., 1859.

Case No. 302 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 6th May 1867.

Dwarkanath Doss Biswas (Judgment-debtor), *Appellant*,

versus

Unnoda Churn Doss (Decree-holder), *Respondent.*

Baboos Sreenath Doss and *Kalee Mohun Doss* for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

Where several of the acts requiring to be done in execution of a decree are such as can be done through a Court, and where all of them are acts, the doing of which may be certified to the Court by the person in whose favor the decree was made, the policy of Section 206 of the Code of Civil Procedure is to exclude the reception of evidence upon the point, or any question arising out of evidence before the Court. No adjustment can be recognized unless made through the Court, or certified by the person in whose favor the decree was made.

When arrest in execution has not been specifically objected to in the Court below, this Court will not interfere.

Jackson, J.—I am inclined to think that the Judge has given a fairly correct statement of what the appellant's object was in making his application to the Zillah Court.

The appellant was the defendant in a suit brought by his nephew to recover that nephew's share in the family-property. The result of the suit was that the parties came to a compromise, the terms of which are contained in the solehnamah executed by the uncle. In that document, which was incorporated in the decree of the Court, he undertook to make over to his nephew certain immoveable properties, and to explain and certify to him the balances and amounts remaining due upon claims against other parties in respect of which no suits had been preferred, and also to make over to the nephew that portion of the moveable property which fairly came to the nephew's share, and further that he would appoint to the charge of the joint concerns and collections of the family-estate a certain person named, and in the event of the person named refusing to undertake the charge, then some other person was to be chosen on the advice of the arbitrators who had been employed in the matter. These stipulations were all to be complied with immediately after the completion of the decree and within three months, and it was agreed that, in the event of the uncle failing to comply with these conditions, the nephew was to enforce fulfilment of them by executing the decree. The nephew, accordingly, applied to the Court, stating that the uncle had altogether refused or omitted to comply with the several stipulations, and he applied to enforce the decree by arrest of the uncle's person. It seems that an order was made, by which a warrant of arrest was to be issued, but that was never carried into effect. The uncle, the defendant, made a petition some six weeks afterwards to the Zillah Court, in which he alleged that he had, in fact, carried out and complied with the whole of the stipulations; that he had made over to the nephew his share of the immoveable property, and to the best of his knowledge and belief all the moveable property to which the nephew was entitled, and he, therefore, contended that nothing remained of the decree to be executed. The Judge proceeds to consider that question, and he describes the object of the petition in these words: "This is "an application from the judgment-debtor "for a declaration of decree to the effect "that he has carried out the provisions of "his deed of compromise, and that, there-"fore, any claim on the part of the decree-"holder for mesne-profits, in consequence "of the non-fulfilment of the provisions "contained in the solehnamah, should not "be allowed." These words do not very materially differ from the terms in which I have just described the object of the petition. The Judge went into a good deal of evidence on the subject, and considered the matter fully, but he finally determined that he could not make the declaration sought by the petitioner, and that, consequently, he must reject the petition. No further order was made, but apparently the decree-holder would thereupon be at liberty to take such steps as he thought fit in execution of decree.

Now, the defendant comes here in appeal, and asks us to set aside the Judge's order. In the first place he seeks to show that the stipulations of the solehnamah have really been complied with, and in the next place he desires to contend that, supposing that the stipulations have not been all of them fully carried out, that yet the particular mode of executing the decree asked for by the plaintiff is not one which the Court

was justified in allowing. And in particular he contends with great urgency that it was never the intention of the parties, and was not proper in the circumstances, that the uncle should be arrested and brought into Court at the suit of his nephew.

Now, in respect of the last point, it is enough to say that the propriety of the order of arrest in the circumstances was a matter which the defendant did not specifically submit to the Judge. He did not say: "Whatever you may find in respect "of my having carried out the stipulations "between me and my nephew, I maintain "that I cannot in any circumstances be "arrested. I can only be subject to certain "other orders of Court, or to other measures "in execution." His petition distinctly was that the decree could not be executed at all, and in his own words he was showing cause against execution of the decree, and he asked that the application should be dismissed with costs. I do not think it would be our business to consider whether the order for arrest was an improper order, without the defendant having specifically objected to it before the Judge. When the decree is one to be executed by the Courts below, under the provisions of Section 200 or Section 201, it is in the discretion of the Court to order execution by arrest of the party against whom the decree is made, or by the attachment and sale of his property, or by both, if necessary. It would be a very strong case in which we should think fit to interfere with the discretion of the Court in that respect, and I certainly should not think of interfering with it when the objection has not been specifically taken below.

And then, as to the question whether the stipulations have been substantially complied with or no, I am entirely of opinion that this is a point which is provided for by Section 206 of the Code of Civil Procedure. The words in the latter part of that Section are: "No adjustment of a decree in part or in "whole shall be recognized by the Court, "unless such adjustment be made through "the Court, or be certified to the Court by "the person in whose favor the decree has "been made, or to whom it has been trans-"ferred." This is a decree. The defendant's allegation was that the decree had been adjusted; that he had done all that he had to do; and that no further relief remained to be given to the plaintiff. Several of the acts required to be done by the defendant in this case were acts which could have been done through the Court, and they were all of them acts, the doing of which might have been certified to the Court by the person in whose favor the decree had been made; and where there are acts of that character, it appears to me that the policy of the 206th Section clearly was to exclude the reception of evidence upon the point or any question arising out of evidence before the Court. It is peremptorily directed that no adjustment, either in part or whole, of a decree shall be recognized, unless made through the Court or certified by the person in whose favor the decree has been made.

I think, therefore, that the Judge did more than he ought to have done in taking evidence upon this point. The only object which would be served by our going into the evidence which has been taken below would be in order to correct any impression made upon our minds as to the conduct of the defendants. But, inasmuch as such impression will not in any way affect the order to be made in execution of decree, I think it is needless that we should go through the evidence for that purpose. We have only to say that the order of the Zillah Judge is not opposed to the law, and is not questionable upon any point on which an appeal lies to this Court.

Mitter, J.—I entirely concur.

The 8th August 1867.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Limitation—Striking a case off the file.

Case No. 298 of 1867.

Miscellaneous Appeal from an order passed by the Judicial Commissioner of Chota Nagpore, dated the 27th January 1867, affirming an order passed by the Assistant Commissioner of that District, dated the 10th September 1866.

Mudun Bhukut and others (Judgment-debtors), *Appellants,*

versus

Dooar Bharatee (Decree-holder), *Respondent.*

Mr. C. Gregory for Appellants.

Baboo Bhowanee Churn Dutt for Respondent.

Striking a case off the file is not an effectual proceeding to keep a decree in force under the Law of Limitation.

Jackson, J.—THIS case must be remanded to the Lower Appellate Court.

It was a case of execution of decree, and the judgment-debtor pleaded two things: *first*, limitation; and, *second*, satisfaction of the decree.

On the question of satisfaction, the Lower Appellate Court appears to have agreed with the Court of first instance that the decree had not been paid in full.

On the question of limitation, he records this opinion: "It is only necessary to say that the case was struck off the file in 1864, and revived in 1865." Now, the fact is that the striking a case off the file is not a proceeding in any sense to keep the decree in force. It is an act of the Court consequent on the failure of the decree-holder to take any proceeding, and the day on which the case may be struck off the file in no way indicates the date on which an effectual proceeding has been taken by the decree-holder.

It is necessary, therefore, for the Judge, before he can hold that the plea of limitation is not a bar to this application, to find that, within three years next before the application, the judgment-creditor had taken some effectual proceeding to keep his decree in force.

The case must go back, therefore, in order that he may find specifically upon that point.

Mitter, J.—I concur.

The 8th August 1867.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Section 27, Act XXIII., 1861—Section 387, Act VIII., 1859—Appeals—Suits and proceedings in execution.

Case No. 283 of 1867.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 28th February 1867, affirming an order passed by the Moonsiff of that District, dated the 8th December 1866.

Ram Jadub Chatterjee (Judgment-debtor), *Appellant,*

versus

Rash Monee Dossee (Decree-holder), *Respondent.*

Baboo Woomesh Chunder Banerjee for Appellant.

Baboos Unnoda Pershad Banerjee and *Anund Chunder Ghosal* for Respondent.

Section 27, Act XXIII. of 1861, takes away specia appeal in all those cases that are expressly alluded to therein, thus overriding Section 387, Act VIII. of 1859.

The provision applies in execution of decree as well as in suits themselves, and to suits and proceedings in execution commenced before 1861, or even before 1859.

Jackson, J.—I HAVE never had the least doubt upon the point raised upon this preliminary objection.

I think, as we have held in other cases in this Court, that the very explicit words of Section 27, Act XXIII. of 1861, overriding Section 387 of the Civil Procedure Code, take away the special appeal in this case; that the provision applies as well to cases in execution of decree as in suits themselves; that it also applies to suits and to proceedings in execution whether they be commenced before 1861, or even before 1859.

I, therefore, think that the preliminary objection in this case must prevail.

The appeal must be dismissed with costs.

Mitter, J.—I entirely concur with my learned colleague.

It appears to me that the appellant is so far right in contending that Act XXIII. of 1861 and Act VIII. of 1859 ought to be read together as parts of one Act, instead of their being read as two distinct Acts. But the appellant is bound to show that his case falls within the proviso in Section 387 of the Procedure Code. He has not shown us, and is not in a position to show to us, that the proceeding out of which the present appeal has arisen was one which was actually pending at the time when the Act came into operation, and, this fact not having been established to our satisfaction by the appellant's pleader, I think that the present appeal cannot be allowed.

There can be no doubt about the construction of the words used in Section 27 in Act XXIII. of 1861. It clearly bars an appeal in all those cases that are expressly alluded to in that Section, and the present case is clearly one of them.

The 9th August 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mortgage—Usufruct instead of interest—Redemption—Mesne-profits and Interest—Notice of cross-appeal—Section 6 (E), Act XXVII. of 1867.

Case No. 108 of 1867.

Regular Appeal from a decision passed by Baboo Nurothun Mullick, Principal Sudder Ameen of Bhaugulpore, dated the 30th January 1867.

Luleet Singh and others (Defendants), *Appellants,*

versus

Mirza Ali Reza and another (Plaintiffs), *Respondents.*

Baboos Debendro Narain Bose and *Nil Madhub Sein* for Appellants.

Mr. R. E. Twidale for Respondents.

Suit laid at Rupees 1,800.

An estate was mortgaged for 100 Rs.; the mortgagee was put in possession, and it was stipulated that he was to enjoy the usufruct in lieu of interest, the mortgagor being entitled to redeem at any time on repayment of the principal. When the mortgagor deposited the principal, the mortgagee set up a false claim upon absolute sale, and forced the plaintiffs into a regular suit, on which possession was decreed to them on payment of the principal. HELD that they were entitled to mesne-profits for such period as may not be barred by the Statute of Limitation. HELD also that plaintiffs were entitled to interest from the date of suit.

Though a notice of a cross-appeal may be lodged with the Registrar, High Court, previously, the cross-appeal itself must, under Section 348, Act VIII., 1859, be taken at the hearing of the appeal, and must bear the stamp required by Section 6E, Act XXVII. of 1867.

Kemp, J.—THIS was a suit to recover Rupees 24,192 on account of mesne-profits from 1267 to 1272 F. S. with interest thereon from date of suit, as per decrees of the Additional Judge of the district, and of the High Court dated respectively the 27th September 1864, and 26th June 1865, under the following circumstances:—

Mouzah Gopalpore was mortgaged by Golam Reza, the ancestor of the plaintiffs, on the 11th Falgoon 1221 F. S., corresponding with 15th February 1814, to the ancestor of the defendants, the mortgage-debt being Rupees 100.

The ancestor of the defendants remained in possession, enjoying the usufruct in lieu of interest on the money borrowed. After resumption of the estate by the Government, a settlement was made with the defendants on the 12th December 1864, the plaintiffs deposited the principal of the mortgage-debt in the Court of the Judge of the district, and applied in the Miscellaneous Department for redemption. The suit was, however, struck off the file.

A regular suit was, therefore, instituted, which terminated in the plaintiffs obtaining possession of the mortgaged property.

The plaintiffs, relinquishing the mesne-profits for the years which are barred under Act XIV. of 1859, sue for them from 1267 to 1272 F. S.

The defendants urged that the claim for mesne-profits prior to the date of the deposit, which they aver was made in Assar 1272, is inadmissible. They further aver that the assets of the mortgaged property amount to Rupees 312-2-3 per annum as per settlement-proceedings, from which must be deducted the Government revenue amounting to Rupees 200-2-3, leaving the annual proceeds at Rupees 112; that, assuming this sum to represent the usufruct of the estate enjoyed by the defendants, the claim of the plaintiffs on account of mesne-profits would at the utmost amount to Rupees 672, instead of the enormous sum claimed by the plaintiffs.

The Principal Sudder Ameen gave the plaintiffs a modified decree awarding Rupees 1,800 as mesne-profits with interest from date of suit to date of realization, at the rate of 12 per cent. per annum.

In appeal it is contended that there was no deposit made prior to the decree of the High Court, dated 26th June 1865, which decree provides that the plaintiffs were to obtain possession on their depositing the amount of the mortgage-debt; that the Principal Sudder Ameen has misapplied the provisions of Regulation I. of 1798; that the order of interest to run from date of suit is wrong.

The plaintiffs sought to put in a cross-appeal objecting to the rate of wassilat awarded by the Principal Sudder Ameen.

We find that the mortgage was concluded on this footing. The mortgagor borrowed 100 rupees. The mortgagee was put in possession of the mortgaged estate, and it was stipulated that he was to enjoy the usufruct in lieu of interest, the mortgagor being entitled to redeem at any time on payment of the principal borrowed, *i. e.*, Rupees 100.

The mortgagor deposited the principal in Court in 1261 Fuslee, and demanded possession. The mortgagee, instead of yielding up possession, and taking the money deposited, set up a false claim of an absolute sale, and thus forced the plaintiffs into a regular suit, which involved protracted litigation and great expense. The first deposit was made by the plaintiff in 1854, and it was not until 1865 that the plaintiffs finally succeeded in obtaining possession.

It is true that, in the decree awarding possession, it is provided that plaintiffs were to obtain possession on payment of the principal, and that, to make the matter doubly sure, the plaintiffs did make a second deposit in 1272; but, as they had already complied with the provisions of the law, Regulation I. of 1798, in 1261 Fuslee, by making the required deposit, and as they were wrongfully kept out of their just rights by the fraudulent conduct of the defendants, they are, in our opinion, clearly entitled to obtain mesne-profits from 1267, or for such period as may not be barred by the Statute of Limitation, which period in this case extends from 1267 to 1272 as claimed by the plaintiffs. Had the defendants given up possession in 1261, when the plaintiffs were legally entitled to it, this suit would have been unnecessary. The defendants, appellants, object orally to the amount of wassilat awarded by the Principal Sudder Ameen, but this objection was not distinctly taken in their grounds of appeal, and is moreover unreasonable. The Principal Sudder Ameen has calculated the wassilat on the assets as fixed by the Government settlement, making a small allowance for the increased value of land since that settlement was concluded.

On the question of interest, we think that the plaintiffs are clearly entitled to it from date of suit, considering the very long period during which they have been deprived of their just rights by the fraudulent acts of the defendants.

The plaintiff's cross-appeal is inadmissible, as it has not been presented upon the stamp required by Section 6 (E), Act XXVII. of 1867. It is said that the petition was put in the day before Act XXVII. of 1867 came into operation; and that, as it is engrossed on a stamp of 2 rupees, it is admissible: page 102, Miscellaneous Rulings, Volume VI., is quoted. On turning to the ruling quoted, we find that the learned Judges held that, as a "point of practice," there can be no objection to a respondent filing a *notice* with the Registrar, and specifying in the notice the objections which he *intends* to take on the hearing of the appeal.

This rule is a good one, and was passed to prevent the pleaders of the opposite party not being taken by surprise, and being consequently unprepared to meet the arguments taken in cross-appeal at the hearing.

The cross-appeal must, under Section 348 of Act VIII. of 1859, be taken at the hearing of the appeal, and it must be put in on the proper stamp under Section 6 (E), Act XXVII. of 1867, although a notice of an intention to take a cross-appeal may have been lodged with the Registrar before that Act came into operation. *See* Weekly Reporter, Volume VII., page 452, Civil Rulings. The respondents now state that they are not willing to pay the stamp-fees required, and their cross-appeal cannot be admitted.

The decision of the Principal Sudder Ameen is, therefore, affirmed, and the appeal of the defendants is dismissed with costs and interest.

The 9th August 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Will—Limitation—Reversioner (suit by).

Case No. 21 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 23rd June 1866.

Soudaminee Dossee (Plaintiff), *Appellant,*

versus

Bistoo Narain Roy and others (Defendants), *Respondents.*

Mr. R. V. Doyne and *Baboos Sreenath Doss* and *Kedarnath Chatterjee* for Appellant.

Baboos Kishen Kishore Ghose, Unnoda Pershad Banerjee, and *Tarucknath Sein* for Respondents.

Suit laid at Rupees 44,576-7-7.

Suit by *A*, a Hindoo lady and daughter of *B*, to declare invalid a will of *B*, made in favor of *C*, a relative. It appeared that *D*, the widow of B, instituted proceedings against *C*, the devisee, in which she claimed the property of *B*. Subsequently, the widow, by a deed of compromise, admitted the rights of *C*, and abandoned her own. HELD *per Seton-Karr, J.*, that limitation in the present suit by *A* against *C*,

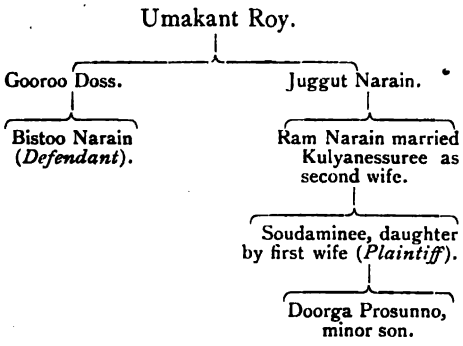
the devisee, run from the date on which the widow admitted the devisee's rights, and not from any prior date, as during the period of the widow's dispute with the devisee she was protecting the interests of *A*, who claimed to be the reversioner, who would not have been heard in the matter, and had no right to sue during the pendency of such litigation.

On the whole case the will was found valid by both Judges.

Seton-Karr, J.—THE plaintiff sues, as a pauper, to set aside what she terms a forged will, to confirm her reversionary right to the properties left by her father, and to obtain possession, as manager, during the lifetime of the widow of her father, who is the step-mother of the plaintiff.

The defendant Bistoo Narain asserts the validity and genuineness of the will, and urges that the claim is barred by limitation.

The position of the parties will be understood from the family-tree which is here set forth :—



Ram Narain, it is stated by the defendant, and not denied by plaintiff, died on the 6th of Kartick 1253, or some time after the middle of October 1846.

On the 3rd of Kartick 1246, or three days previous to his death, he is said by the defendant to have executed the will now in dispute, in which, after reciting his illness and fear of death, he assigns to his step-mother as maintenance the sum of 200 rupees a year, and a similar sum to his second wife Kulyanessuree, and he then makes over the whole of his real and personal property, save the ornaments of the women to the defendant Bistoo, who is his first cousin.

Nothing whatever is left by this document to the plaintiff, and she is only mentioned in the will as his "dhatta kunya," or married daughter.

The case between the parties turns principally on the genuineness of the will, and we may say that it is the only *fact* in dispute.

The Principal Sudder Ameen has found the claim barred by limitation, and we gather from his judgment, which is very brief, that he thought the will genuine, inasmuch as plaintiff had not given any direct evidence respecting its invalidity, and as evidence had been given by the defendant as to its execution.

In appeal it has been urged before us by Mr. Doyne, *1st*, that the suit is not barred by limitation; and, *2ndly*, that the will is not genuine.

As regards limitation, it is necessary to go somewhat into the history of various litigations; and it appears that, within three months from the date of the alleged execution of the will, and from the death of the testator, Bistoo Narain appeared before the Moonsiff in a case of execution of decree, and prayed that he might be allowed to represent the deceased Ram Narain as decree-holder *versus* one Bissambhur Mundul. This was on the 7th of January 1847; and, after a proclamation and the examination of certain witnesses, the prayer was complied with, and Bistoo Narain was allowed to carry out the decree in place of Ram Narain.

To this proceeding the plaintiff was no party, but, subsequently, one Kasheenath, as putneedar, brought a suit for rents from 1245 to 1256 against Soudaminee, the plaintiff before us, Kulyanessuree, the step-mother, and Bistoo Narain. In this case Bistoo propounded the will now in dispute, and Soudaminee asserted that she had arrived at her majority, and that no will had been executed by her father. This is the case which the Principal Sudder Ameen takes as the date from which limitation runs, and it was decided on the 24th of September 1852, a decree being given for rents against Kulyanessuree and Bistoo.

It next appears that Kulyanessuree sued Bistoo before the Magistrate, under Act IV. of 1840, alleging that she had succeeded to the property of her husband, and that Bistoo was only her *karpurdaz*, or manager; but the Magistrate, finding Bistoo in possession, maintained him there, and then followed a civil suit on the part of Kulyanessuree, who, however, ended by compromising the same on the 25th of April 1853, or the 12th of Bysack 1260. In the razeenamah filed on this occasion, the then plaintiff recited the history of the family and the contents of the will, and admitted that she had been badly advised in instituting the suit, and in impugning the genuineness of a deed which

had been really executed by her husband, and could not be set aside.

Mr. Doyne contends, as the plaintiff contended in the Court below, that limitation can only run from the date of this compromise (from which admittedly the suit is in time); that adverse possession only commenced then, when the widow of Ram Narain collusively and improperly ceded her rights to Bistoo, and imperilled the interests of the plaintiff, reversioner; that the plaintiff could not have been heard in defence of her own interests before this transaction, or until the widow ceased to contend with Bistoo; and that the plaintiff was not bound to bring a suit merely because she had attained to a knowledge of an alleged will in the suit instituted by the putneedar for rents, in which suit nothing was decided but liability for rents.

In the course of argument on this point, the following cases have been cited:—

Marshall's Reports,		page	33
Weekly Reporter, Volume	II.	„	271
„ „ „		„	276
„ „ „	VI.	„	222
Hay's Reports,	„ I.	„	107
„ „ „		„	239
„ „ „	II.	„	477
Sudder Dewanny Adawlut Reports,	1859,	„	210
„ „ „	1858,	„	995
Special Number, Weekly Reporter,		„	165

None of these cases are, however, exactly in point. Some of them recognize the power of the reversioner to sue during the lifetime of the widow, in order to prevent waste or destruction of the property, and in order to declare that a conveyance is not binding except during the widow's lifetime (*see* Special Number, page 165, and Volume VI., Weekly Reporter, page 222). In the case reported at Volume II., page 273, it is certainly ruled that, in a suit to set aside a deed, the cause of action accrues when the deed is executed, or at such time as the deed which is impugned came to the knowledge of the plaintiff.

But in the present case I think there is this difference, *viz.*, that the plaintiff had had no occasion to sue so long as the widow was urging her claim to the property, and was suing Bistoo, first in the Magistrate's, and then in the Civil, Court. For this period the widow was practically protecting the rights of the reversioner, who would not have been heard in the matter, and who had no call to sue.

When the widow gave up her own rights, acknowledged the validity of the will, and left Bistoo in undisputed possession, not as agent, but as devisee under the will, then the rights of the plaintiff were endangered, and she was bound to sue. In this view, I hold that limitation began to run only from the 25th of April 1853, and that, consequently, the suit, which was instituted on the 16th of March 1865, would be in time by rather more than a month.

Holding this, it becomes necessary to decide as to the genuineness of the will, and our decision will obviously be guided by a consideration of the direct evidence, as well as of the internal probabilities of the deed.

The names of nine witnesses are engrossed on the deed. The depositions of Bhugeeruth Laha, the writer, of Kanai Lall, and of Kishen Singh, were taken in the case, in which Bistoo in 1847 applied to the Moonsiff to succeed to Ram Narain as decfee-holder, and copies of those depositions have been put in this case, and they were not objected to in the Lower Court.

But they were not taken in a case in which Soudaminee was a party, and we have attached no weight to them in forming our judgment.

But the evidence of Mooktaram Ghose, and of the attesting witnesses to the deed, has been taken at length in this suit, and he proves the execution of the will, the illness of the testator, and the demise of all the attesting witnesses, except Khettra Kobiraj, who, apparently, cannot be produced.

Also one Romanath, the son of Bhugeeruth Laha, the writer, has appeared, and has deposed to his father's presence at the time and to the writing of the deed, the deponent being himself also present at the time. The same circumstances have also been deposed to by Ram Kristo Koar, Raj Kishore Roy, Luckhee Narain Mookerjee, Mon Mohun Mookerjee, and Kishen Doss Mundul. These witnesses are apparently of a respectable station in life, and no reason is assigned why they should give false evidence in favor of the defendant.

But the internal evidence and the probabilities are also in favor of the will.

The plaintiff was married at the time of the testator's death, but had no issue.

There would not exist, we think, in the mind of a Hindoo any particular motive for making any special provision for a daughter so situated. There might, indeed, be something calculated to excite suspicion in the fact that the testator deprived his second wife of her life-interest in the property, and left her only a maintenance of 200 rupees a year. But the widow sits down contentedly, and, after a brief contest, acknowledges the genuineness of the deed. There is no proof, nor we may add, any probability of collusion between Bistoo and Kullyanessuree in such a matter, or any reason for thinking that Kullyanessuree treacherously or ignorantly abandoned her rights.

The object and scope of the will are what might be looked for in a person situated as the testator, who had no nearer male relative than the devisee; and, at any rate, we cannot pronounce the will as immoral or inofficious in a purely Hindoo point of view.

Then, the conduct of the plaintiff herself has been such as to lend strength and corroboration to the defence.

She was fully aware of the will as far back as July 1852, and she must have known of the abandonment of her rights by Kullyanessuree in the April following. Yet, for nearly 12 years, she sits down contentedly, and only sues when nearly all the attesting witnesses have passed away, and when it is scarcely possible for the defendant to adduce direct evidence of a better or fuller nature than he has done. Moreover, as a fact, the will is fairly proved.

The conduct of Bistoo, we may add, has, on the other hand, been straightforward and consistent from the beginning.

Though the will was not registered, it certainly saw the light within three months of the testator's death. Bistoo was all along in possession, and was found to be in possession by the Criminal Court. In various proceedings, in the year 1848, in various Courts, the defendant appeared in the same character, and early publicity and persistent maintenance of his rights have characterized all his actions throughout.

Looking to the amount and character of the direct evidence and to the internal probabilities, as well as to the extreme negligence of the plaintiff, I can have no reasonable doubt that the will is genuine, and that the suit was rightly dismissed on the merits.

The appeal is, therefore, dismissed with costs.

Macpherson, J.—I think that the will is well proved, and concur generally in the reasons for arriving at this conclusion assigned by Mr. Justice Seton-Karr.

The appeal will, therefore, be dismissed with costs.

The 9th August 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Enhancement—Clause 3, Section 17, Act X. of 1859—Boundaries of jote.

Case No. 729 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Purneah, dated the 28th December 1866, affirming a decision passed by the Assistant Collector of that District, dated the 3rd August 1866.

Bibee Reazoonissa (Plaintiff), *Appellant,*

versus

Shaikh Dad Ali (Defendant), *Respondent.*

Baboo Romanath Bose for Appellant.

Baboo Greesh Chunder Ghose for Respondent.

In a suit for enhancement under Clause 3, Section 17, Act X. of 1859, on the ground that defendant held lands in excess of that originally granted to him, the mere fact that defendant held for 20 years at an unvarying rent does not excuse him from payment of rent on any land in excess of his jote, unless under special circumstances.

Glover, J.—This was a suit under Clause 3, Section 17, Act X. of 1859, for enhancement on the ground that the defendant's jote had been found on measurement to be 125 beegahs, instead of 102½ beegahs. The ryot denied holding any excess, and pleaded that he had paid an unvarying rent from time immemorial.

The Assistant Collector refused to take the evidence offered by the landlord, on the ground that the questions of notice and measurement were not disputed. For the rest he found that the defendant had been holding his jote for 20 years at an unvarying rate, and was not, therefore, liable to enhancement.

The Judge held that the plaintiff had failed to produce any evidence in support of his plea that the area of the jote was

formerly 102½ beegahs, and on the other points agreed with the Assistant Collector.

This decision cannot stand. In the first place the Judge is wrong in stating that no evidence to prove the original area of the defendant's jote was forthcoming. It is admitted by the Assistant Collector that he refused to take the plaintiff's evidence, and in the fourth ground of the plaintiff's appeal to the Judge objection is taken to the Assistant Collector's ruling on this point. The special appellant, therefore, had no opportunity of putting in his proofs as to the original size of the jote; he wished to file them in the first instance, but was prevented.

Then, again, the mere fact of holding for 20 years would not excuse the ryot from payment of rent on any excess land he had contrived to hold over and above his jote; unless, indeed, that jote were defined as to extent and boundaries, or by the latter alone, in which case he might retain at the original rent all the land comprised within those boundaries. But in this case we are told that no pottah exists or any specification of boundaries. The ryot is said to have held a jote of 102½ beegahs without pottah.

The case must go back to the Assistant Collector, who will take evidence from the plaintiff, *first*, as to the extent of defendant's holding as granted to him by the zemindar; and, *2ndly*, as to the amount of land he holds in his possession now; and, if the latter exceed the former, the defendant, unless he prove special circumstances which are not to be found in the pleadings, will be liable for the excess.

Costs to follow the result.

The 9th August 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Leased land taken for public purposes—Compensation under Act VI., 1857—Tenant's claim for damages—Lessor's liability.

Case No. 434 of 1866.

Regular Appeal from a decision passed by Baboo Mohendronath Bose, Officiating Principal Sudder Ameen of Hooghly, dated the 20th September 1866.

Mr. William Minto (one of the Defendants), *Appellant,*

versus

Kalee Churn Doss (Plaintiff), *Respondent.*

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Appellant.

Baboos Kalee Prosunno Dutt, Otool Chunder Mookerjee, Bama Churn Banerjee, and *Nubo Kishen Mookerjee* for Respondent.

Suit laid at Rupees 500.

Government took, for public purposes, a quantity of land which included 4 cottahs leased by *M* to plaintiff as the site of an iron-foundry. Proceedings with a view to compensation were duly had, pursuant to Act VI. of 1857, and the arbitrators awarded a sum for the whole land and premises, of which sum they gave plaintiff a small part, and the rest to *M*. Plaintiff, who did not appear before the arbitrators, brings a suit to reimburse himself for loss sustained by having been turned out of his holding and deprived of the machinery, &c., of his foundry. HELD that *M* as lessor is not answerable for plaintiff's eviction, or for damages on any other ground.

Phear, J.—THE plaintiff in this suit became in Assar 1266 tenant to the first-named defendant Mackey of certain 4 cottahs of ground as the site of an iron-foundry for a term of five years.

During the pendency of this tenancy, the Government of India took for public purposes, namely, for the use of the East Indian Railway, a considerable quantity of land belonging to Mr. Mackey, in which was included the 4 cottahs leased to the plaintiff. Proceedings for the assessment of the purchase-money and compensation were duly had pursuant to the provisions in that behalf of Act VI. of 1857, and the arbitrators awarded Rupees 5,20,000 in respect thereof for the whole of the land and premises. Of this sum, they gave Rupees 6,520 to the zemindar, and the remaining Rupees 5,13,480 to Mr. Mackey. The present plaintiff did not appear before the arbitrators to claim any interest in the land or to ask for a portion of the compensation. He now brings this suit to reimburse himself for the loss which he says he has sustained by reason of being turned out of his holding and deprived of the machinery, &c., of the foundry.

It is not clear from the plaint upon what ground the plaintiff seeks to make Mr. Mackey liable to recoup him this loss. The words of the plaint seem to imply that the cause of action was simply the disturbance of the tenant's peaceable possession. We are distinctly of opinion that, under the circumstances of the case, Mr. Mackey, as lessor, is not answerable for the eviction of the plaintiff from the 4 cottahs. Nor do we see any

other ground upon which the plaintiff can be entitled to damages from Mr. Mackey. But then it is said that the plaintiff really is suing to obtain from Mr. Mackey so much of the purchase-money and compensation received by him from the Government as was awarded for property which, in fact, belonging to the plaintiff, although the arbitrators treated and valued it as a portion of Mr. Mackey's larger interest. Assuming that the plaintiff has an equitable right as against Mr. Mackey in respect of this, and that his plaint is such as to enable him to assert it now, we think that the evidence before us is entirely insufficient to lead us to any definite conclusion upon it. We are by no means satisfied that any property of the plaintiff's was included in that which the arbitrators valued; and, if any there was so valued, the plaintiff has not placed us in the position to make even a guess at the relation which that property bore, to the whole of the land and assets which the arbitrators assessed by their award at Rupees 5,20,000. We are, consequently, quite unable to arrive at any judgment as to the aliquot part of the whole compensation and purchase-money which is attributable to the plaintiff's share of the property.

It thus appears to us that the plaintiff has completely failed to make out his case. His pleader has pressed us to refer the case to the Lower Court under the provisions of Sections 354 and 355 of Act VIII. of 1859, in order that the deficiency in the evidence may be supplied; but we do not think that we ought to show the plaintiff any favor of this kind. He did not choose to go before the arbitrators in 1862, when the matter was fresh, and the property desired to be valued could have been inspected and spoken to in the condition of daily use, and he is scarcely entitled, now that five years have elapsed by his own laches, to claim any indulgence to aid him in repairing his own imperfection on this head. We also see traces of much vexaticus behaviour on his part. When notice was given to him to remove his machinery and moveable materials from the ground, he refused to do so, thinking it better policy to seek compensation for them through the medium of a suit in the Civil Court. In pursuance of this intention, he first brought his suit against the Railway Company alone, but this he withdrew before proceeding to trial. He now sues that Railway, the Collector, and Mr. Mackey jointly, and yet even now is unprepared to make out a case against either defendant.

On this view of the facts, we reverse the decision of the Lower Court, and dismiss the suit with costs in both Courts.

The 9th August 1867.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Suit for dispossession—Oral evidence of possession—Jumma-wasil-bakee papers.

Case No. 957 of 1867.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 29th January 1867, affirming a decision passed by the Moonsiff of Durbangah, dated the 9th June 1865.

Sheo Suhaye Roy and others (Plaintiffs), *Appellants,*

versus

Goodur Roy and others (Defendants), *Respondents.*

Baboo Poorno Chunder Shome for Appellants.

No one for Respondents.

In a suit brought on an allegation of forcible dispossession, oral evidence, if credible and pertinent, is sufficient to establish the fact of possession.

It is doubtful whether, under Section 43, Act II. of 1845, *jumma-wasil-bakee* papers are admissible as corroborative evidence.

Jackson, J.—I THINK that this case must go back to the Lower Appellate Court.

The allegation was one of forcible dispossession in the year 1267 B. S. The defendants met that with a distinct denial that plaintiffs had been in possession at the time stated or at any time within 12 years, or that the defendants had, as alleged, forcibly dispossessed them.

The Moonsiff, who tried the suit, was of opinion that the witnesses for the plaintiff, whom he stated, were *dulili*, whatever he meant by that, made out the plaintiff's case. He described defendants' witnesses as *bedulili*, and that they did not rebut the evidence for the plaintiff. The case going before the Judge, he remarks upon the failure of plaintiff to produce the jumma-wasil-bakee papers of certain years, and to attest properly the preparation of those jumma-wasil-bakee papers which had been produced, and then he says that in such a case, where the plea of limitation is set up, and the plaintiffs

having been required to prove the fact of their possession within 12 years, he cannot consider mere oral evidence as sufficient to the challenge. If the Judge meant to say that the plaintiff could not support such a case by oral evidence that oral evidence was not legally sufficient, then he was unquestionably wrong. There can be no doubt that oral evidence, if credible and pertinent, could sufficiently establish the fact of possession. It may be observed that jumma-wassil-bakee papers in a case of this kind are really of very little consequence or value, as it is a matter of perfect ease for either party in the suit to produce any number of such papers. It is even doubtful whether, under the terms of Section 43, Act II. of 1855, jumma-wassil-bakee papers would be admissible even as corroborative evidence strictly speaking: certainly, they are not independent evidence of any kind whatever, and therefore the absence of particular papers of that kind does not appear to be a very material omission.

The case will, therefore, go back to the Judge in order that he may determine upon careful consideration whether the witnesses on the plaintiff's side prove plaintiff's allegation. He will bear in mind that these same witnesses were believed and accepted as sufficient by the Court before which they deposed.

Mitter, J.—I entirely concur with my learned colleague.

It appears to me that, in this case, an error in law has been committed by the Lower Appellate Court in the investigation of the case which may have produced an error in the decision of the case upon the merits. The remark made by the learned Judge in the Court below with regard to the value of oral evidence appears to me to be one which is entirely contrary to law.

The plaintiff in this case starts with a decree of 1835, which is admitted by the defendants. It is also admitted by the defendants that the lands in dispute are covered by that decree. Under these circumstances, the plaintiff having given direct evidence to prove his possession and dispossession, and this evidence having received the approbation of the Court which had the best means of judging upon the point, it was incumbent upon the Judge to give a distinct and clear opinion upon the value of that evidence.

The only difficulty I felt was, whether the Judge means to say that oral evidence should not be accepted as evidence of possession within 12 years, or that the particular oral evidence adduced in this case was insufficient to satisfy him that the plaintiffs were in the enjoyment of possession of the property in dispute as alleged by them until the date of ouster; but, looking at the whole of the judgment, I think that the Judge has not at all gone into the oral evidence which was adduced by the plaintiffs. I am, therefore, of opinion that the ends of justice require that this case should be remanded to the Lower Appellate Court for re-trial.

The 9th August 1867.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Kubooleut.

Case No. 967 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 24th January 1867, reversing a decision passed by the Deputy Collector of that District, dated the 9th August 1865.

Yakoob Ali and another (Plaintiffs), *Appellants,*

versus

Kaernoollah and another (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellants.

Mr. R. E. Twidale for Respondents.

In a suit for a kubooleut on the allegation that the defendant is holding a specific quantity of land under him, if the plaintiff's allegations are disproved, and the relation of landlord and tenant is not established, the plaintiff's suit must altogether fail.

Quære.—Whether a suit for a kubooleut on an allegation of the kind stated will lie.

Jackson, J.—It appears to me in this case, without going specifically into the points raised in special appeal, that the plaintiff is not entitled to maintain this suit. He alleged in his plaint that the defendant held a specific quantity of land under him, and he simply asked that the defendant should be required to give him a kubooleut for that amount of land. Without laying it down in this case, whether or no a plaintiff may sue for a kubooleut simply on the allegation that the defendant is holding land under him, although I incline to the opinion that such a suit will not lie, I think it quite sufficient to say that, when the plaintiff's allegations are for the most part wholly

disproved, that is to say, when it is found that a part of the land is not in the defendant's occupation at all, and that another portion of it is held by him under a lakheraj title, in such case there was no course, but to dismiss plaintiff's suit altogether.

I, therefore, think that the special appeal must be dismissed with costs.

Mitter, J.—I concur with my learned colleague.

The Lower Appellate Court having found that the plaintiff, special appellant, has failed to establish that any relation of landlord and tenant exists between him and the special respondent, the special appellant has got no ground whatever to complain against that finding. If the lands which are now in the occupation of the special respondent are lands belonging to the zemindaree of the special appellant, the Revenue Courts are not the Courts to which the special appellant is entitled to resort for the purpose of obtaining relief. This appeal, therefore, ought to be dismissed with costs.

The 9th August 1867.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Enhancement—Notice—Productive powers of the land—Clause 11, Section 17, Act X. of 1859.

Case No. 894 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 4th February 1867, reversing a decision passed by the Deputy Collector of that District, dated the 27th August 1866.

Khondkar Abdoor Ruhman and others (Defendants), *Appellants,*

versus

Wooma Chunder Roy and others (Plaintiffs), *Respondents.*

Baboo Khetturnath Bose for Appellants.

Baboo Mohinee Mohun Roy for Respondents.

A notice in a suit for enhancement under Section 17, Act X. of 1859, should be distinct and intelligible as to the grounds upon which enhancement is sought.

A rise in the value of the lands owing to a considerable portion of the town in which the lands are situated having been swept away by a river is not such an increase in the productive powers of the lands as is contemplated by Clause 11 of Section 17 of Act X.

Macpherson, J.—In this case we think that the judgment of the Lower Appellate Court is wrong, and that the plaintiff's suit ought to have been dismissed.

The suit is for enhancement of the rent of a holding in the town of Beauleah. The notice which is the basis of the suit is so framed as to touch, and barely to touch upon all the grounds of increase mentioned in Section 17 of Act X. of 1859, without indicating upon which of those grounds plaintiff intends to rely. The words of the notice are to the following effect:—

"In this jote, there has been a measure-"ment, and the lands have had their product-"ive powers increased; therefore, according "to the nirrick of the villages in the turuf, "39 rupees, odd annas, will be a proper jum-"ma."

From such a notice, it is impossible to say whether the enhancement is meant to be on account of increased productive powers, or of the rent being less than that paid for similar land in the neighbourhood, or on account of its having been shown by measurement that the tenant held more land than he was supposed to hold. We find, too, that, as a matter of fact, there has been much doubt and discussion in the Lower Courts as to what was the ground upon which enhancement was sought.

In our opinion, it is essential that a notice under Section 17 of Act X. of 1859 should be distinct and intelligible. This notice not being so, the suit based upon it fails. There is no question that the defendant is substantially prejudiced by not having got distinct notice of the ground or grounds upon which the right to enhance was claimed.

We may add that the "productive powers" of the land which have been relied upon consist merely of the increased value now attached to lands in the town of Rampore Beauleah in consequence of a considerable portion of the town having been swept away by the River Ganges. It appears to us that a rise in the value of the land, from such a cause as this, is not such an increase *in the productive powers* of the lands as is contemplated by Clause 11 of Section 17 of Act X.

Our present order will be without prejudice to the right of the plaintiff to give proper notice hereafter and enhance the rent of this property, if he can establish his right so to do.

The decision of the Court below is reversed, and the plaintiff's suit dismissed with costs and interest in all the Courts.

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The 9th August 1867.

Present :

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Act XL. of 1858—Acts of guardians without certificate.

Case No. 1003 of 1867.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 21st February 1867, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 26th September 1866.

Mussamut Shooghury Koer (one of the Defendants), *Appellant,*

versus

Boshisht Narain Singh and others (Plaintiffs), *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Bhowanee Churn Dutt* for Appellant.

Baboos Chunder Madhub Ghose and *Hem Chunder Banerjee* for Respondents.

Act XL. of 1858 declares that a person shall not be competent to institute a suit in Court, in respect of property of which he claims the charge, until he shall have obtained a certificate; but not that every act of a guardian who has not such a certificate shall be null for the want of one.

Jackson, J.—It appears to me quite clear that this case must go back.

The special appellant claims under decrees executed by guardians of Boshisht and of the minors. The Judge's decision appears to me to be entirely based upon this, that the deed of sale, as he says, was declared null by the Judge's decision on the 4th January 1862, and as to an ikrarnamah of 3rd February 1862, by which the parties agreed to forego the effect of that decision, that he says, is not a legal document, inasmuch as the guardians had no authority to bind the ward by such an instrument, nor to execute the bye-bil-wuffa of the 20th December 1861. In laying this down, the Judge has adopted what I must consider an untenable opinion of the Principal Sudder Ameen that a guardian not having a certificate under Act XL. of 1858 is not capable of doing any act in reference to the estate of his ward. I am not aware of any authority for such a position. Act XL. of 1858 declares that a person shall not be competent to institute any suit in Court in respect of property of which he claims the charge until he shall have obtained a certificate. But then it provides that the Court may at its discretion dispense with such certificate; but the Act nowhere says that every act of a guardian who has not such a certificate shall be null for want of such certificate.

It is quite clear, therefore, that the Judge has altogether omitted, as the Principal Sudder Ameen before him omitted to enquire into these acts of the guardian whether they were done under legal necessity with due regard to the interests of the minors, and whether for such reasons they were justifiable and binding.

I think, therefore, that the case must go back to the Judge in order that he may enquire specifically into that matter, and decide the case accordingly.

I would add that, if the Judge should be of opinion that the acts of the guardian are so far wanting in authority that they cannot stand, or that the plaintiff should be entitled to recover possession of the lands alienated, it will then be for him to consider upon what terms the plaintiff should recover them. It would be hardly right that the defendant, who had innocently and with reasonable enquiry purchased and given value for them, should be compelled to part with them without having anything in the shape of an equivalent restored to him.

Mitter, J.—I entirely concur with my learned colleague.

The 10th August 1867.

Present :

The Hon'ble C. P. Hobhouse and Dwarkanath Mitter, *Judges.*

Evidence—Sheristadar's report.

Case No. 669 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 5th January 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 15th May 1866.

Byjnath Singh and another (Defendants), *Appellants,*

versus

Maharanee Indurjeet Kooer (Plaintiff), *Respondent.*

Baboo Debendro Narain Bose for Appellants.

Mr. S. Verlannes and *Baboo Romanath Bose* for Respondent.

The report of a sheristadar is not, under Section 180 of the Code of Civil Procedure and in view of the fact that there was a Commissioner attached to the Court, legal evidence.

Hobhouse, J.—We are of opinion that there is no point of law raised in this case. The appeal is dismissed with costs.

We remark that the report of the sheristadar relied upon by appellant is not, under the provisions of Section 180 of the Code of Civil Procedure and in view of the fact that there was a Commissioner attached to the first Court, legal evidence.

The 10th August 1867.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Appeal—Section 88, Act VIII. of 1859.

Case No. 399 of 1867.

Miscellaneous Appeal from an order passed by the Officiating Principal Sudder Ameen of Dacca, dated the 4th June 1867.

Huro Soonduree Chowdhrain, *Appellant,*

versus

Baboo Bungshee Mohun Doss and others, *Respondents.*

Baboo Sreenath Doss for Appellant.

No one for Respondents.

No appeal lies from an order refusing to grant compensation under Section 88, Act VIII. of 1859.

Note by the Deputy Registrar.—This case was before the High Court on a previous occasion. (*See* Weekly Reporter, Volume III., page 28.)

The present appellant was the appellant on that occasion. His application was then, as now, for compensation under the terms of Section 88, Act VIII. of 1859.

On the previous occasion, application was made to, and granted by, the Principal Sudder Ameen of Mymensingh, in whose Court the money that had been attached by the order of the Court of the Principal Sudder Ameen of Dacca had been deposited.

The order of the Principal Sudder Ameen was then appealed to the Judge of Mymensingh who entertained the appeal, and reversed the order as one passed without jurisdiction.

The special appeal to this Court, which was admitted by the Miscellaneous* Bench for trial, in the presence of the respondent, of the question raised by the office as to whether such an appeal was provided by law, was dismissed on the ground that the law provided no appeal in such a case, and that consequently the Lower Appellate Court had acted without jurisdiction in receiving and trying the appeal. The Court, moreover, reversed the order of the Principal Sudder Ameen under the concluding terms of Section 35, Act XXIII. of 1861, considering that the order of the Principal Sudder Ameen was altogether illegal, and that the application should not have been made to him but to the Principal Sudder Ameen of Dacca, who had not only ordered the attachment of the deposit in the Mymensingh Principal Sudder Ameen's Court, but had afterwards directed the removal of the attachment by an order in a judgment passed in a case before him in which the appellant was the defendant.

* *Present:* Loch and Glover, JJ.

Application was then made to the Principal Sudder Ameen of Dacca, who rejected it.

The present appeal is from that order of rejection.

I beg to refer the matter to the Judge presiding in the Miscellaneous Department on the points—

1. Whether such an appeal is admissible, there being no express provision for one by law; and

2. If there be an appeal, whether the appeal should not be preferred to the Lower Appellate Court, the damages applied for being less than Rupees 5,000.

Jackson, J.—I do not find any appeal provided by law against this order. Clearly, it is not one coming under Section 11 of Act XXIII. of 1861, and it is not an order relating to execution of decree. If it were a matter arising out of Section 88 of Act VIII., it would be an interlocutory order, and would form a matter for objection on the hearing of the appeal against the decree. The appeal cannot be admitted in this form.

The 12th August 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Possession—Qualified admission by defendant.

Case No. 552 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 2nd February 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 26th September 1866.

Gopal Roy and others (Plaintiffs), *Appellants,*

versus

Tekaet Roy and others (Defendants), *Respondents.*

Messrs. C. Gregory and *S. Vertannes* for Appellants.

Baboos Mohinee Mohun Roy and *Chunder Madhub Ghose* for Respondents.

In a suit in which the plaintiff sued as owner of property in dispute, and in which defendant admitted plaintiff's possession, but qualified it by saying that plaintiff held as zur-i-peshgeedar or mortgagee, the Lower Appellate Court committed an error in law in the investigation in omitting to try the question of possession.

Mitter, J.—There are two points of special appeal urged before us in this case; *1st*, that the Lower Appellate Court has rejected upon illegal grounds a certain deed of conditional sale, dated 2nd December 1861, and containing an admission that the respondents were proprietors of four annas of the disputed property only; and, *2ndly*, that the Lower Appellate Court has overlooked the fact of possession which was in a manner admitted by the respondents.

With reference to the *first* point, we observe that the deed of conditional sale has not been proved by evidence. The respondents disputed its genuineness, and it was necessary for the special appellant to prove it in a legal manner if he wanted to derive any benefit from it as an exhibit containing an admission by his opponents. With regard to the *second* point, we are of opinion that the judgment of the Lower Appellate Court is defective in law in the investigation of the case. It is true we cannot interfere with the finding of the Lower Appellate Court regarding the failure of the special appellant to prove the ikrarnamah of 1846, which is the basis of his title. But the point of possession is one of material importance. The respondents admitted in their written statement that the special appellant was in possession of the disputed 4 annas till the year 1268, though they qualified that admission by stating that this possession was held in the capacity of zur-i-peshgeedar or mortgagee. If on enquiry therefore, it is found that the special appellant was in possession as owner, and not as a zur-i-peshgeedar, and if the special appellant is still in possession, as he contends, the bare fact of such possession having extended over a period sufficient to bar any claim on behalf of the respondents for recovery would be sufficient to give to the special appellant a title to be maintained in possession of the disputed property. (*See* Boulnois' Reports, Volume I., page 70; and High Court Decisions, Weekly Reporter, Volume V., page 261.) Then, again, this long possession would be at least sufficient to raise a presumption of title in favor of the special appellant which it will be for the respondents to rebut by proving that it was held in the capacity of a mortgagee. According to both these views, the question of possession is one of great importance, and the Lower Appellate Court has committed an error in law in overlooking it altogether. We remand this case to the Lower Appellate Court to try the question of possession, and then to give to it such legal effect as might be deemed just and proper under the circumstances of the case.

The 12th August 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Butwarah Ameen's fees (Suit for contribution for)—Act XI. of 1838.

Case No. 562 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Rungpore, dated the 11th January 1867, affirming a decision passed by the Moonsiff of that District, dated the 15th September 1866.

Greesh Chunder Lahoree (Defendant), *Appellant,*

versus

Asudoonissa Bebee (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboos Gopeenath Mookerjee and *Nurshing Chunder Mitter* for Respondent.

A suit for contribution for the fees of an Ameen who was deputed to make a butwarah will lie against another proprietor of the estate who joined with the plaintiff in applying for the butwarah, and is not affected by the fact that the butwarah was, for certain reasons, not carried out. The Collector, having called upon the proprietors to pay the fees of the Ameen, the plaintiff's payment of the whole amount was not a voluntary payment, as the Collector could have sold the whole estate to realize the fees. Such suit is governed by Act XI. of 1838.

Mitter, J.—THE respondent in this case brought this action against the special appellant, her co-sharer, in a certain zemindaree, for contribution on account of the fees of a Butwarah Ameen, the whole of which, it is admitted, has been paid by her. The special appellant contends that, inasmuch as the application for butwarah was made by the respondent herself, and that, inasmuch as the butwarah has not been completed in consequence of some dispute regarding the share of one Bibee Luteefun, no claim for contribution can lie against him. The facts found by the Lower Courts, however, are that, on an application being made for the butwarah of the mehal on the part of the respondent, the special appellant gave his consent to the butwarah, but, on objections being preferred both by the special appellant and the respondent regarding the share of Bibee Luteefun, the Collector, by his proceeding of the 8th November 1861, struck off the butwarah-case from his file. It is also admitted that the Collector issued a perwanah to all the proprietors of the estate, calling upon them jointly to pay the fees of the Ameen who had been previously deputed by him to adjust the different *sahams* or shares.

Upon this state of facts, we do not think that the objection above referred to is of any force. The pleader for the special appellant drew our attention to the provisions of Section 4, Regulation XIV. of 1819. We think, however, that the case is really governed by Act XI. of 1838. According to the provisions of this Act, the Revenue officers are authorized to realize the fees of a Butwarah Ameen from the proprietors of the estate at such times and in such proportions as the Governor-General in Council (now the Board of Revenue) might be pleased to sanction. It matters little that, in the present case, the butwarah has not been completed; nor can the special appellant complain of this fact, inasmuch as he had joined the respondent, in asking for a *butwarah*, and inasmuch as the Collector's proceeding above referred to was held, not only upon the objection of the respondent, but also upon his own. The Collector had full power, with the sanction of the higher authorities, to call upon all the proprietors jointly to defray the expenses of the Butwarah Ameen, which expenses had been already incurred. The respondent having satisfied this joint liability is fully entitled, in our opinion, to sue special appellant for contribution.

Another objection has been taken before us by the special appellant, namely, that the payment made by the respondent being a voluntary payment, the latter is not at liberty to sue for contribution. According to the view expressed above, this contention also cannot stand. If the Collector had the authority to call upon all the proprietors jointly to pay the Ameen's expenses, he had also the authority to realize the same by selling the whole estate. The respondent had every right to save the estate from sale, because her own share in it might have been sold if the money had not been paid by her. The respondent has discharged a joint liability by this payment, and it cannot be treated as a voluntary payment in any sense of the term. The special appeal is dismissed with costs.

The 12th August 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Acknowledgment—Limitation—Section 4 and Clause 10, Section 1, Act XIV. of 1859.

Case No. 446 of 1867.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 31st January 1867, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 7th May 1866.

Gora Chand Dutt (Plaintiff), *Appellant,*

versus

Lokenath Dutt and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboos Kalee Prosunno Dutt* and *Chunder Madhub Ghose* for Appellant.

Baboos Onookool Chunder Mookerjee, Ashootosh Dhur, and *Bykuntnath Paul* for Respondents.

Where there is a bond which not merely secures a sum of money, but also hypothecates lands as a further security for its due payment, and a suit is brought to recover the money (the suit in no way relating to the mortgage or charge on the lands), the limitation prescribed in Clause 10, Section 1, Act XIV. of 1859, applies.

Memoranda of payments made, indorsed on the bond, and signed by the defendant, are not acknowledgments in writing within the meaning of Section 4, Act XIV. of 1859.

Macpherson, J.—THE first point taken by Mr. Allan for the appellant is that, as the bond upon which the suit was brought, not merely secured the payment of a sum of money, but also hypothecated lands as a further security for the payment being duly made, the suit is within time if brought within 12 years from the time when the cause of action arose; and two decisions of the Madras High Court in the cases of Chetti Gaundam *versus* Saudaram Killai and others, 2 Madras Reports 51, and Kristna Ram *versus* Hachapa Sugapa, 2 Madras Reports 307, are relied upon in support of this contention.

In these cases, it was held that, when there is a bond to secure the payment of a sum of money with interest, by which bond also lands are charged with the payment of the debt, and when a suit is brought upon the bond to recover the amount of principal and interest due upon it, and to have the property pledged sold (as subject to the lien created by the bond) in satisfaction of the debt—the suit is for the recovery of an interest in land, and the period of limitation is twelve years under Clause 12 of Section 1 of Act XIV. of 1859. Neither of these cases, however (which, I may remark, are in direct conflict with two decisions of this Court, to be found reported in 6 Weekly Reporter, pp. 132 and 318), apply to the case now before us, which is a simple suit for the money due upon the bond, and contains no allusion to lands, or to the existence of a mortgage or charge of any sort. Such a suit, I think, clearly falls within Clause 10 of Section 1 of Act XIV. of 1859 (see 7 Weekly Reporter 354). Whether Clause 12 would be applicable if the plaint had prayed for a declaration that the debt was a charge on the lands mortgaged, and for an order that they should be sold in satisfaction of the debt, I need not now decide.

The second point on which Mr. Allan relies is, that the memoranda of payments made, indorsed on the bond, and signed by the defendants, amount to an acknowledgment under Section 4, Act XIV. of 1859, and prevent the suit from being barred by limitation. The judgment of the Madras Court in Kristna Ram's case is again referred to, and it is, no doubt, directly in Mr. Allan's favour. That was a suit for money due on a bond, and it was contended that the claim was not barred, because the defendant had admitted the debt "by an acknowledgment in writing signed by him." The defendant had, on the back of the bond, signed a memorandum of payments made; and it was this memorandum that was relied upon as an acknowledgment. It was to the following effect: "Payment on account of this; up to the 21st November 1858, interest was paid in full, and on account of principal 107 rupees." The Court (Scotland, C.J., and Frere, J.) held that Section 4 of Act XIV. of 1859 does not require that the writing should express in terms a direct admission that the debt or part of it is due, but that it is left to the Court in each case to decide whether the writing, reasonably construed, contains a sufficient admission. And the Court further held that the memorandum in question clearly implied an admission that the debt due on the bond at the time the memorandum was signed was the amount of the principal less Rupees 107, the sum stated to have been paid.

In this interpretation of Section 4 of Act XIV. of 1859 I cannot concur, notwithstanding the high respect which I entertain for the opinion of the learned Judges who decided the case of Kristna Ram.

Part payment being, according to repeated decisions both of this Court and of the Madras High Court, insufficient in itself to bring the case within Section 4, I cannot understand why it should be sufficient if a memorandum of it be made in writing and signed by the defendant. If the Legislature intended to allow an inference of a promise to pay to be drawn from a part payment proved by a memorandum signed by the defendant, it is not easy to comprehend why it should not have permitted a similar inference to be drawn from any part payment well proved. But it is

perfectly clear to my mind that what the Legislature intended was to shut out inferences and deductions of all sorts, and to admit nothing short of a direct admission in writing. An express acknowledgment in writing that the debt is due is a very different thing from a memorandum made by the defendant for his own protection and benefit, that he has made a part payment. The Madras Court says that such a memorandum warrants the inference of a promise to pay. I do not think that it warrants any such inference; and, if it did, still, as in drawing this inference the Court has to go far beyond the actual writing, it would not be an *acknowledgment in writing signed* by the defendant.

It does not necessarily follow that a debt is due, because it has not been paid; for it may have been discharged in other ways than by actual payment. And what Act XIV. of 1859 requires is an acknowledgment in writing that the debt or part of it is due, not a mere acknowledgment of a fact from which it may be presumed that the debt or part of it is unpaid or due.

I find that the opinion I now express is supported by a recent decision of a Division Court in the unreported case of Bishawkha Moyee Chowdhrain *versus* Ranee Huro Soonduree Debia (special appeal 2100 of 1866). I have referred to the papers in that case, and find that a memorandum of payments made, endorsed on the bond, and signed by the defendant, was relied on as being an acknowledgment within the meaning of Section 4 of Act XIV. of 1859. But the Court (Peacock, C. J., and L. S. Jackson, J.) held that the endorsement did not amount to an acknowledgment, and that the suit was barred.

On the whole, I hold that there has been no acknowledgment of the debt within the meaning of Section 4; and, my opinion being thus adverse to the appellant upon both the questions raised by him, I think that the decree of the Lower Court ought to be confirmed, and that the appeal must be dismissed with costs.

Seton-Karr, J.—In this case the plaintiff sued on a kistibundee of the 27th Falgoon 1260.

The first Court held that the claim would have been barred by limitation, but that, as the defendants had acknowledged by their signatures certain payments made on the back of the deed, the claim was good, and the Principal Sudder Ameen, therefore, decreed the same.

The Judge reversed the decision, holding the claim barred by limitation, because the endorsements did not amount to an "acknowledgment in writing."

In appeal, Mr. Allan takes two points before us:—

1st.—That the deed sued on is, in reality, a mortgage, creating an interest on land, and that the plaintiff should have twelve years to bring his claim.

2nd.—That the endorsements of payment on the back of the deed, signed by the defendants, are acknowledgments in writing within the meaning of Section 4, Act XIV. of 1859.

The first point, I think, is wholly untenable. The plaintiff sued on the kistibundee to get his money, and never sought to make the land liable. It is not easy to see how he can now call on the Court, on special appeal, to alter the nature of his claim, and to give him a relief wholly different from that which he sought.

As regards this point, I think we ought to follow the ruling reported at page 354 of the Weekly Reporter, Volume VII., 6th April 1867.

As regards the second point, I would follow the ruling of our own High Court, quoted by my brother Macpherson, on special appeal 2100 of 1866, and, according to this decision, signatures to part payments made by the defendants would not be considered "acknowledgments in writing" within the meaning of Section 4 of Act XIV. of 1859.

I would uphold the decision of the Judge, ruling that the claim is barred by limitation, and would dismiss the appeal with costs.

The 12th August 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Jurisdiction—Possessory action—Title—Clause 6, Section 23, Act X. of 1859—Section 21, Act X. of 1859—Transfer of Tenure.

Case No. 542 of 1867.

Special Appeal from a decision passed by Mr. A. Hope, Judge of Sarun, dated the 28th December 1866, affirming a decision passed by Baboo Gunga Churn Shome, Principal Sudder Ameen of that District, dated the 19th December 1865.

Baboo Lalljee Sahoo and others (Defendants), *Appellants,*

versus

Baboo Bhugwan Doss (Plaintiff), *Respondent.*

Baboo Kalee Kishen Sein for Appellants.

Baboo Anund Gopal Palit for Respondent.

A suit for recovery of possession of land in which the plaintiff's title is put in issue and tried does not fall within the words of Clause 6, Section 23, Act X. of 1859, and is cognizable by the Civil Courts.

A decree against a vendor obtained before a Collector cancelling a pottah of a jote which has been sold is not binding on the purchaser of the jote if the purchase was made *before* the transfer of the tenure to him took place. The purchaser having entered into possession became a "ryot holding under a pottah the term of which had not expired" within Section 21, Act X. of 1859, and, therefore, could not be ejected otherwise than in execution of a decree made in a suit against himself.

A *yearly* tenancy cannot be transferred without the lessor's consent, and the fact that the lessee has had enjoyment under the pottah for a very long series of years does not alter the *character* of the interest originally created by the pottah.

Phear, J.—The plaintiff is purchaser from one Mokha Mezan, of a jote held by pottah of the defendant. The defendant, after the date of the plaintiff's purchase, and after the plaintiff had received possession thereunder, obtained in the Collector's Court a decree of cancelment of the pottah against his (the plaintiff's) vendor for arrears of rent accrued *due before* the purchase. Under this decree, the plaintiff was evicted, and he now sues in the Civil Court to recover possession. He has been successful both in the Court of first instance and in the Lower Appellate Court.

On special appeal, the defendant urges that the matter of suit falls within the words of Clause 6, Section 23 of Act X. of 1859, and, therefore, the Civil Court has no jurisdiction to entertain it. We observe, however, that the defendant by his written statement has put in issue the plaintiff's title in more than one particular, and, as this issue fairly rises out of the substance of the plaint, and has actually been tried by the Courts below, we think that he cannot now say that the legality of the ejectment was alone in question between the parties to the suit. Consequently, according to the ruling of the Full Bench reported in 7 Weekly Reporter 186, Civil Rulings, the suit was well brought in the Civil Court.

Again, the defendant urges that the Collector's decree cancelling the pottah, under which the plaintiff claims to hold, is binding upon him, because it was made against his vendor. That would be so, no doubt, if it had been made *before* the transfer of the tenure to him took place, for in that case the plaintiff would have taken nothing by his purchase. But, as the suit in the Collector's Court was *not*, in fact, brought against the plaintiff's vendor *until after* the plaintiff had purchased, and entered into possession of the jote, we think that the principles enunciated by Mr. Justice Markby in Nobin Kishen Mookerjee *versus* Shib Pershad Pattuck, 8 Weekly Reporter 96, Civil Rulings, are applicable to this case. Assuming that the transfer of the tenure was *bonâ fide* and valid, the plaintiff became thereby "a ryot holding under a "pottah the term of which had not expired" (Section 21, Act X. of 1859), and, therefore, could not be ejected otherwise than in execution of decree or order made in a suit against himself. The defendant's contention on this head cannot, therefore, be upheld.

Lastly, the defendant maintains before us that the pottah does not in its terms pass a transferable interest, and consequently that the plaintiff is necessarily a stranger, without title to the jote. We have considered the words of the pottah fully, and are of opinion that the Lower Courts have placed an incorrect construction upon it. We think the defendant is right upon this point. It

appears to us that the tenancy by the terms of the case is a *yearly tenancy*, and as such cannot be transferred without the consent of the lessor. The fact that the lessee has had enjoyment under the pottah, for a very long series of years, does not alter the *character* of the interest, which was originally created by the pottah, although, supposing any ambiguities to exist on the face of the document itself with regard to that, the nature of the enjoyment might possibly serve to explain them. No such ambiguities do exist in this case, and the long occupation of the original tenant without change is obviously quite as consistent with the view that the alleged transferability of the tenure has never been thought of till lately, as with the contrary.

The appeal is decreed, and the plaintiff's suit dismissed with costs in all Courts.

The 12th August 1867.

Present :

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Adverse holding without contract—Decree for Kubooleut—Suit for arrears of rent.

Case No. 563 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 31st December 1866, reversing a decision passed by the Deputy Collector of that District, dated the 10th July 1866.

Jan Ali (Plaintiff), *Appellant,*

versus

Goocoo Doss Roy and others (Defendants), *Respondents.*

Mr. R. E. Twidale and *Baboo Nursing Chunder Mitter* for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

Where a party, after obtaining a decree establishing his title to land, sues for and gets a decree for a kubooleut against another who was holding the land adversely to him without any contract, express or implied, for the payment of rent, he cannot maintain a suit for arrears of rent for a period previous to the kubooleut, which cannot have retrospective effect.

Mitter, J.—This was a suit brought by the special appellant ostensibly as a suit for arrears of rent at enhanced rates after service of notice. The Lower Appellate Court has dismissed it upon the ground that the claim is barred by Section 32, Act X. of 1859. The special appellant contends before us that the Lower Appellate Court has committed an error in law in applying the Law of Limitation in the manner it has done. After hearing the pleaders on both sides, we find that the special appellant has mistaken his remedy upon the admitted facts of the case. It is agreed between the parties that the respondent held the land in suit for the period in question upon a title adverse to that of the special appellant, and that, during this period, no relationship of landlord and tenant existed between them. The special appellant brought a suit for a kubooleut against the respondent, but this suit was dismissed by the Revenue Court, on the ground that, the special appellant having failed to prove that the respondent was his tenant, his claim for a kubooleut could not be allowed. The special appellant then brought a suit in the Civil Court to establish his title to the land, and this suit was decreed in his favor on the 24th April 1865. He then brought a suit for a kubooleut against the respondent, and ultimately succeeded in getting a decree on the 27th February 1866, corresponding with Magh 1227 M. S. The period for which the present suit is brought is covered by the years 1224, 1225, and 1226, M. S. It is a mistake in the first place to call this suit a suit for arrears of rent at enhanced rates. The respondent never paid any rent to the special appellant at any time previous to the period in question; nor was there, as has been already observed, any relationship of landlord and tenant existing between them until the date of the decree for a kubooleut above adverted to. This kubooleut, however, cannot have a retrospective effect, and we do not see how the special appellant can maintain a suit for arrears of rent for a period previous thereto when the respondent was holding the land adversely to the special appellant without any contract, express or implied, for the payment of rent. Holding this view of the case, we think it unnecessary to try whether the Lower Appellate Court has correctly applied the Law of Limitation to the suit brought by the special appellant. We dismiss his appeal with costs.

The 12th August 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Oral evidence (to vary written contract).

Case No. 164 of 1867.

*Application for review of judgment passed by the Hon'ble Justices Kemp and Glover on the 4th April 1867 in special appeal No. 3317 of 1866.**

Mussamut Ram Deye Kooer (Appellant), *Petitioner,*

versus

Baboo Bishen Dyal Singh (Respondent), *Opposite Party.*

Baboo Kalee Kishen Sein for Petitioner.

Mr. R. E. Twidale for Opposite Party.

Parol evidence inadmissible to vary the terms of a written document, except under special circumstances.

Glover, J.—THE point taken in this application is that the Full Benchruling of this Court in the case of Kasheenath Chatterjee does not apply, and that our order is opposed to other rulings of Divisional Benches.

On the first part of the objection we are clearly of opinion that the Full Bench ruling covers this case. The ruling in Kasheenath's case was that parol evidence was not admissible to vary or alter the terms of a written contract in cases where there was no fraud or mistake, and in which the parties intended to express in writing what their words imported.

Now, in the present case, it is admitted that the husband did execute the deed, and make over the property to his wife. The very nature of his plaint shows it, for, if he did not make it over, how was he to benefit by the check imposed upon himself? If he retained it in his own hands, the evil that he said he wished to avoid would remain with him.

It is quite clear also that there was neither fraud nor mistake, and that, whether the consideration were paid or not, the husband intended it to be understood that he had been so paid.

It appears to us, therefore, that this case comes exactly within the Full Bench ruling, and that the petitioner was rightly prevented from giving parol evidence to show that no consideration passed, after distinctly admitting in a regularly drawn-up deed of sale that it had so passed.

The adverse rulings quoted in the VIIth Volume, Weekly Reporter, pages 428 and 408, by the petitioner do not, we think, apply.

In the *first* case, the document in question was a bond, and it was held that oral evidence could be taken to prove that no consideration had passed, the recital in the bond notwithstanding. But, with regard to bonds, the law has laid down specifically that the mere recital in them of payment of consideration is not sufficient to prove the fact, and in such cases, therefore, parol evidence of the payment is not only admissible but essential.

The *second* case (page 408) went on the apportionment of certain purchase-money, and it was held that, in a suit for the purchase-money, oral evidence was admissible to show how that money had been apportioned.

The last case quoted is that of Shurab Singh, appellant (VI. Weekly Reporter 267), and it was held in it (*vide* marginal note), "oral evidence was admissible to prove that the consideration stated in a deed to have been paid was not paid."

On turning to the body of the decision, however, we find that the marginal note does not represent the ruling, which was that oral evidence was not admissible to prove that only a small portion of a consideration stated in a deed to have been received in full was to be paid at the time, and that the rest was to remain in abeyance till a suit had terminated successfully for the purchaser.

The cases are altogether different from the one now before us, and we see no reason to alter the decision originally arrived at by us.

The application must be rejected with costs.

* *See* 7 Weekly Reporter 334.

The 12th August 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Possession under a deed of conveyance—Fraudulent sale—Declaration of title.

Case No. 540 of 1867.

Special Appeal from a decision passed by Moulvie Anwar Ali Khan, Principal Sudder Ameen of Tipperah, dated the 24th December 1866, affirming a decision passed by Mr. R. Fenny, Moonsiff of that District, dated the 16th February 1866.

Mussamut Tomminissa (Defendant), *Appellant,*

versus

Mussamut Nujeema Banoo (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Sreenath Banerjee for Respondent.

Where a plaintiff has been long in possession under a deed of conveyance which was subject to an undertaking to reconvey on re-payment within a period long elapsed, he is entitled to establish his right to possession against a hostile purchaser, whose claims are based on a fraudulent sale.

Phear, J.—THE plaintiff in this case sues for declaration of title to land in his possession, the right to which is menaced by the purchaser at a sale in execution of a decree for debt, obtained by one member of his vendor's family against another.

Both the Lower Courts find that the plaintiff has been long in possession under a genuine deed of conveyance from the original owner of the property, and also that the decree and the sale thereunder were brought about collusively for the purpose of recovering the land and premises to the family.

The objections in special appeal in no degree impeach the correctness of these findings, except so far as to say that the plaintiff's conveyance effected a mortgage, and not an out-and-out sale. However, we are satisfied that the transfer to the plaintiff was absolute, subject only to an undertaking to re-convey on repayment within a period which has long elapsed. It may be that the plaintiff's *vendor* or his representative is entitled to *redeem*, but the plaintiff is also certainly entitled to establish his right to possession against a hostile intruder whose claims are based on a fraudulent sale. The judgment of the Appellate Court seems to us quite correct on the facts set out in it, and we, therefore, dismiss this appeal with costs.

The 13th August 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Appellate Court.

Case No. 783 of 1867.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 21st January 1867, affirming a decision passed by the Moonsiff of that District, dated the 30th December 1865.

Radha Gobind Kur and others (Defendants), *Appellants,*

versus

Ram Kishore Dutt and others (Plaintiffs), *Respondents.*

Baboo Debendro Narain Bose for Appellants.

Baboo Rajendronath Bose for Respondents.

An Appellate Court is bound to give reasons for deciding a specific point (in this case limitation) raised before it in appeal, even if it confirm generally the order of the Court below.

Glover, J.—THE point taken in this special appeal is that the Judge has passed no orders on the question of limitation, a question which was taken before him on appeal.

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No doubt, this is so. The Judge has decided the case entirely on the merits, without making the least mention of the preliminary objection urged in the appellant's petition.

It is contended, indeed, by the special respondent, that, as the Moonsiff did decide the point, and as the Judge confirmed the first Court's order, he has virtually tried and disposed of the issue of limitation himself.

This, however, is carrying the doctrine of "endorsement" too far, and a Court of appeal is bound to give reasons for deciding a specific point raised before it, even if it confirm generally the order of the Court below.

But, in this case, we are by no means clear that even the Moonsiff decided the issue. The Ameen's report, on which he appears to base his opinion, was rejected as having been made under improper influence, and, if that report were eliminated from the record, there would seem to be no evidence of the plaintiff's possession.

But, however this may be, and it is a point which it is the Judge's province to notice, if he deem it necessary to do so, we think that the Judge's own decision is deficient in clearness, and that he must distinctly find whether or no the issue of limitation pleaded by the defendants is proved. The plaintiff may have the best title to the land as appertaining to his estate, but, as he comes into Court for confirmation of such title, he must, as has been frequently ruled by this Court, prove that he is in possession of the disputed land, or fail in his suit.

Costs will follow the result of the remand.

The 13th August 1867.

Present :

The Hon'ble W. S. Seton-Karr and Dwarkanath Mitter, *Judges.*

Parol evidence—Possession of land—Consequential relief—Declaratory decree under Section 15, Act VIII., 1859.

Case No. 427 of 1866.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 29th September 1866.

Thakoor Deen Tewaree (one of the Defendants), *Appellant,*

versus

Nowab Syud Ali Hossein Khan and another (Plaintiffs), *Respondents.*

Messrs. R. E. Twidale and *C. Gregory* and *Baboo Onookool Chunder Mookerjee* for Appellant.

Baboos Mohesh Chunder Chowdhry and *Kalee Kishen Sein* for Respondents.

Suit laid at Rupees 25,000.

Mere oral testimony is insufficient to prove possession of land without any of the documentary evidence (leases, agreements, collection-papers, &c.) which is the invariable concomitant of actual possession in this country.

Parties not proving possession and not entitled to consequential relief may yet, under Section 15, Code of Civil Procedure, obtain a decree declaring them rightful owners.

Mitter, J.—This was a suit instituted by the plaintiffs, now respondents, before us for the confirmation of their possession in certain specified portions of Talook Rambaud, in Pergunnah Cholla, and Tuppa Rampore, in Pergunnah Belonuch, by setting aside a miscellaneous order of the Civil Court dated 3rd February 1866; as also a mooktearnamah and a bill of sale dated 11th July 1861 and 23rd July 1861 respectively. The Principal Sudder Ameen of Zillah Gya, who tried the case in the first instance, has, for reasons set forth in his judgment, dated 29th September 1866, given a decree to the respondents, and the defendant Thakoor Deen Tewaree, who was the principal defendant in the cause, has in consequence preferred this appeal to us.

The pleaders for the appellant have raised the two following points for our decision :—

1st.—That the plaintiffs, respondents, have utterly failed to prove their alleged possession, and their suit, being for confirmation of possession, ought, therefore, to be dismissed.

2nd.—That the appellant has satisfactorily proved his plea of purchase and the genuineness of the mooktearnamah and bill of sale relied upon by him in support thereof.

With reference to the first point, we observe that, whilst we so far agree with the appellant that the respondents have failed to prove their allegation of possession, we cannot, upon that ground, dismiss the whole suit. We are unable to accept the finding of the Court below that the respondents have succeeded in showing that they were in possession of the property in suit at any time previous to the institution of this action. We have carefully gone through the evidence produced by them to establish this point, and are clearly of opinion that this evidence is wholly insufficient to give any satisfaction to our minds. We cannot believe that, if the respondents were in

possession at any time since the death of their ancestor Kodrutoonissa Begum, they could have possibly failed to produce documentary evidence to prove this possession when the appellant has been distinctly challenging them to do so. The property in suit is considerable and large; upon the respondent's own showing, it extends over 200 villages. If they were really in possession of these villages for the period of two years that has elapsed from the date of Kodrutoonissa's death to that of the present suit, their means of proving such possession must have been abundant. Not a single pottah, kubooleut, jumma-wasil-bakee, or other collection-paper has been produced; and, if the allegation of the respondents had any foundation in truth, masses of such evidence, which is the invariable concomitant of actual possession in this country, would have been forthcoming. But, be this as it may, the fact of their having failed to produce a single ryot, tahsildar, or patwaree, or even a neighbour, to prove this important point in their case, is a difficulty which, we think, it is nearly impossible for them to get over. They have produced a number of witnesses, it is true; but, even if the testimony of these witnesses were not open to other objections of a grave character, we do not think that it can supply the defects pointed out above. With regard to this testimony itself, we are wholly unable to endorse the opinion recorded about it by the Principal Sudder Ameen. We do not mean to say that there is any presumption of perjury against oral evidence in this country, but we are not prepared to admit that there is any very strong presumption of truth in its favor. When oral evidence standing by itself tends to lead to a conclusion which is not consistent with the admitted facts and circumstances of the case, it would be dangerous to rely upon such evidence, unless there is some tangible guarantee that the witnesses are speaking the truth. Our difficulty in this case is that the Court below, which had the best means of judging on this point, has come to a different conclusion; but this difficulty is considerably removed when we find that nothing has been said about the respondent's witnesses beyond a general statement towards the conclusion of the judgment now under consideration. On turning to this evidence, however, we find that there is not only nothing in it to satisfy us that it comes from a reliable source, but that the entire result of it does not go beyond a general statement that the respondents have been in possession since the death of Kodrutoonissa Begum. We cannot accept such evidence as settling a disputed question of fact. We require the materials from which the witnesses came to the conclusion that the respondents were in possession, in other words, the various acts of ownership exercised by the respondents with which the witnesses were personally acquainted. On these all-important particulars, we have not got the slightest information; and, whether this paucity of information has proceeded from the negligence or inefficiency of those who were entrusted with the examination of the witnesses in the Court below, we cannot upon that ground accept their evidence as it stands, as being in any manner satisfactory. We are equally clear in our opinion that the ends of justice do not require that a fresh opportunity should be given to the respondents to re-examine these witnesses, or to supply their shortcomings in any other mode. Our finding, therefore, is that the respondents have utterly failed to prove their alleged possession, and that, therefore, they are not entitled to a decree for confirmation of possession. But because we are unable to give them the "consequential relief" they have prayed for, we do not see any substantial reason why we should not make a binding declaration of right between them and the appellant in this very case. It has been contended that we have no power to make such a declaration in the present suit, but we cannot accept this contention as correct. Section 15 of the Procedure Code, which is set out in extenso in the margin, expressly gives us such power. The case before us falls within the express wording of the second part of this Section. The plaintiffs, respondents, had asked for a confirmation of their possession in the property under litigation. This relief we have seen we are not in a position to give to them, but the law gives us full power to make a binding declaration of title between the parties to the suit, and we fail to perceive any reason why we should not exercise this power in this case if we think that justice requires it. The words "*without* granting consequential relief" clearly indicate that the Civil Courts can grant the one sort of relief, though they

"No suit shall be open to objection on the ground that a *merely* declaratory decree or order is sought thereby, and it *shall be lawful* for the Civil Courts to make *binding* declarations of right *without* granting consequential relief."

might not be able to grant the other. The law leaves it in the discretion of the Court, it is true, but we are clearly of opinion that this is one of the fittest cases in which such discretion ought to be exercised. It is admitted that the respondents are the heirs-at-law to the deceased Kodrutoonissa Begum. If the deeds propounded by the appellant are not good and valid deeds, as contended for by the respondents, the latter are the undoubted owners of the property in suit. An issue regarding the genuineness and validity of these deeds has been already joined and decided between the parties in the Court below; and no satisfactory reasons have been shown to us to justify our interference with the exercise of a discretion which the law has clearly vested in that Court. It is true that the respondents have failed to prove one of the material averments in their plaint; but this can hardly be taken to be an all-sufficient reason for depriving them of the entire relief they have obtained from the Court below, because we find that they are not entitled to a part of it. From what we have seen regarding the conduct of both the parties to this litigation, we are clearly of opinion that an order of dismissal would lead to no other consequence than that of allowing them an additional opportunity to mend their hands by producing further evidence of a character precisely similar to that which we regret to say they have so unscrupulously resorted to on the present occasion. * * * * * * * * *

We, therefore, hold that the decree of the Court below ought to be reversed so far as it declares that the respondents are entitled to be maintained in the possession of the property in suit, and we confirm it to the extent of declaring that the respondents are the rightful owners of that property. The costs of the Lower Court will be borne by the parties themselves, but the costs of this appeal must be paid by the appellant to the respondents with interest at 12 per cent. per annum.

The 13th August 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Possession—Evidence—Regulation X. of 1822.

Case No. 303 of 1866.

Regular Appeal from a decision passed by the Judge of Mymensingh, dated the 11th June 1866.

The Government (Defendant), *Appellant,*

versus

Rajah Raj Kishen Singh Surmona Bahadoor (Plaintiff), *Respondent.*

The Advocate-General and *Baboo Kishen Kishore Ghose* for Appellant.

Mr. R. V. Doyne and *Baboos Unnoda Pershad Banerjee, Onookool Chunder Mookerjee, Sreenath Doss, Hem Chunder Banerjee, Bhugobutty Churn Ghose,* and *Shoshee Bhoosun Sein* for Respondent.

Suit laid at Rupees 99,000.

At the time of the Permanent Settlement the northern boundary of the Pergunnah Shoosung (situated in Mymensingh at the foot of the Garrow hills) was not defined by Government. From before that time, and certainly for more than sixty years, the zemindars of the pergunnah have always, but in an irregular and uncertain manner, exercised certain rights in the Garrow hills and over the inhabitants who are half savages—such as hunting elephants, cutting wood, levying cesses on the inhabitants when possible (including in some parts of the hills a tribute of one rupee per hut), and exacting occasional services from them. Government held a survey and declared the northern boundary of Pergunnah Shoosung to be a line running along the base of the Garrow hills. The zemindar having thereupon sued to set aside the survey, and for a declaration that the northern boundary lay many miles further north, and for a declaration that the intermediate hill-country belonged to him as forming part of Pergunnah Shoosung:

HELD, per Macpherson, J., that the acts of possession proved by the zemindar were not sufficient to entitle him to a decree, being acts of mere easement independent of possession; but

HELD per Seton-Karr, J.—*Contra* (affirming the judgment of the Lower Court).

Macpherson, J.—THE plaintiff sues to set aside a survey-award, and to obtain a declaration of his right to certain hills, villages, and hamlets, "as part and parcel of Pergunnah Shoosung," in the Zillah of Mymensingh. The property in dispute is a large tract of country containing more than 450 square miles, situated on the southern boundary of Mymensingh. It is a hill-country, covered with the densest jungle, and is inhabited only by a wild half-savage race known as the Garrows.

The plaint states that the cultivated villages, "*along with the hills and waste* "*lands to the north thereof in Pergunnah* "*Shoosung*, are held and owned by the "plaintiff as his ancestral raj, the same "having been obtained in the time of the "Mussulman Government on an *agurbooree* "*peshkus jumma*, with the powers of a "Moonsiff over the Garrows," and that the lands in question were, at the time of the decennial settlement, permanently settled with the plaintiff's ancestors. It goes on to say that, recently, the Collector of Mymensingh had proceeded to determine the northern boundary of Pergunnah Shoosung, when, although the plaintiff proved "that the hills "lying to the north of the villages of "Abulgarai and Shemshemgarai form the "northern boundary of the pergunnah," the Collector declared that the boundary lay much further to the south, and excluded from the pergunnah the tract lying to the north of the Rajail hills. The boundaries and details of the district claimed are given in the schedule to the plaint. The boundaries are: on the west the river Nitai, on the south the demarcation-line laid down in the survey-map, on the east the river Moheskhola, on the north-east the river Billi and the Billi Dhoba and Chora, and on the north the hills situate on the northern limits of the villages of Abulgarai and Shemshemgarai. Abulgarai and eighteen other villages are mentioned by name, together with other villages and hamlets, the names of which are not given; "and below the hills" Kochogarai (and three others which are named) and several other villages and hamlets are also claimed.

The question is whether the Government are right in saying that Pergunnah Shoosung extends northward only to the foot of the Garrow hills—the plaintiff contending that they are wrong, and that it runs into the Garrow hills, as far as the hills to the north of the villages of Abulgarai and Shemshemgarai and the Billi river.

The plaint and the written statement of the plaintiff state that the property has been "held and owned" by the plaintiff and his ancestors for generations. And, in the sixth para. of the written statement, it is said that it appears from the report of Collector Wroughton in 1788 that the plaintiff's great-grandfather collected rents from the Garrows. This is the only direct allegation which I find of any specific act indicative of possession.

The Government of Bengal, acting under the provisions of Section 8 of Regulation X., 1822, had, prior to the institution of this suit, that is to say, on the 18th November 1862, directed the separation of the disputed tract from the estate of the plaintiff, which was (in the words of the Regulation) the estate of a neighbouring zemindar to which this hill-tract was claimed to be attached.

Regulation X., 1822, was passed in order to enable the Government to declare that certain portions of the Garrow hills were not subject to the general Regulations applicable to the rest of Bengal. It is important to consider and bear in mind the recitals and provisions contained in this Regulation, not only as affording an explanation of what has taken place as to this matter between the plaintiff and the defendant, but also as showing the state of things existing among the Garrow tribes; for the description given in Regulation X. is as applicable now to the Garrows of the tract which is the subject of this suit, as it was in 1822 to the Garrows inhabiting the hills on the frontier of Rungpore.

Section 1 recites that "there exist, "in the different parts of the territories "subordinate to Fort William, races of people "entirely distinct from the ordinary popula- "tion, and to whose circumstances, there- "fore, the system of Government estab- "lished by the general Regulations is "wholly inapplicable." It then recites that savage tribes exist on the north-east frontier of Rungpore, "of which the race denominated Garrows and occupying the hills called after them are the principal." Then it alludes to the animosity existing between the Garrows and the people of the low country, and continues: "The zemin- "dars of the frontier have, there is reason "to believe, usually been the aggressors, by "encroaching on the independent territory "of the Garrows and similar rude tribes, "until, despairing of other resource, the "latter are driven to seize occasions of "private revenge and retaliation. These "encroachments having been of long stand- "ing, several zemindars were, at the time "of the perpetual settlement, on the receipt "of incomes derived from cesses of various "kinds levied from the tribes, and hence a "portion of the tract of country occupied "by them has been considered to lie within "the operation of the general Regulations "as forming part of the zemindaries. This, "however, instead of conducing to reclaim

"the tribes to civilized habits, has rather "had a contrary effect, the system being "totally inapplicable to their savage and "secluded condition, and being calculated "to leave them at the mercy of the zemin- "dars, rather than to offer any substantial "means of redress. The condition of the "Garrow mountaineers, and of the other rude "tribes on that frontier, has for some time "past attracted much of the attention of "the Governor-General in Council, and the "circumstances which have conduced to "check the progress of civilization amongst "them have been fully investigated and "ascertained. With a view, therefore, to "promote the desirable object of reclaiming "these races to the habits of civilized life, "it seems necessary that a special plan for "the administration of justice, of a kind "adapted to their peculiar customs and "prejudices, should be arranged and con- "certed with the headmen, and that mea- "sures should, at the same time, be taken "for freeing them from any dependence on "the zemindars of the British Provinces, "compensation being, of course, made to "the latter for any just pecuniary claims "they may have over them. Preparatory "to the execution of measures adopted to "this end, it has been deemed indispensible "to suspend the operation of the existing "rules for the administration of civil and "criminal justice, and generally of the Re- "gulations of Government within the tract "of country comprised in or bordering on "the hills and jungles occupied by these "tribes, and to appoint a commissioner with "full power to conclude arrangements with "the chiefs, and to conduct the entire ad- "ministration of the tract in question, sub- "ject only to such orders and instructions "as he may receive, from time to time, from "the Governor-General in Council."

Section 2 is as follows: "The tract of "country now comprised in the thannah "jurisdictions of Gowalpara, Dhoobree, "and Kurreebarree, in the district of "Rungpore, is hereby declared separated "from the said district, and the operation of "the rules for the administration of the "police and of civil and criminal justice, as "well as those for the collection of the "land-revenue, customs, abkaree, and "stamp-revenues, together with all other "rules contained in the Regulations printed "and published in the manner prescribed "by Regulation XLI., 1793, are suspended, "and shall cease to have effect therein "from the date of the promulgation of this "Regulation, except in so far as may be "hereinafter provided."

The only other part of the Regulation to which I need refer specially is Section 8, which runs thus: "In the conduct of the "revenue-duties of the tract of country "placed under the Commissioner, as well "as those relating to the customs, abkaree, "stamps, and other miscellaneous items as "to the land-revenue, the Commissioner "shall observe the rules and principles of "the general Regulations with such limita- "tions and restrictions as to the authority "to be exercised by himself as may be pro- "vided in the instructions he may receive "from time to time from the Governor- "General in Council; *provided, however, "that it shall be competent to the Governor- "General in Council to direct the separa- "tion, temporarily or permanently, of any "tract of country occupied by Garrow "mountaineers or other rude tribes from "the estates of any neighbouring zemindars "to which the same may now claim to be "attached*, also to discontinue the collection "by zemindars or others of any cesses, tri- "butes, or exactions, on whatsoever pretence "the same may be levied from such people, "and to make arrangements either for the "remission of the same, or for their collec- "tion direct by the officers of Government "making such compensation to zemindars "or others justly entitled thereto for the "relinquishment as may to him seem most "equitable and proper.

"*Second.*—No suit shall be entertained "by any Civil Court having jurisdiction, or "that may hereafter have jurisdiction, "within the tract of country, subject to the "authority of the Commissioner, on account "of any act of the above description done "under the authority of the Governor- "General in Council."

Under the provisions contained in the first Clause of Section 8, the Government, adopting the boundary-line laid down by the survey-authorities, directed the separation of the tract which is the subject of this suit from all connection with the plaintiff's zemindaree, and directed that compensation should be given to the plaintiff for any loss which he might sustain in consequence. The Rajah, being dissatisfied with this proceeding, instituted the present suit, in answer to which the Government simply pleaded that, under the second Clause of Section 8, the suit was not cognizable by the Civil Court. This plea was considered to be good by the

Deputy Commissioner of Goalpara, by whom the case was in the first instance tried, and by whom the suit was accordingly dismissed.

On appeal to this Court, however, the order of the Deputy Commissioner was reversed, the Court (Kemp and Seton-Karr, JJ.) being of opinion that Regulation X., 1822, did not authorize the Government to act as it had done, because the Regulation referred only to the three thannah jurisdictions in Rungpore specially mentioned in Section 2. The Court did not thereupon give judgment for the plaintiff, but remanded the suit for trial on the merits, and transferred it from the Court of the Deputy Commissioner of Goalpara to that of the Judge of Mymensingh—on the ground apparently of a personal objection taken by the plaintiff to the Deputy Commissioner, by whom the case would, in ordinary course, be tried if remanded to Goalpara.

After the case was remanded, the Government put in a written statement, alleging that the lands sued for do not appertain to Pergunnah Shoosung, and that they appertain to the "tract of land known as the Gar-"row hills, which are beyond the revenue-"jurisdiction of Mymensingh or of Goal-"para."

The case for the Government thus is, that the lands do not belong to the plaintiff's pergunnah, and that they are neither in Mymensingh nor in Goalpara, but are a separate distinct tract lying intermediate between those two districts.

Many documents of one kind or other have been put in evidence, and eighteen or twenty witnesses have been examined. The Judge decided in favor of the plaintiff, declaring that the line drawn by the survey-authorities is not the northern boundary of Pergunnah Shoosung in Mymensingh, and declaring that the plaintiff has proved his right and title to the lands claimed by him.

The opinion of the Judge as to the general state of the facts, as proved, appears from the following passages in his judgment: "The witnesses for the plaintiff consist of "the Rajah's amlah who collects for him "in the hills, of the traders who trade with "the Garrows, and have their head-quarters "at Ryak, of villagers from various places "in the hills, and of villagers from the "northern boundary claimed. They give "fair testimony, and declare that the land "claimed is part of the Pergunnah Shoosung, "the property of the Rajah; that he exer-"cises rights of forestry in all of it; that "the inhabitants cut grass and bamboos for "him, and render him a sort of tribute on "birds and honey, &c. They all testify to "a general levy of a tax of one rupee per "*chang* or house; they state that all the "tribe assist in the elephant-catching; that "the Rajah alone catches elephants, and will "let no one else catch them; that these rights "have always been exercised by plaintiff's "ancestors through all the witnesses' lives, "and that their fathers told them the same "was the case in their time. They declare "that the *ajoor* wood grows only in the "higher hills, and that it is cut for the Rajah, "and for him alone; and that he takes and "leases rights to coal and limestone.

"The evidence for the defence is that "of an Inspector of Police, formerly *ameen* "in the survey, who went with Mr. Baker "in his expedition to Rudarun; the head-"men told him that the distant villages "were in no one's possession, and paid tax to "no one; he was also with the Commis-"sioner of Goalpara in an expedition some "eleven years ago.

"I consider this evidence is very strongly "in favor of the Rajah, and generally shows "possession and receipt of rent and cesses, "and gifts or tributes, clearly for a long way "into the hills; *probably the inhabitants "of the more distant villages pay nothing "and acknowledge no one*, neither Govern-"ment nor the Rajah. They are mere sav-"ages; when annoyed, they disappear in the "forest; if harmed, they retaliate by murder-"ing innocent people in the lower country. "There is nothing to rebut this testimony; "and, had the hills been given clearly to the "Rajah at the decennial settlement, and "their boundaries been fixed and named, I "doubt if he could have shown any other "possession in such forests.

"From the above evidence, and from the "arguments of the pleaders, I deduce that "the Rajah's ancestors obtained a permanent "settlement of Pergunnah Shoosung from "being in possession of it; that the settlement "was completed without specification of "arrears or boundaries; that the Government "of that day took no pains to define the bound-"ary, and that the position of the Rajah "was similar to the kind of possession de-"scribed in the preamble of Regulation X. "of 1822."

Against this decision the defendant, the Government, has appealed. The grounds of

appeal chiefly relied on are that the plaintiff failed to prove that the lands in suit are part of the zemindaree settled with his ancestor at the time of the decennial settlement; that the evidence shows no such possession on the part of the plaintiff and those through whom he claims as will support such a suit as this; that some of the documents put in are not proved; and that much of the documentary evidence relied on is not evidence at all as against the defendant.

As regards the objection that the report of Collector Wroughton of the 12th February 1788, and other similar documents of which there are several, cannot be read against the defendant, I think that, as they were admitted without opposition on the part of the defendant in the Court below, it is too late now to say (if at any time it could have been properly said) that they are inadmissible. I think that all these documents (including the decisions of the Goalpara and Cossyah Commissioners as to the southern boundary of their districts) must, for the purposes of this appeal, be considered to be in evidence for what they may be worth. At the same time, I am of opinion that nothing which is contained in any of them is *conclusive* on the defendant. So far as the Goalpara and Cossyah Commissioners, not content with defining the boundaries of their respective districts, proceeded to declare what was the northern boundary of Shoosung, their declarations are clearly made without jurisdiction and in excess of their authority, and, being so, they cannot bind the defendant.

As regards the documents which were not proved also, no objection was taken at the trial below; and I think that they must now be deemed to be in evidence, *quantum valeant*.

The general conclusions at which I arrive upon the facts are not very unlike those at which the Judge appears to arrive in the passages of his judgment which I have quoted—except that I do not find that there is any proof of receipt of rent or of possession in the ordinary sense of these terms—and except that I do *not* deduce that this part of country was settled with the Rajah's ancestors, as being a portion of Shoosung, at the time of the permanent settlement.

I have no doubt that the position of affairs has always been, until recently, much the same as is described in the preamble of Regulation X., 1822, *viz.*, that through encroachment and aggression the zemindars of the adjoining Pergunnah of Shoosung have (when they could) levied cesses of various kinds from the mountaineers, by reason of which a portion of the tract of country occupied by them may have come to be considered to be within the operation of the general Regulations, as forming part of the zemindary. But, although they may have come to be so considered, it does not follow that in law they came to form part of the zemindary. Regulation X., it is to be observed, does not say that the hill-tracts with which it dealt did, in fact, form part of the adjoining zemindaries. It puts the position of the zemindars no higher than this that, by reason of the exactions levied in the neighbouring hill-tracts, those tracts "are claimed to be attached" to the zemindaries. And there is nothing in the Regulation which admits the legality of the exactions in question: the words used in Section 8 are "also to "discontinue the collections by zemindars "or others of any cesses, tributes, or exac-"tions, on *whatsoever pretence the same* "*may be levied* from such people." It is indisputable that the tract of land now sued for has (like the tracts dealt with by Regulation X.) long been claimed "to be attached" to Shoosung; but the plaintiff wholly fails to prove that it ever, in fact, formed part of that zemindary.

That it was not originally settled at the time of the decennial settlement as part of Shoosung, I have no doubt. It is admitted that, at that settlement, the northern boundary of the zemindary was not expressly named or fixed. If the foot of these Garrow hills was then considered to be the boundary, we have at once a sufficient reason why no detailed line was laid down, inasmuch as the country at the foot of the hills was then impenetrable jungle, which had never been surveyed by any one. But if, on the other hand, the Nitai river and the rivers Billi and Moheskhola were considered to be the western, north-eastern, and eastern boundaries, it is very remarkable that they were not named, being, as they are, large rivers, whose existence must have been known as well then as now. It appears to me that it is highly improbable that these rivers would not have been named if it had been intended that they should be the limits of the pergunnah.

I agree substantially with Mr. Collector Campbell in what he says in his report of the 15th April 1859. I think it is proved that the plaintiff and his ancestors have for many

generations (and for more than 60 years) levied certain cesses and imposts, whenever they could, from the inhabitants of these hills; and that the plaintiff and his ancestors have exercised the right of hunting elephants and of cutting the ajoor tree, and have received or exacted certain occasional services from the hillmen. But in this I find no evidence of the relation of landlord and tenant, or of proprietary right in the soil, such as entitles the plaintiff to the decree which he has obtained in the Court below. There has been no regular levy even of the tax of a rupee per chang, which has been spoken of, or of any other impost. All payments made and services rendered have been of the most casual description: while, as regards a large portion of the country sued for, no right whatever can possibly have been exercised, the country being, in fact, impenetrable, except to the very sparse population of hillmen who inhabit it.

I agree with the Judge below in the opinion that the so-called *firmans* are quite insufficient to show either possession or title to the hill-lands as forming part of Shoosung, and the *dowl bundobust* papers show them as little. I agree with him also as regards Collector Wroughton's report.

Collector Scott from his letter in 1820 does appear to have considered that the Shoosung Rajah made certain collections in the Garrow hills. The fifth para. of his letter is the only one that is material: "The residence of the present Rajah is at "Doorgapore, on the northern bank of the "Shomessury river, at the bottom of the "Garrow mountains; and that particular part "of the country is inhabited by a fine hardy "race of independent people (the Garrows), "who differ materially in manner, customs, and "language from the cowardly Bengalees. The "introduction of a new system of *canoongoe* "or *putwaree* among them, I should think "liable to many objections, as from the en- "quiry, which I made on the spot in the "month of January last, I am inclined to "think they pay no fixed rent either in "money or in kind to their landlord." Even Mr. Scott, however, it is to be remarked, found that the hillmen paid no fixed rent either in money or in kind.

Mr. Kemp, in his report of 1854, expresses the distinct opinion that the Rajah's forests (which may be taken, in a general way, to represent the lands now in dispute) are within his permanently settled estate. But Mr. Kemp relied much on Collector Wroughton's report; and altogether I do not agree in the conclusions arrived at by him.

In 1858 an Assistant Commissioner of the Cossyah and Jynteah hills, in a suit where the present plaintiff was defendant and the Cossyah Rajah was plaintiff, decided that the claim then made by the latter was untenable, and declared that the Billi river was the northern boundary of the Shoosung estates. Of this decision, all that need be said is that, so far as it decided that the Shoosung estate extended up to the Billi river, it was wholly without jurisdiction. It is perhaps worthy of remark, as illustrating the inapplicability of the ordinary procedure of the regular Courts to suits for the possession of these mountain-districts that, in the proceedings before the Assistant Commissioner of the Cossyah hills, it would seem that the plaintiff's cause of action or complaint was that the defendant had encroached *to the extent of one day's journey from east to west*, and *four days' journey from north to south*. When such general terms as these have to be used, it is clear that tribunals other than the ordinary ones are required to settle the merits of the various claims set up. The Assistant Commissioner's decision, like the decision of the Goalpara Court, is conclusive only so far as it decides that the lands in question do not belong to the district lying within the jurisdiction of the Court which passed the decision. There is no doubt, however, as to the fact that the opinion of the Goalpara and Cossyah authorities was entirely in favor of the present plaintiff's claim, and so strong was this opinion that certain sums which had been collected in a portion of the district now in dispute were paid over to the plaintiff on the ground of his being entitled to them.

The plaintiff has put in certain leases given by him to Gibson and Tayler, authorizing them to work coal, &c., in the hills. But these leases are no evidence of anything, save that the plaintiff attempted to exercise rights of property in the hills There is no evidence which satisfies me that the attempt ever came to be more than a mere attempt, save possibly in some degree in the case of Gibson.

Among the documents filed as evidence are some thirteen papers all bearing date in 1197 B. S., which purport to be *kubooleuts* given to the then Rajah of Shoosung by different persons who had been appointed by him to be *bhooyea* or headmen of mehals

in the hill-country. They are all substantially similar in their terms, and the following is a specimen: "I have given a kubooleut for the collections of the Garrow *bustees* "lying within my division; and I will "give to your sircar 1¼ puns of cotton, 100 "bamboos, 8 puns of cane, 1 parrot, and "1 rupee salamee. Besides that, I will "give you 1 rupee on each marriage or "death whenever it takes place in the family "(of the Rajah of Shoosung)."

These documents, if genuine (and, although filed with the record, there is no evidence of any sort to show what they are or whence they came, and their authenticity is most doubtful), go to prove that in 1197 various headmen undertook to make certain payments to the Shoosung Rajah. But they do not show any actual exercise of any right of possession or of property on the part of the Rajah in the Garrow mehals. Although reference is made in them to collections to be made from the various *bustees*, nothing is said in them as to the levy of one rupee per chang, which is now so much relied upon, and which, indeed, is spoken to by some of the witnesses as a direct rent or tax paid by the occupants of the several changs to the Rajah. If these kubooleuts are genuine, the question may well be asked why none of a more recent date are forthcoming. It is odd that a number of such papers dated so far back as 1197 should be in existence, and that there should be none of a more modern date.

According to the oral testimony given by the witnesses who are examined for the plaintiff, the plaintiff is, no doubt, in possession of the Garrow villages, "by receiving from each villager one rupee for each holding of the resident Garrow tenants;" and, in addition to this, the Garrows are said to bring from the hills, when ordered by the Shoosung Rajah, coals, lime stone, and ajoor wood, and to catch elephants for his benefit. And villages are named which the witnesses say they know render these various payments and services. But the statements of the witnesses are for the most part mere general declarations which I by no means credit to their full extent. And there is nothing to show any detailed or regular collection by the plaintiff, or the existence of any accounts kept by him, or of any leases granted by him to Garrows. True, certain individuals speak of having themselves paid considerable sums annually for being allowed to reside at Byak. But these are chiefly traders, not residing wholly in the Garrow country, but who merely went there for certain months of the year for the purposes of trade. That payments should be made by them goes but a small way towards proving that the inhabitants of the country generally paid rents. It is evident from the statement of the witnesses that (save as to the traders who returned annually to the low country) there is no regular payment, and not necessarily any payment at all, made by the hillmen. There is no sign of the Rajah having ever enforced any payment or right of any kind. While in the hills, the Garrows come and go as they please, occupying any spot they choose, without reference to the plaintiff or any agent of his. That they render him certain services and make occasional payments of money may be nevertheless true; as also it is probable that those payments and services are exacted from them whenever they venture out of their mountains down into the low country of Shoosung.

There remains the question whether the facts which I consider to be proved, the levying of certain cesses (such as the one rupee per chang) when possible, the cutting the ajoor tree, the hunting elephants, and the exacting petty services when opportunity offers—whether these amount to such a possession as in law suffices to support this suit, which is in the nature of an action of ejectment, so far at least as the evidence necessary to support a judgment for the plaintiff is concerned.

Mr. Doyne has relied upon the language used by the Chief Justice in the case of Watson & Co. *versus* the Government (III. Weekly Reporter 8). In the course of his judgment in that case, after quoting certain passages from Domat's Civil Law, the learned Chief Justice says: "The exercise "of such acts of ownership over jungle-lands, "as would ordinarily be exercised over pro-"perty of that nature, would be evidence "of possession. For instance, if it were "proved that the ghatwals were in the "habit of cutting or preserving the wood, "gathering wax or wild honey, collecting "stick lac, &c., this might be evidence of "acts of ownership or possession; and those "who have to deal with the facts of the "case must determine whether the acts were "referable to the right of property or pos-"session, *or acts of mere right or easement* "*independent of possession.*"

In the rule thus enunciated, I entirely acquiesce. But, having to deal with the facts of the present case, it seems to me that the acts which are relied on as evidence of possession are not (to use the words of the Chief Justice) "referable to the right of property or possession," but are "acts of mere right or easement independent of possession."

I cannot look upon them as more than mere easements independent of possession, when I find them exercised over so comparatively small a portion of the whole surface claimed, when I find them exercised so irregularly, so occasionally, and with such uncertain result. I do not consider them as any proof that the relation of landlord and tenant, in any sense of the term, exists or ever existed between the plaintiff and the inhabitants of the disputed tracts.

It was argued by Mr. Doyne that the *onus* did not lie upon the plaintiff to prove his case; and that, even if the plaintiff had proved nothing, he was entitled to a decree by reason of the form which the proceedings had taken. He argued that, inasmuch as the defendant had, in the first instance, put in no defence on the merits, but had merely pleaded that, under Regulation X., 1822, the Civil Courts had no jurisdiction, the High Court, when holding the plea to be bad, should at once have given judgment for the plaintiff. He also contended that the Lower Court had no right, when the case was remanded, to allow the defendant to file a fresh written statement, and to raise fresh grounds of defence.

As regards the High Court's order of remand, it is not now open to question any more than is that portion of the Court's judgment which declared that the Regulation X. of 1822 did not deprive the Civil Courts of jurisdiction in the matter. If the one part of the judgment could be re-opened now, so might the other.

As to the filing of a fresh written statement after the remand, it may have been an irregularity. But the case was not decided on its merits when first tried, the Government having relied on the one defence arising out of Regulation X., 1822: the filing of the new written statement by the defendant was not objected to by the plaintiff; and, after it had been filed, the case was fully gone into and tried without objection upon the new issues raised. Under these circumstances, if there was any irregularity, it has been cured.

The plaintiff having come into Court praying for a declaration of his title to these lands as forming part of the permanently-settled Pergunnah of Shoosung, the *onus* certainly lay upon him to prove that title. And, failing to prove it, he could not be entitled to a decree in his favor. The Government, though they have never admitted the plaintiff's claim to the extent to which it is asserted in this suit, never at any time denied, and, as I understand Mr. Advocate-General, do not deny, that the plaintiff has certain rights or easements in or over portions of the disputed district; and, for any loss which might be sustained in respect of those rights, the defendant was ready and offered to make compensation when acting under Regulation X. of 1822. I fail, therefore, to see that there is anything inconsistent in the conduct of the Government in requiring the plaintiff to prove his title as laid in his plaint.

Moreover, looking at all the circumstances of the case, I fail to see anything which is (as argued by Mr. Doyne) either oppressive or unreasonable on the part of the Government, in the attempt which is now being made to reclaim these hill-tracts. The plaintiff, as it appears to me, is not entitled to a declaration that these tracts are part of Shoosung, or that he has any proprietary right as zemindar, or otherwise, in them. And the real question which the plaintiff was entitled to raise as against the defendant was (as is said by the Government of Bengal in its letter of the 18th November 1862, which was read to us by Mr. Doyne), not one of disputed boundary, but a question as to the nature and extent of the rights exercised by the zemindar of Shoosung within the limits of the Garrow country.

What the precise nature and extent of those rights are, I need not at present inquire. It is sufficient that I decide that the plaintiff has not shown himself to be the proprietor or zemindar of these hill-lands, either by reason of their having originally formed part of his permanently-settled Pergunnah of Shoosung (which is the only title alleged in the plaint), or by reason of his having enjoyed uninterrupted possession of them for many years.

In my opinion, the decree of the Lower Court ought to be reversed, and the plaintiff's suit ought to be dismissed with all costs

(subsequent to the remand-order) both in this Court and in the Court below.

Seton-Karr, J.—This case has been very fully argued by the Advocate-General for Government, the appellant, and by Mr. Doyne for the Rajah of Shoosung, the plaintiff, who was successful in the Court below. It is unnecessary for me to set out *at length* the facts of the case, the nature of the claim, or the history of the various enquiries which have been made into the rights of the Rajah over the territory inhabited by the Garrows, because the same have been fully set forth by my brother Macpherson.

I regret that I am compelled to differ from him as to the result of the evidence, and as to the points which it proves in the Rajah's favor. I am of opinion that the judgment of the Lower Court should be substantially upheld, and that Government is not entitled to have that decision set aside in its favor.

In the first place, I must begin by observing that we ought not to look for the same strict amount of proof of possession, and of exercise of rights in the case of this wide and unknown territory covered, as it always has been, with dense and unhealthy jungle, as we should do if we were trying a claim to landed properties in the heart of a populous and long-settled district, or a claim for a house and garden, with metes and bounds, at Alipore.

The zemindaree of the Rajah of Shoosung was, it is admitted, settled with him at a peshkush jumma, that is, he paid tribute for his lands, and the very mention of this tribute is suggestive of feudal rights and of extensive possessions. I do not mean to lay great stress on the fact, but, at any rate, it is quite certain that the northern boundary of the Shoosung estate had never been at all defined, though various Collectors appear to have reported on the matter, until Mr. C. H. Campbell settled the case in 1859 by drawing the line, which it is the object of the present suit to set aside.

It will simply be necessary for me concisely to review the evidence which the Rajah has adduced in support of his claim, and which leads me to conclusions opposed to those of Mr. Justice Macpherson.

I attach no weight to the firmans for the reasons given by the Judge, except in so far as one of them mentions the supply of ajoor wood; this wood, it is shown from other evidence, is found *mainly* in the higher hills and within the tract now claimed by the Rajah. But I attach a considerable amount of importance to the reports of the different Collectors who have reviewed, at various times, the claims of the Rajah. These reports can most properly be received, as evidence, for what they are worth. They are the deliberately expressed opinions of the chief revenue-officials of a large and important district. We may assume them to be based on all the information which could be commanded by servants of Government placed in that responsible situation, and, with the exception of Mr. C. H. Campbell, all these gentlemen report more or less in favor of the Rajah's claims.

Mr. Wroughton, in 1788, stated that the great-grandfather of the plaintiff traded with the hillmen, and paid the Government demand out of, or partly out of, this source. His report, however, is based on information gleaned from others.

But Mr. Scott, on the 26th May 1820, seemed disposed to admit the claim of the Rajah to hold his lands, not as an ordinary zemindar, but on peshkush or tribute. The Collector expresses an opinion that the Garrows paid no "fixed rent" in money or in kind to the landlord (*i. e.*, the Rajah). The gist of his letter refers to the appointment of a canoongoe who, the Collector thought, should be stationed in the low country, and not in the hills. But there is no expression of opinion adverse to the Rajah's collections of *some* kind in the hills; and I infer from the letter that the Collector wanted a canoongoe only for the tract in which regular collections of "fixed rents" were known, *i. e.*, for the low country.

Mr. Kemp (now Mr. Justice Kemp), when Collector on the 29th of August 1854, was of opinion that the Rajah had long enjoyed the right of catching elephants in the hills and forests. It is clear from this report that the settlement of Shoosung was made in a very summary manner, and "without specification of limits or villages or rukbah" (area). Mr. Kemp also relied on the proceedings of the Political Assistant and of the Commissioner, which will be mentioned below, as showing that, at all events, one of the villages claimed by the Rajah in the hills belonged to Pergunnah Shoosung. This proceeding of the Political Assistant in the Cossyah Hills is dated the 18th of July

1839, and it shows that, in a dispute between the Cossyah and the Shoosung Rajahs, the boundary of the former Rajah was defined with accuracy, and was admitted by the Cossyah Rajah as correct. It is urged that the Political Assistant had no authority to define the boundary of the Shoosung territory, though he might define the Cossyah boundary. This may be, but his proceedings show clearly that at that time the Shoosung Rajah was collecting or exercising some show of authority, so far in the interior of the Garrow hills that he *actually reached the part over which the Cossyah Rajah had a claim*. The view taken by the Political Assistant was upheld by the Commissioner on the 17th March 1841, and it is evidence that, after as full an enquiry as was possible, in which the Collector of Mymensingh took part, certain mouzahs, being likhon and others, were released from the Government claim, and were left in possession of the plaintiff.

The Collector of Mymensingh in 1837 (September 27th) was of the same opinion; and he held it proved from depositions of witnesses and other papers that the Rajah had been in possession of what he then claimed for four *generations*. The Collector, moreover, explains that mouzahs in the hills bore different names, because they took the name of the headman for the time being.

The same remarks apply to the proceedings of the authorities of Goalpara.

Mr. Campbell's review and settlement of the boundary in 1859 is, no doubt, very elaborate and exhaustive. But even he does not appear to deny that the Rajah had exercised, at some time, certain privileges in the hills; and his decision as to the correct boundary seems based on a consideration that the hills and forests cannot be a part of the estate settled with the Rajah at the permanent settlement. The Board of Revenue, without giving any reasons, simply affirmed the view taken by Mr. Campbell.

There is also evidence to show that the Rajah gave leases of quarries of lime and coals in this tract to Europeans, Messrs. Gibson and W. Tayler, though there is little to show that the same quarries were successfully worked. But it is quite certain that the Rajah dealt with these matters as one who could give a title, and that European gentlemen were found to accept grants and leases from him on his own terms, and that a case was instituted about these quarries in which Mr. Gibson was concerned.

The oral evidence is that of some 20 witnesses, who depose consistently and fully to various acts of trade and collection and elephant-catching on the part of the Rajah, and to tribute paid by the Garrows in the shape of parrots, mynahs (birds), wax, honey, bamboos, &c., and one rupee per *chang*, or house. These acts have been performed, and this sort of tribute paid, according to all the witnesses' statements, for as long as they can remember.

I agree with the estimate of this evidence formed by the Judge, and I see no reason to discredit it, as that of either tutored, incompetent, or ignorant witnesses. The witnesses are obviously in a position to speak with certainty on the subject. Several of them trade in the hills, and have resided there for such portions of the years as residence in such places is possible, or have paid rents to the Rajah as their fathers did before them, or have assisted in catching elephants. I think that it is impossible to require, at the hands of the Rajah, detailed accounts of regular collections of such dues made under considerable impediments, and probably at intervals, and in a country of that wooded and impervious character which the whole body of evidence, as well as historical notoriety, shows it to be. I agree, however, with my brother Macpherson, in thinking it remarkable that kubooleuts, some 12 or 13 in number, should be forthcoming for the collection of rents in the hills from the Garrows in the years 1196 and 1197, and for no subsequent years. But this fact will not, in my mind, discredit the Rajah's other evidence.

In fact, the whole of the evidence, documentary and oral, proves *sufficiently* to my thinking that the Rajah of Shoosung for generations, and possibly from time immemorial, has exercised in the tract of country from which he is now cut off by the line drawn by Government in 1859, a right partly feudal, and subject to fluctuations and impediments; and that evidence, looking to the nature of the suit, is both credible and is sufficient to establish his claim.

The Government has not seriously attempted to displace or rebut this evidence, or to adduce anything but some oral evidence which is insignificant, to the effect that the Rajah had no rights in the tract in question, and the Government does not assert that any third person is entitled to rights which the Rajah is unjustly claiming. In reality, the proceedings of

the Government are almost an admission that the Rajah did exercise certain rights in a tract of country, from which, for certain reasons, it was desirable to exclude him by fixing a boundary for the first time in 1859.

I do not, in fact, understand that my learned brother Macpherson doubts, discredits, or impugns the evidence in any very material point, or that he takes a really different view of it, as mere evidence, from that which I take. I gather that his judgment, adverse to the Rajah, is based on a consideration of the weak and uncertain character of these rights; that he holds them to be mere easements or privileges, possibly usurped, and certainly exercised with irregularity, and that the evidence is not sufficient or precise enough to establish the claim on the sure and solid footing on which it should be established in order to call for the aid of a judicial tribunal in its enforcement.

He endorses, as I interpret him, the contention of Mr. Advocate-General that the evidence establishes a mere feudal superiority, and not the relation of landlord and tenant.

But, as I stated at the commencement of my judgment, I think the chief points for our consideration are, whether the evidence is of the character and weight which we should look for in support of a claim of this kind, though it might not support a claim to a zemindary, or to a house and lands, in the settled provinces; whether the plaintiff has not proved all that was, or could be, expected of him; and whether he has not a right, on that evidence, to call on the Courts to remove the line arbitrarily drawn for the first time in 1859, and to allow him to exercise his rights of catching elephants, receiving tributes of honey, wax, birds, apes, and such products of the forests, and of levying a rupee on the few and scattered *changs* that may be found in the locality, just as he and his father have done for the last 80 or 90 years.

My opinion, after much consideration, is that these questions ought to be answered in the affirmative; that the Rajah could not have produced any evidence differing much in kind from what he has produced, though possibly he might have given more detailed evidence of the same kind, or have filed collection-papers; that there is nothing, except political convenience, to support and justify the proceedings of the Collector in 1859; and that a decree should pass in the Rajah's favor affirming the decision of the Judge, and allowing the Rajah to go on collecting in the tract in question as hitherto. Even if it be conceded for Government that the Rajah has not shown, by precise and documentary evidence, that this hill-tract actually formed part of the assets of his estate at the perpetual settlement, I would still say that he has shown a prescriptive right to collect in, and receive tribute from, the tract in question, and that the Government, in opposition to the case which he has set up, has shown literally nothing to debar him from the future exercise of those rights.

I would simply confirm the judgment of the Lower Court, and declare the Rajah entitled to the privileges and dues which he has always enjoyed till a recent date. It is obvious that the collection of these cesses, however primitive, irregular, and uncertain, may form an important part of the plaintiff's income. It would, no doubt, be satisfactory if, by any means, an arrangement could be come to between the Government and the Rajah, by which the latter were to receive a compensation for abandoning claims which may possibly lead to disputes and disturbances with the savage tribes of the Garrows. These, however, are political questions. Dealing with the case as a judicial tribunal ought to deal with it, I have only to say that I think the judgment ought to be affirmed substantially, and the appeal dismissed with costs.

As we differ in effect, the Court's decision must be that the appeal of the Government be dismissed with costs.

The 13th August 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Limitation—Sections 5 and 6, Act VI. (B. C.), 1862—Suit for accrued rent.

Case No. 786 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Purneah, dated the 25th January 1867, affirming a decision passed by the Assistant Collector of that District, dated the 25th August 1866.

Shaikh Ahmed Hossein (Plaintiff),
Appellant,
versus
Shaikh Keramut (Defendant),
Respondent.

Baboos Sreenath Banerjee and *Poorno Chunder Shome* for Appellant.

Baboo Goopeenauth Mookerjee for Respondent.

Section 6, Act VI. (B. C.) of 1862, refers to the period within which suits on account of rent which has accrued prior to the date of deposit under Section 5 may be brought, not to suits for rent at an enhanced rate after notice.

Kemp, J.—THIS was a suit for the rent of 1273 at an enhanced rate after service of notice. Both the Courts below have held that the plaintiff's (special appellant's) suit is beyond time, because it was not brought within six months from the date of the service of notice under Section 5, Act VI. of 1862 (Bengal Council).

The Lower Courts have wholly misunderstood the Act quoted by them. Section 5 refers to deposits by tenants of the rent which they may consider to be the full amount of rent due from them, and Section 6, Act VI. of 1862, refers to the period within which suits on account of rent which has accrued prior to the date of deposit under Section 5 must be brought.

Now, the present suit is not for rent which has *accrued*, but has for its object the enhancement of the jumma payable hitherto by the defendant, and the question for trial is whether the defendant's tenure is liable to enhancement or not, and this is what the tenant understood the suit to be. The deposit under Section 5 is to save the ryot from interest and costs, if it be found that he has deposited what was properly due from him, or at all events to the extent of the sum so deposited.

Remand for trial.

The 13th August 1867.

Present:

The Hon'ble C. P. Hobhouse and Dwarkanath Mitter, *Judges.*

Pleas—Oral examination—Issues—Section 139, Act VIII., 1859—Procedure—Jurisdiction—Proprietary title and under-tenancy.

Case No. 657 of 1867.

Special Appeal from a decision passed by Baboo Modhoo Sudun Ghose, Principal Sudder Ameen of Chittagong, dated the 7th January 1867, affirming a decision passed by Moulvie Syud Nuseeroodeen Ahmed, Moonsiff of Sundeep, dated the 22nd March 1866.

Kobeeroodden Ahmed (one of the Defendants), *Appellant,*

versus

Nyan Bibee and others (Plaintiffs), *Respondents.*

Moulvie Syud Murhumut Hossein for Appellant.

No one for Respondents.

A Court cannot refuse to enquire into a plea set up by a plaintiff's pleader in reply to questions put them by the Court, although such plea was not advanced in the original plaint. Section 139, Code of Civil Procedure, authorizes a Court to frame issues on allegations collected from the oral examination of parties or their pleaders, notwithstanding discrepancy between these allegations and the written pleadings.

Proper procedure pointed out in a suit for recovery of possession of certain lands on an allegation of illegal dispossession, where defendant sets up a superior title as proprietor against the allegation of a similar title on the part of plaintiff. If defendant in such a case establishes his better title as a landlord, then plaintiff cannot, in a Civil Court, succeed on the title of an under-tenant.

Mitter, J.—THIS was a suit instituted by the plaintiff, now special respondent, for recovering possession of certain lands, on the ground that the defendant, special appellant, had illegally dispossessed her of the same in the year 1263. She having failed, however, to disclose her title in the original plaint filed by her, the Moonsiff of Sundeep, who tried the case in the first instance, put certain questions to her pleaders, and the latter gave a reply in writing, stating that the lands in suit had been purchased some time ago by her husband Mahomed Fazil from the proprietors of the talook in which they were situated. The special appellant in his written statement pleaded, among other matters, that he was the owner of the talook by purchase from the former holders thereof; that the husband of the special respondent held the lands some time ago under a kubooleut executed by him in favor of the special appellant; that the special appellant had never ejected the respondent, but that, her husband having absconded and left the lands, the special appellant had taken possession of the same by virtue of his rights as talookdar. Various issues were laid down by the Moonsiff regarding the question of title and possession; and, after going into the evidence produced by the parties with reference to the same, he gave a decree to the special respondent in full. On appeal, the Principal Sudder Ameen of Chittagong has confirmed this decree, but upon entirely different grounds. The Principal Sudder Ameen holds that, the special respondent having failed to advance her plea of pur-

chase in her original plaint, the Court could not give her a decree upon that ground; but that, the special appellant having admitted that her husband was in possession as a tenant, and having failed at the same time to prove his plea of relinquishment, the special respondent was entitled to recover the lands and to hold them as a tenant. In special appeal I am clearly of opinion that this case must be sent back to the Lower Appellate Court for a proper investigation. The decision of the Principal Sudder Ameen, as it stands, is clearly erroneous. The special respondent cannot recover possession of the lands in suit as a tenant of the special appellant, when she had never put that forward as the basis of her claim. Nor is the Principal Sudder Ameen right, as it appears to me, in refusing to enquire into the plea of purchase set up by the pleaders of the special respondent in their reply to the questions put to them by the Court of first instance. By the provisions of Section 139 of the Procedure Code, the Court is expressly authorized to frame the issues in the cause from the "allegations of fact which it collects from the oral examination of the parties or their pleaders," any discrepancy between these facts and the allegations made by them in their written pleadings notwithstanding. I do not mean to say that there was any such difference or variation in the present case; but, even if there were, this was nothing to prevent the Principal Sudder Ameen from going into the plea of purchase raised by the pleaders for the special respondent, and decided in her favor by the Court of first instance. I wish also to point out the proper mode in which this case ought to be investigated. The first point to be enquired into is the truth or otherwise of the particular cause of action upon which the special respondent has come into Court. If the special respondent can succeed in showing that she was illegally dispossessed by the special appellant as alleged by her in her plaint, and further that she, or the party through whom she claims, was in possession of the lands in suit for a period of 12 years and upwards before the date of such ejectment, she would be clearly entitled to a verdict, unless the special appellant can show that this possession was held in the capacity of a tenant under himself or under his predecessor. This principle is clearly recognized in a decision of this Court reported in page 261, Volume V., Weekly Reporter, as also in an elaborate judgment passed by Sir Lawrence Peel, C.J., with special reference to the law regarding landed property in the mofussil, reported in page 70, Boulnois' Reports, Volume I. If, on the other hand, the special respondent is not competent to prove that her possession extended over a period of 12 years, but the illegal ejectment is established, the defendant, special appellant, should then be called upon to prove his title. If he fails to do so, the special respondent would be entitled to a decree. If, however, he succeeds in proving his title, the special respondent is then to be called upon to prove a superior one which in this case is the title by prior purchase put forward on her behalf by her pleaders in the Court below. If she succeeds in proving this allegation of purchase, she would be entitled to a decree; but if, on the other hand, she fails to do so, her suit ought to be dismissed. *See* VII. Weekly Reporter, pp. 174. I would, therefore, remand this case to the Lower Appellate Court to re-try it with reference to the foregoing remarks.

Hobhouse, J.—I concur. I observe that special appellant has admitted that, in some capacity or other, special respondents were in occupation of the lands in dispute; and that, though special appellant has alleged

that special respondents relinquished the said lands, yet that it has been found as a fact by the Lower Appellate Court that this relinquishment is not proved.

It seems to me, therefore, to follow that, if special respondents have been in occupation of the lands at any time within 12 years before suit, so as to give the Courts jurisdiction, then *primâ facie* special appellant's ouster of special respondents must be considered to have been an illegal ouster, and special respondents would be entitled to be put again in possession.

But the special appellant sets up a superior title as proprietor against the allegation of a similar title on the part of special respondents; and, of course, if special appellant should prove that he has the better title, and the burden of proof is upon special appellant first, then he will be entitled to retain possession.

I observe that, if special appellant should establish his better title as landlord, then special respondents cannot in this, the Civil Court, succeed on the title of an under-tenant.

The 14th August 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Genuineness of deed on production of copy—Issue between co-defendants.

Case No. 806 of 1867.

Special Appeal from a decision passed by Moulvie Nazirooddeen Mahomed, Principal Sudder Ameen of Dacca, dated the 15th January 1867, affirming a decision passed by Baboo Mohesh Chunder Shome, Sudder Ameen of that District, dated the 31st March 1866.

Bhugwan Chunder Banerjee (Plaintiff), *Appellant,*

versus

Sreemuttee Dukhina Debia (Defendant), *Respondent.*

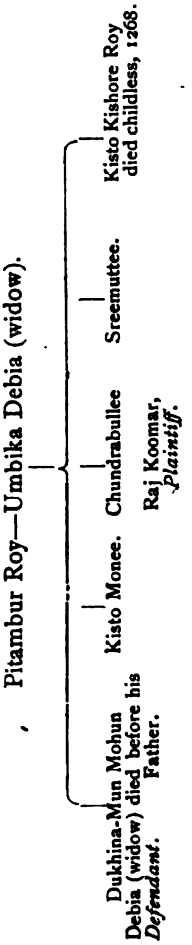
Baboos Woomesh Chunder Banerjee and *Kalee Mohun Doss* for Appellant.

Baboos Onookool Chunder Mookerjee, Romesh Chunder Mitter, Sreenath Banerjee, and *Anund Chunder Ghosal* for Respondent.

The finding of a Lower Appellate Court pronouncing, on evidence, on the genuineness of a deed on the production of a copy (the original having been lost) is not open to interference in special appeal.

One of the defendants to a suit having relied on the validity of a hibanamah and a will, the former of which was alone contested below by the plaintiff, the Lower Court was right in not trying the issue as to the will which was one raised between co-defendants, and the plaintiff was not allowed to contest that point in special appeal.

Glover, J.—THE accompanying family-tree will explain the pleadings in this case:—



The plaintiff claims the ancestral property heretofore held by Pitambur Roy, as heir of his uncle Kisto Kishore, who succeeded on his father's death, and on whose demise, Umbika Debia, plaintiff's grandmother, took with a life-interest. Umbika Debia being

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now dead, plaintiff claims the property as preferential heir, alleging that, of his two surviving aunts, Kisto Monee is a childless widow, and Sreemuttee, though married, has no children, and consequently no right to inherit.

The defendant Dukhina Debia, widow of Pitambur's eldest son, alleges that the property in suit passed by deed of gift to Umbika Debia from her husband Pitambur, and that Umbika, on her death, bequeathed it to her by will.

The Court of first instance found both hibanamah and will genuine, and dismissed the plaintiff's suit.

The Principal Sudder Ameen, however, only pronounced on the hiba which he considered proved, and, holding that opinion, thought it unnecessary to give any opinion upon the will as it concerned two of the co-defendants Dukhina Debia and Sreemuttee only.

It is urged in special appeal—

(1.) That the hibanamah produced by the special respondent is only a copy, the original of which has not been accounted for, and is, therefore, no legal evidence of the gift; and

(2.) That the Principal Sudder Ameen should have found as to the genuineness of the will.

With regard to the first objection, we observe that the Principal Sudder Ameen appears from his judgment to have been satisfied that the original hibanamah was lost, and to have, therefore, received the copy as evidence. This he was fully justified in doing, and his decision on the point is not appealable.

As to the copy itself, the special appellant contends that the very appearance of the deed shows it to be fabricated, for it purports to be signed by Pitambur by a gomashtah, and not by Pitambur himself, whilst a duplicate procured from the Registry office has Pitambur's own signature upon it.

We do not see how the fact that the copy of the hiba filed by the defendant purports to be signed by the gomashtah for the donor, and not by the donor, can affect the genuineness of the deed of gift itself, if that deed be otherwise proved. The utmost it would show would be that the copy was incorrectly taken, and the special appellant himself has cleared up all doubts on this point by producing on his own account a duplicate of the original hiba from the Registry office in which Pitambur's signature appears; and it has been found by both Lower Courts that the custom in the Registry offices, when a donor was absent, was that his mooktear should sign his principal's name in the copy. This may or may not be so, but the enquiry satisfied the Principal Sudder Ameen of the good faith of the parties propounding the deed.

But, besides this, the special appellant's own witnesses, six in number, have deposed to the fact that Pitambur did give this property to his wife Umbika Debia, whilst all the zemindary-papers, kubooleuts, receipts, lowazima, &c., were in Umbika's name, and in the Principal Sudder Ameen's opinion proved her ownership. There were, besides, documents by which Umbika Debia had, during her lifetime, made certain alienations of portions of the property, signed as witnesses by various members of the family, which showed that they at least considered the deed of gift genuine.

So that whatever doubt might have been raised by the fact of the deed of gift being signed by a gomashtah has been done away with by the special appellant's own witnesses and by the duplicate of the hibanamah taken from the Registry office, as well as by the strong array of evidence above noted.

At all events, the Principal Sudder Ameen's decision is a finding of fact on evidence, with which there is no interference possible in special appeal.

Then as to the will. It is contended that, granting the hibanamah to be genuine, the property would, unless divested by will, descend from Umbika Debia to her grandson Raj Coomar to the exclusion of his aunts, Kisto Monee and Sreemuttee, and that, therefore, it was absolutely necessary for the Principal Sudder Ameen to find whether or no the will was genuine.

This objection was not, we observe, taken below. The plaintiff's objection then was, that Umbika had only a life-interest, and was not capable of alienating the property. There was no dispute as to the genuineness of the will on the part of the plaintiff. The dispute on this head was between two of the aunts, and the Principal Sudder Ameen ruled that, the issue being between two co-defendants in the suit, he could not raise nor try it, the special appellant not having any interest.

We think that the Principal Sudder Ameen was right on this point, and that, in any case, proof of the hibanamah would dispose of the present suit; for, if the property became Umbika Debia's own by that deed, it would not, in the ordinary course of descent, go to the special appellant, but to his aunt Sreemuttee who is married and likely to have male issue. *Vide* Vyavasta Durpana, Volume II., page 786.

We see, therefore, no reason to interfere with the Principal Sudder Ameen's decision, and dismiss the special appeal with costs.

The 14th August 1867.

Present:

The Hon'ble W. S. Seton-Karr and Dwarkanath Mitter, *Judges.*

Attachment in execution—Claim of third party—Sections 246 and 348, Code of Civil Procedure—Limitation.

Case No. 629 of 1867.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 5th January 1867, reversing a decree of the Principal Sudder Ameen of that District, dated the 18th May 1866.

Nito Kalee Debee (one of the Defendants), *Appellant,*

versus

Kripanath Roy (Plaintiff), *Respondent.*

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Appellant.

Baboo Onookool Chunder Mookerjee for Respondent.

Where a Civil Court attaches immoveable property for sale in execution of a decree, and a third party comes forward and claims a portion, the Court need not, under Section 246, Code of Civil Procedure, hold any inquiry in the matter. The claimant should be treated as a defendant, and his proofs used as they bear upon the question whether the judgment-debtor is in possession.

A third party is not bound to go and urge his claim to a property advertised for sale in execution, or to sue within one year from the date of delivery to the auction-purchaser.

Mitter, J.—In February 1862 the rights and interests of one Prannath Roy in a certain mehal called Holoodghur Oghyra, bearing No. 39 on the Collector's towjee, were attached for sale by the Moonsiff of Pubna in execution of a decree. Sooruj Monee Debia, wife of the judgment-debtor, appeared before that officer, and laid claim to 17½ gundahs of the mehal, alleging that she had obtained the same by a deed of sale from one Beejoy Kanth Bagchee, and a deed of gift from her husband's aunt Koroona Moyee Debia. On the 28th of the said month, the Moonsiff held a proceeding, whereby he allowed this claim, and directed the 17½ gundahs therein included to be exempted from the sale. Inconsistently, however, with this order, the rights and interests of the judgment-debtor in the entire mehal, without reservation or deduction, were actually put up for sale, and purchased by the special appellant before us. Sooruj Monee has now sued the special appellant for recovering possession of certain specified shares in several villages in *this* mehal, as is distinctly admitted by her in her own plaint. The Principal Sudder Ameen of Rajshahye, who tried this case in the first instance, dismissed the entire suit, holding that the deeds put forward by the plaintiff were concocted by her husband, with a view to defeat the rights of his creditors. On appeal the Judge has decreed the claim for 17½ gundahs, holding that the defendant, special appellant, could not contest the right of the plaintiff, special respondent, with reference to the same in consequence of the Moonsiff's proceeding above referred to. The remainder of the claim has been disallowed upon the ground that, the special respondent having failed to appear in the execution department, and more than a year having elapsed from the date of delivery of possession to the auction-purchaser, her present suit could not be permitted to go on. Both parties have come to us in dissatisfaction of this judgment, the defendant in the ordinary way. and the plaintiff under Section 348 of the Procedure Code.

Without going specifically into the several grounds urged before us by the defendant, special appellant, we are clearly of opinion that the Judge's order, with regard to these 17½ gundahs, must be reversed. The certificate of sale granted to the special appellant shows conclusively that the Court had sold to him all the rights and interests of the judgment-debtor in the mehal. The proceeding of the Moonsiff above referred to was clearly illegal from the beginning to the end. He had attached a certain mehal for sale. A third party came forward with a claim relating to a portion of the mehal, without stating whether the judgment-debtor had or had not any interest in the remainder. Under such circumstances, the Moonsiff, if he had attended to the provi-

sions of Section 246, might have at once perceived that it was not at all necessary for him to hold any enquiry into the matter. Instead of doing this, he proceeded to hold an investigation which is clearly opposed to the express wording of the law. If any investigation was necessary, the matter which he ought to have enquired into was whether the judgment-debtor was directly or indirectly in the enjoyment of the rents and profits of the mehal advertised for sale. Whether the claim preferred by the third party was a good one or a bad one was not the matter directly in issue before him. The claimant is required to be treated as a defendant, and his proofs are to be made use of so far as they bear upon the only enquiry before the Court, namely, whether the judgment-debtor is in possession, actual or constructive. The order which the Moonsiff was competent to pass depended entirely upon the result of such enquiry, and it could only be either for releasing the property from attachment, or for disallowing the claim on the ground that the debtor had such rights and interests as could be sold in execution of a decree. The order passed by the Moonsiff for allowing the claim, and at the same time directing 17½ gundahs only to be exempted from the sale, was clearly illegal. Such a proceeding cannot affect the rights of the special appellant, who has purchased all the right, title, and interest of the judgment-debtor in the mehal in question; and he is in every respect competent to call upon the special respondent to prove the title upon which she has come into Court.

With reference to the objection taken by the special respondent under Section 348, we are equally clear in our opinion that the Judge's decision is erroneous in law. There is no law which renders it compulsory on a third party to go and urge his claim to a property advertised for sale in the execution department, nor is there any law in force to render it obligatory on him to sue within one year from the date of delivery of possession to the auction-purchaser. It matters very little that the special respondent had preferred a claim for 17½ gundahs of the mehal, and not for the remainder involved in her present suit. This may raise a strong presumption of fraud against her, but it cannot deprive her of her legal rights if she has any, and if she has come within the period prescribed by the law, which in this particular case is 12 years from the date of the cause of action.

It were better if the Judge had expressed himself more positively on the merits of the case. In one part of the judgment he says that he agrees with the Principal Sudder Ameen in holding that the various titles set up by the respondent were all fraudulent, but in another part of it he says that it was not necessary for him to determine this question. We are, therefore, obliged to remand this case to him to be tried upon the merits with reference to the foregoing remarks.

Seton-Karr, J.—I concur. I think the Judge should first find distinctly whether the transactions alluded to are true or false. If he is clearly of opinion that they are unreal or fraudulent, there would be an end of the case. Our present judgment merely has the effect of setting aside the Judge's decree in plaintiff's favor for 17½ gundahs of the property, and of leaving him to find distinctly whether the plaintiff's title is worth anything.

The 14th August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Sale in execution—Keeping decree in force.

Case No. 69 of 1867.

Miscellaneous Appeal from an order passed by the Judge of West Burdwan, dated the 28th November 1866, reversing an order passed by the Principal Sudder Ameen of that District, dated the 10th February 1866.

The Maharajah of Burdwan (Decree-holder), *Appellant,*

versus

Luckee Monee Debee and others (Judgment-debtors), *Respondents.*

Baboo Jugodanund Mookerjee for Appellant.

Baboo Kalee Mohun Doss for Respondents.

Where there is a sale in execution, the latest act of the decree-holder to keep his decree in force is the sale which took place at his instance, not the confirmation of the sale.

Jackson, J.—I AM of opinion that, in the case before us, the decision of the Judge below was right.

If there had been a petition presented on the part of the judgment-debtor impugning the regularity of the sale or of the proceed-

ings before sale, and if the decree-holder had appeared to rebut such petition, then I think that he would have been taking a proceeding to keep his decree in force, or to enforce his decree; but, inasmuch as the sale took place, and no objection was afterwards presented, then I think that the confirmation of the sale was merely a formal proceeding with which the creditor had nothing to do, and that, consequently, in these proceedings, the very latest act which can be said to have been done by the decree-holder to enforce his decree must be the sale which took place at his instance by the Court. Consequently, I think that the Judge was right, and that the special appeal must be dismissed with costs.

Hobhouse, J.—I concur.

The 14th August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Lease granted under pretended title—Ejectment of lessees.

Case No. 246 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Gya, dated the 11th February 1867, affirming an order passed by the Sudder Ameen of that District, dated the 29th March 1866.

Sheo Shunkur Lall (Judgment-debtor), *Appellant,*

versus

Dhurm Joy Pooree and others (Decree-holders), *Respondents.*

Baboos Kishen Succa Mookerjee and *Chunder Madhub Ghose* for Appellant.

Baboo Nil Madhub Sein for Respondents.

Where a manager or trustee conveyed certain property to himself by a pretended deed of gift, and under such pretended title granted a dur-mokurruree lease, and his title is set aside by a decree of Court, the lessees cannot be allowed to maintain possession, especially if the lease itself was brought to question in the suit and set aside in the decree.

Jackson, J.—It appears to me that the Judge's decision in this case must be affirmed.

The respondents were plaintiffs in a suit in the Court of the Sudder Ameen of Gya. They complained that Mungulpoori, who was really the manager or trustee on behalf of a body of mohunts, had set up a pretended deed of gift conveying the entire right and interest in certain landed property to himself; and that, under such pretended title, he had granted certain leases, including the dur-mokurruree to the present special appellants. The parties holding under these various leases were parties to the suit, and in especial the present appellants were parties, and the plaintiffs sought to have the dur-mokurruree granted to them set aside by a decree of Court. The case after a partial decree before the Sudder Ameen came to the Court of the Principal Sudder Ameen of Gya, who gave the plaintiffs a decree for all that they sought in their plaint, and that decision was affirmed on special appeal by the High Court. In executing the decree, the plaintiffs have applied for khas or immediate possession of the lands in dispute, and this has been allowed by the Court below, ousting thereby the present special appellants, the dur-mokurrureedars. The latter, however, contend that the effect of the decree was to restore the plaintiff only to the proprietary right in the mouzahs, and that their dur-mokurruree did not necessarily fall, and they urge that, in the case of Nowrungee Lall, who held a ticca lease of part of the same lands, the plaintiffs have not been allowed to dispossess him, but an enquiry has been ordered whether the lease to him was granted and taken *bonâ fide*, and whether he cannot be allowed to maintain possession for the term of his lease. It seems to me that, whatever the grounds may have been for making this order in favor of Nowrungee Lall, they will not apply to the present special appellants. Nowrungee Lall held a lease for a limited term which had been granted by the defendant Mungulpoori in the exercise of his authority as manager. It may very well be that the granting of a lease for a term would be an act within the authority of the manager for the benefit of the co-sharers, but it is quite a different thing if a manager, alleging himself to be the proprietor under a pretended deed of gift, should grant a lease in perpetuity. That is clearly an act beyond the powers of a manager, and, moreover, this document itself, the dur-mokurruree, was expressly brought into question in the suit, and the decree of the Principal Sudder Ameen appears to have altogether set it aside.

I think, therefore, that the special appellants are not in a position to ask for an enquiry in these proceedings as to the character of the dur-mokurruree. They were defendants in the suit, their dur-mokurruree

was expressly challenged by the plaintiff, and I think it was for them in that suit to show that their dur-mokurruree was of such a character that, notwithstanding the failure of the title of their lessor, it should be allowed to stand.

I, therefore, think the special appeal must be dismissed with costs.

Hobhouse, J.—I concur.

The 14th August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Section 347, Act VIII. of 1859—Dismissal of appeal for default of prosecution.

Case No. 218 of 1867.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Jessore, dated the 16th February 1867.

Shaikh Mittoo Khan, *Appellant,*

versus

Ruhman Khan and others, *Respondents.*

Baboo Khetter Mohun Mookerjee for Appellant.

No one for Respondents.

To bring an appellant within the terms of Section 347 of the Code of Civil Procedure so as to give the Court jurisdiction, his application for re-admission of the appeal, dismissed for default of prosecution, must be made within 30 days from the date of the dismissal.

Previous rulings allowing a special appeal from an order under Section 347 followed but doubted.

Jackson, J.—THE contention of the special appellant's pleader in this case is wholly untenable. His client was appellant in the Principal Sudder Ameen's Court, the case had been remanded for decision by this Court, and, the appellant failing to appear, under Section 346 the appeal was dismissed in that Court for default. No application was made by the appellant under Section 347 within 30 days; but, about five months after the appeal had been so dismissed, an application was made, which was described as one for a review of judgment, and for reasons stated the Court was asked to re-consider its order; that application was unsuccessful, and another petition of the same kind was made in September, several months later. The Principal Sudder Ameen refused that application also upon the ground that no decision upon the merits of the case was sought to be reviewed, and also that the application had not been made within 30 days. The appellant now comes here specially. He maintains that he is entitled to a special appeal. If it were not for the authority of two cases reported in the II. Weekly Reporter, one at page 22, Miscellaneous Rulings, and the other at page 254 of the Civil Rulings, I should have doubted whether any appeal, either regular or special, would lie against a decision of the Court under Section 347, inasmuch as the re-admission of an appeal under that Section, after sufficient cause shown, would seem to be a matter left wholly to the discretion of the Court which dismisses the appeal. But, if we are to say on the authority of these decisions that a special appeal will lie in such cases, it is quite clear that the appellant before us has not brought himself within the terms of Section 347, inasmuch as he made no application to the Court within 30 days; but he preferred to make his application as for a review of judgment, and treated the application which he insists he was entitled to do as an application for review of judgment. He then makes the anomalous assertion that he is entitled to appeal specially here upon the order rejecting the application for review of judgment, whereas the law expressly provides that orders upon application for review are final. It is quite clear, therefore, that, if this had been an application under Section 347 (which the appellant does not call it), it would fail by reason of the application not being made within 30 days, even if a special appeal would lie in such cases, whereas, if it be an application for review of judgment (which, I think, it manifestly is not), then a special appeal cannot lie, because the orders upon such application are final.

But it is also very plain to me that this was not an application for review of judgment, because there had been no judgment, the appeal by reason of the appellant's default never came on for hearing at all. Instead of that, it was struck out of the list, or, in other words, "dismissed on default." There was, therefore, no judgment, and properly, I should think, no decree; consequently, there could be no application for review of judgment.

The appeal, therefore, I think, must be dismissed.

Hobhouse, J.—I concur.

It seems to me that this was either an application for review of judgment under Section 376, or it was an application after

dismissal of the suit on default under Section 347. If it was an application for review of judgment, under Section 378 there is no appeal. If it was an application under Section 347, then, admitting that there is an appeal specially to this Court (and on that point I share the doubts of my brother Jackson), it seems to me that, even then to give the Court below any jurisdiction at all, the applicant must have come within 30 days. Admittedly, he did not come within 30 days, and, therefore, he was out of Court.

On either ground, therefore, I think the decision of the Court below was perfectly correct.

The 15th August 1867.

Present :

The Hon'ble W. S. Seton-Karr and Dwarkanath Mitter, *Judges.*

Sale in execution—Intervenors—Section 246, Code of Civil Procedure—Omission to produce evidence in Lower Court.

Cases Nos. 731 and 892 of 1867.

Special Appeals from a decision passed by the Judge of Patna, dated the 16th January 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 5th March 1866.

Misree Begum and others (Defendants), *Appellants,*

versus

Punnoo Singh and another (Plaintiffs), *Respondents.*

Messrs. R. E. Twidale and *C. Gregory* for Appellants.

Baboos Sreenath Doss, Kishen Succa Mookerjee, and *Mohesh Chunder Chowdry* for Respondents.

Where a judgment-debtor's rights and interests in certain property are advertised for sale in execution, and third parties intervene as claimants of a portion, if they admit that he has *some* interest in the property, it is unnecessary for the Court to enquire into the claim. Section 246, Code of Civil Procedure, applies where judgment-debtor has no possession in the property, actual or constructive; and, for the purpose of determining this issue, the claimants should be put in the category of defendants.

Where parties make no *bond-fide* attempt in the Lower Court to prove the genuineness of conveyances on which they rely, they have no right to ask the Appellate Court to relieve them of the consequences of their own negligence.

Mitter, J.—Two grounds of special appeal have been urged before us in this case :—

1st.—That the proceedings of the Civil Court dated 4th July 1860 is a bar to the plaintiff's claim for anything in excess of 1 anna 15 gundahs of the property in suit.

2nd.—That the Lower Courts ought to have given an opportunity to the special appellants to prove the conveyances relied upon by them in their defence.

With reference to the *first* point, we are clearly of opinion that the contention of the special appellants is not sound. In execution of a decree against one Misree Khanum, her rights and interests in the property in suit were advertised for sale. The special appellants intervened as claimants, and objected to the sale upon the ground that Misree Khanum had only a share of 1 anna 15 gundahs, the remaining 14 annas 5 gundahs belonging to them under divers instruments purporting to have been executed in their favor by the judgment-debtor herself and various other co-parceners in the estate. Upon this intervention, the Court, executing the decree, held the proceeding in question, and directed thereby that the 14 annas 5 gundahs claimed by the special appellants should be exempted from sale. An order was passed at the same time for selling the rights and interests of the judgment-debtor in the property attached, whatever those rights and interests were. We think that this proceeding, exempting a portion of the property from sale, is illegal on the very face of it, and can, therefore, form no bar to the right of the auction-purchaser to recover anything that might be established to have been the share of the judgment-debtor, even though it is found to be greater than the 1 anna 15 gundahs allowed to her by the special appellants themselves. Under the circumstances stated above, it was wholly unnecessary for the Court to hold any enquiry whatsoever in the execution department. There was no claim advanced before it, which required an adjudication under the provision of Section 246 of the Procedure Code, the only law under which it was competent to interfere in the matter. The special appellants having admitted that the judgment-debtor had *some* interest in the property attached for sale, which could be seized and disposed of in execution of the

decree passed against her, any enquiry into the extent of such interest was altogether unnecessary, and therefore illegal. The Court guarantees nothing to the auction-purchaser beyond the right, title, and interest of the judgment-debtor; and, as long as the party objecting to the sale is unable to deny that the debtor has some interest in the property advertised for sale, so long it is perfectly useless to enquire whether the claim preferred is good or bad. Section 246 was enacted for the purpose of avoiding the inconvenience and hardship which might accrue to third parties in consequence of the sale of any property as the property of the judgment-debtor, when the latter has got no possession in it, either actual or constructive. The very nature of the enquiry prescribed by this Section, and of the order to be passed upon the result of such enquiry, clearly shows that this construction of the law is perfectly correct. The validity or otherwise of the title set up by the claimant is not to be investigated directly. The issue for adjudication is whether the judgment-debtor is in possession of the property attached for sale, actually or constructively; and for the purpose of determining this issue, the claimant is to be placed in the category of a defendant. A person who comes forward with a claim, and admits at the same time that the debtor is in possession of *some* share or interest, however small, admits the very fact which it is the object of an enquiry under that Section to ascertain. What, again, is the order to be passed after the necessary enquiry is made? It must be either for releasing the entire property under attachment, or for directing the sale of the rights and interests of the judgment-debtor, in rejection of the claim. The order passed in the present case is inconsistent and illegal. What can be the meaning of an order which directs the release of the 14 annas 5 gundahs claimed by the special appellants, and at the same time allows the sale of the rights and interests of the judgment-debtor in the property attached to be proceeded with? Such an order could not have been possibly passed, if the Court had kept in view the provisions of the law above referred to. It cannot be contended that it was the intention of the Legislature that, whenever a claim is preferred in the execution department, the Court is bound to enquire into its validity. Suppose a person appeared as a claimant upon the ground that the judgment-debtor was in possession of the property attached as a mere mortgagee, the right of ownership being vested in himself. Is it necessary for the Court to enquire into such a claim under Section 246? If it is not, we fail to perceive any reason why an enquiry under that Section should be required when the claimant contends that the debtor is in possession of half, and not of the whole, property under attachment. This principle was expressly recognized by the Circular Order of the late Sudder Court bearing date the 10th of June 1842, and we do not think that there has been any departure from it by the enactment of Section 246 of the Civil Code. The proceeding relied upon by the special appellants is in our opinion void for want of jurisdiction, and is otherwise bad in law for the illegal way in which it has been conducted, as also for the illegal order which it has given rise to.

With regard to the *second* point, we observe that the Judge below has declared the alienations set up by the special appellants as void in law in consequence of their having been made at a time subsequent in date to the institution of legal proceedings by a mortgagee to enforce his mortgage-lien upon the property alienated. The soundness of this ruling has not been questioned before us by the pleaders for the special appellants, and we ourselves do not see any reason to come to a different conclusion. We observe, however, that, even if it were necessary to enquire into the genuineness and *bona fides* of the conveyances relied upon by the special appellants, ample opportunity was given to them to produce all the evidence they had to produce in the case. No *bonâ-fide* attempt was made to do so, and the special appellants, therefore, have no right to ask us to relieve them from the consequences of their own negligence.

We, accordingly, dismiss this special appeal with costs.

The 15th August 1867.

Present:

The Hon'ble W. S. Seton-Karr and Dwarkanath Mitter, *Judges.*

Procedure—Limitation.

Case No. 1149 of 1867.

Special Appeal from a decision passed by the Second Principal Sudder Ameen of the 24-Pergunnahs, dated the 25th February 1867, affirming a decision passed by the Moonsiff of Baraset, dated the 28th June 1866.

Kedarnath Ghose (one of the Defendants), *Appellant,*

versus

Kasim Mundul and another (Plaintiffs) and others (Defendants), *Respondents.*

Baboo Nubo Kishen Mookerjee for Appellant.

Baboo Tarucknath Sein for Respondents.

There is no law which prevents a Lower Appellate Court from looking into all the facts of a case before coming to a conclusion on the point of limitation.

Seton-Karr, J.—THERE are no grounds for special appeal in this case. Upon a review of the whole evidence on the record, the Lower Appellate Court has come to the conclusion that the plaintiff had been dispossessed by the defendant in 1260, as stated in the plaint. The Lower Appellate Court has also found that the plea of relinquishment set up by the defendant is not established. Under these circumstances, we cannot interfere with the judgment passed by the Court below.

It is said that the Lower Appellate Court has committed an error in law in trying the plea of limitation with the merits of the case. We do not think that this objection is at all valid; and, even if there were any law to prevent the Lower Appellate Court from looking into all the facts of the case before coming to a conclusion on the point of limitation, the special appellant has failed to show us how the merits of the case have been affected by the procedure adopted by the Lower Appellate Court. For these reasons we dismiss this special appeal with costs and interest.

The 16th August 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Witness (Evidence to be taken of every)—Suit by minor—Legal necessity—Onus—Plaint.

Cases Nos. 588 and 594 of 1867.

Special Appeals from a decision passed by the Judge of Sarun, dated the 29th December 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 31st August 1865.

Looloo Singh and another (Defendants), *Appellants,*

versus

Rajendur Laha (Plaintiff), *Respondent.*

Baboos Debendro Narian Bose and *Doorga Dass Dutt* for Appellants.

Baboo Kalee Kishen Sein for Respondent.

Every party to a suit is entitled to have all the witnesses, whom he desires to call, and is ready at the trial to produce, heard by the Court, whatever opinion the Court may form by anticipation as to the probable value of the evidence when it shall be given.

In a suit to set aside sales made by a minor's guardians, on the ground that the sales were not justified by any recognized legal necessity, the *onus* is on the defendant to prove the necessity. Nature of proof sufficient to discharge such *onus* explained.

Each alienation in a suit of this nature by the guardians constitutes the root of a distinct cause of action, and a suit which combines several of them in one plaint ought not to be entertained.

Phear, J.—BOTH these appeals arise out of a suit which was brought by one Rajendur Laha against the purchasers of several portions of his property to set aside the respective contracts of sale. These contracts were made during his minority by four ladies, the two widows of his father and the two widows of his paternal uncle, who appear some or all of them to have acted as the minor's guardians. It was alleged that the sales in question were not justified by any recognized legal necessity, and on this ground the plaintiff placed his title to the relief he sought.

Both the Lower Courts arrived at the conclusion that there was no sufficient necessity to give validity to any one of the sales, and therefore decreed the plaintiff's claim in all instances.

Against this decision, two only of the defendants have appealed by petitions numbered as above.

The grounds taken by the appellant in No. 594 are—

1st.—That the Court of first instance refused to allow witnesses to be called in his behalf, who were in Court ready to give their evidence, and were tendered by him for that purpose; and that, although he objected before the Lower Appellate Court to the first Court's decision for this reason, the Lower Appellate Court overruled his objection.

2nd.—That the *onus* of proving the validity of the sale was wrongly placed upon the defendant.

3rd.—And lastly that, by the finding of the Lower Appellate Court itself, necessity for the sale to the extent of at least 950 rupees was actually made out.

We are of opinion that the appellant ought to succeed on the *first* mentioned ground. Every party to a suit is entitled to have *all* the witnesses whom he desires to call, and is ready at the trial to produce, heard by the Court, whatever opinion the Court may form by anticipation as to the probable value of the evidence when it shall be given.

As to the *second* ground, we think that the burden of proof was rightly placed by the Lower Courts, although it seems to us that both the Courts erred as to what that *onus* involved. To discharge that *onus*, it was not obligatory on the defendant to show that the alleged necessity for the sale actually existed; it would have been sufficient if he had established that, before completing his purchase, he had made all reasonable enquiry as to the existence of that necessity, and that the result of his enquiries was to satisfy him, as an honest man, of the necessity being real, and not pretended. However, the defendant does not now complain of the nature of the burden laid upon him, and does not say that he could have supported it had its character been changed, and we see no reason for supposing that he has suffered by the mistake of the Courts. As, therefore, he is clearly wrong in his present contention, we reject this head of appeal.

The *third* point urged in special appeal does not call for particular decision now. The case is remanded in order that the defendant may have an opportunity of producing before the Court those witnesses who were present in Court, and ready to give their evidence in the first instance. In coming to a final conclusion on the whole of the evidence, including that which may be added according to the terms of this remand, the Lower Appellate Court will consider the facts involved in the third of the special appellant's grounds of appeal.

In No. 358 the appellant objects—

1st.—That the Lower Appellate Court wrongly decided that the Court of first instance had given him ample time to file and produce his evidence before it.

2nd.—That it also wrongly decided that the Court of first instance had not been asked to call for the record of another suit mentioned, with the view to the production of documentary evidence therefrom.

3rd.—That the burden of proving the validity of the sale was wrongly placed upon him.

The appellant gives us no means of judging as to the correctness of the Lower Appellate Court's decisions complained of in the first and second grounds. These decisions were clearly come to on the exercise of a discretion possessed by the Court, and, in the absence of any evidence to the contrary, we must assume on special appeal that that discretion was judicially exercised.

The *third* ground of special appeal we have already dealt with in our judgment upon special appeal 594.

This appeal No. 588 must be dismissed with costs.

We feel bound to remark, with regard to this suit generally, that the plaint seems to have been framed in a manner greatly calculated to embarrass the defendants. Each alienation by the plaintiff's guardians constituted the root of a distinct cause of action, and the first Court ought not to have entertained a suit which combined several of them in one plaint.

The 17th August 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Oral evidence sufficient to prove title.

Case No. 652 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 24th January 1867, reversing a decision passed by the Officiating Moonsiff of Seetakoond, dated the 18th May 1866.

Ram Soondur Mundul (Plaintiff), *Appellant,*

versus

Akima Bibee and others (Defendants), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

No one for Respondents.

Oral testimony, if worthy of credit, is sufficient without documentary evidence to prove a fact or a title.

Loch, J.—THIS case has been most unsatisfactorily disposed of by the Principal Sudder Ameen in appeal from the judgment of the Moonsiff. The dispute is about a tank which plaintiff alleges was excavated by his grandfather, and which the defendant holds of him as jotedar. The defendants claim it under a pottah from another proprietor. The Moonsiff found against the defendants, holding that the pottah was spurious, and that plaintiff had proved his case. The Principal Sudder Ameen commences by stating that plaintiff has produced no evidence to establish his allegation whether the disputed land has been held rightfully by plaintiff from the time of his ancestor. He then goes on to say that, "though plaintiff's witnesses have deposed "to the tank having been excavated by the "plaintiff's ancestor, yet they have stated "the same to have been held by the defend-"ant 10 or 11 years. Therefore the plaint-"iff's claim has not been proved. The tank "cannot be held as proved to have belonged "to the plaintiff's predecessor, simply by oral "evidence."

Now, it appears to us, the Principal Sudder Ameen has committed two mistakes in this judgment: *first*, he has not stated the whole purport of the evidence given by the plaintiff's witnesses, *viz*, the nature of the defendant's possession; and, *secondly*, he lays down a rule that oral testimony is of itself insufficient to prove a fact or a title. Surely, the Principal Sudder Ameen is aware, after the experience he has had as a judicial officer, that oral testimony, if worthy of credit, is sufficient without documentary evidence to prove a fact. If the Principal Sudder Ameen consider the evidence of plaintiff's witnesses undeserving of credit, he should give his reasons for rejecting it. The High Court have, for some time past, had occasion to remark that the careful and well-considered decisions of Moonsiffs are frequently set aside by Principal Sudder Ameens hastily and on insufficient grounds, and the judgment of the Lower Appellate Court now before us appears to us to be of that character. The case is remanded to the Lower Appellate Court, to be disposed of with reference to the above remarks.

The 17th August 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Ikhteatun or Pro forma defendants—Res adjudicata.

Case No. 590 of 1867.

Special Appeal from a decision passed by Mr. A. Hope, Judge of Sarun, dated the 21st February 1867, affirming a decision passed by Baboo Gunga Churn Shome, Principal Sudder Ameen of that District, dated the 21st February 1866.

Deokee Nundun Roy (Plaintiff), *Appellant,*

versus

Kalee Pershad and others (Defendants), *Respondents.*

Mr. R. T. Allan for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

A decree made in favor of a plaintiff in a suit is binding upon the defendants collectively and severally, notwithstanding any of them was made a defendant only *ikhteatun, i. e.*, by way of precaution. Any issue which is material to the rights of parties in the matter of the suit between them, whether actually contested or not, shall not afterwards be raised in a subsequent suit between the same parties.

Phear, J.—IN this case it appears that a certain estate, of which there were several co-proprietors, was put up for sale and sold for arrears of Government revenue.

Amongst the co-proprietors were Mussmut Eden and Syud Uzamut Hossein. In execution of a decree against these two persons jointly, their share in the proceeds of the revenue-sale in the Collector's hands were sold to one Kalee Pershad.

Upon this Kalee Pershad brought a suit against Mussamut Eden and Syud Uzamut Hossein as *principal* defendants, and all the other co-proprietors, or their representatives (including the present plaintiff), as *pro formâ (ikhteatun)* or precautionary defendants, to have it declared that he was entitled to have this share of the money paid out to him by the Collector. In this suit Kalee Pershad obtained the decree he sought, without any qualification as to rights to the same share in any of the defendants.

The present plaintiff now sues Kalee Pershad to establish that he has a mortgage (dated upwards of 30 years before that suit) over the whole of the property which was sold at the Government sale, and a lien upon the portion of the proceeds to which his decree declared him entitled.

The only question before us is this, namely, whether or not the decree which Kalee Pershad obtained in declaration of his right to be paid by the Collector the share of Mussamut Eden and Syud Uzamut Hossein in the surplus proceeds of the revenue-sale is binding on the present defendant. It is urged that it is not so; because, although he was a defendant in that suit, he was not a *principal* defendant, but was only made a defendant (as the plaint termed it) "ikhteatun" (literally "by way of precaution"); and that the whole tenor of the plaint shows that the claim was made against the *principal* defendants, and not at all against the *precautionary* defendants.

We are of opinion that this contention cannot be upheld. The decree in any suit must be treated as an adjudication of right as between the plaintiff on the one side, and the defendants collectively and severally on the other, except only so far as the decree itself contains any modification or reservation in regard to any of the individual defendants. If the claim which the present plaintiff now makes against Kalee Pershad be well-founded, it would have constituted a good defence to the action which Kalee Pershad formerly brought against him and others. It is his own fault that he did not set up that defence at that time. The necessity of putting some term to litigation is the foundation of the rule that any issue which is material to the rights of the parties in the matter of suit between them, whether actually contested or not, shall not afterwards be raised in a subsequent suit between the same parties. And, in this respect, a defendant brought in *pro formâ* is in exactly the same situation as any other defendant, whatever may be the case with regard to his costs.

Kalee Pershad's decree of right was in terms absolute against all the defendants (including the present plaintiff without exception). Therefore, the present plaintiff cannot in this suit question it, or make it subject to a reservation, which, in the former suit, he failed to set up or establish by way of defence.

Holding these views, we think the Lower Courts are right in considering the subject of the present suit a *res adjudicata* between the parties, and we therefore dismiss this appeal with costs.

The 17th August 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Intervenor under Section 77, Act X.—Receipt of rent—Adding a respondent to the record—Error as to a stamp—Appeal—Section 350, Code of Civil Procedure.

Case No. 554 of 1867.

Special Appeal from a decision passed by Mr. O. Toogood, Judge of Beerbhoom, dated the 24th December 1866, modifying a decision passed by Mr. A. Clarke, Assistant Collector of that District, dated the 27th March 1866.

Showdaminee Dossee, mother and guardian of Tara Prosunno Bose, minor (Objector), *Appellant,*

versus

Ram Roodroo Gangooly and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboos Jugodanund Mookerjee and *Rash Beharee Ghose* for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

An intervenor under Section 77, Act X. of 1859, who had never been in receipt of rent prior to the commencement of the suit, has no *locus standi* in Court.

A Judge has discretion in the matter of adding a fresh respondent to the record, the latter having been a party to the original suit.

An error on a matter of stamp is no ground for appeal, and is no reason for interfering with the decision of the Court below under Section 350 of the Code of Civil Procedure.

Mitter, J.—THE special appellant before us is an intervenor in a suit brought by the respondent for arrears of rent. It is not necessary for us specifically to go into the first three grounds taken in the memorandum of appeal. These grounds might have been good and valid grounds if the ryot had been complaining before us against the decree passed in the Court below, or even if the special appellant had come up to us as a plaintiff suing for arrears of rent. The Lower Appellate Court has distinctly found it as a fact that the special appellant had never been in the receipt of rent at any time prior to the commencement of the suit; and this finding is quite sufficient to throw him out of Court. Section 77 of Act X. of 1859 distinctly lays down this to be the only point for enquiry as between a plaintiff and an intervenor; and, if this point is not established in favor of the latter, he has got no *locus standi* in Court.

With reference to the last ground, we observe that it cannot be maintained. The plaintiff had omitted to make the special appellant a respondent to the appeal he had preferred in the Court below. He then applied for leave to bring him into the category of respondents, and the Judge granted the application. It is admitted that the Judge has jurisdiction to allow an appeal to be filed after the expiration of the prescribed period; and we do not see any reason why it is to be held that he cannot exercise a similar discretion in the matter of adding a fresh respondent to the record, it being borne in mind that the latter was a party to the original suit. The latter privilege follows as a necessary corollary to the former. The only question that can be raised is whether a fresh stamp ought to have been filed. We do not think that this is the intention of the Legislature. But, even if it were, an error on a matter of stamp is no ground for appeal. It is a technical objection which does not affect the merits of the case, and therefore does not afford a reason for interfering with the decision of the Court below under Section 350 of the Code.

We dismiss this appeal with costs.

The 17th August 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Jurisdiction—Suit to set aside lease—Clause 5, Section 23, Act X., 1859—Payment of rent.

Case No. 589 of 1867.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 31st December 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 9th July 1866.

Tajeh Mahomed Purdhan (Defendant), *Appellant,*

versus

Jogendro Deb Roykut (Plaintiff), *Respondent.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboos Onookool Chunder Mookerjee and *Kishen Dyal Roy* for Respondent.

A suit to set aside a lease as null and void does not fall within the provisions of Clause 5, Section 23, Act X., 1859, but is cognizable by a Civil Court, even though plaintiff mentions that a balance of rent is due by defendant.

If defendant's lease is declared null and void, the fact of his having paid rent for one year will not entitle him to retain the land.

Loch, J.—THIS was a suit to set aside a lease given by the manager of the plaintiff's estate while it was under the charge of the Court of Wards. Both the Lower Courts have given a decree in favor of the plaintiff. In special appeal it is urged by the defendant that this suit should have been brought in the Collector's Court under Clause 5, Section 23, Act X. of 1859, as the plaintiff seeks to eject the defendant alleging an arrear of rent, and, second, that, as the plaintiff's brother had received rent from the defendant, and had thereby acknowledged his tenancy, the plaintiff was barred by the act of his brother.

We agree with the Judge in dismissing the suit. Though plaintiff mentioned that a balance of rent was due by the defendant, he did not sue to eject him on that ground, but he brought his action to have the lease granted by the manager declared null and void, and therefore the plaintiff's case did not fall within the provisions of Clause 5, Section 23, Act X. of 1859, but was cognizable by the Civil Court. The second objection we think untenable; for,

the lease under which the defendant holds be declared null and void, the fact that plaintiff's brother took rent for one year from the defendant will not entitle the latter to retain the land.

We dismiss the appeal with costs.

The 17th August 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Mortgage—Premature suit to recover possession.

Special Appeals from a decision passed by Mr. A. Hope, Judge of Sarun, dated the 29th September 1866, reversing a decision passed by Moulvie Itrut Hossein Khan, Principal Sudder Ameen of that District, dated the 29th April 1864.

Case No. 3335 of 1866.

Shah Kimdun Lall and another (Defendants), *Appellants,*

versus

Susta Kooer and another (Plaintiffs), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellants.

No one for Respondents.

Case No. 3 of 1867.

Mussamut Susta Kooer (Plaintiff), *Appellant,*

versus

Shah Kimdun Lall and others (Defendants), *Respondents.*

Mr. R. T. Allan for Appellant.

Baboos Tarucknath Sein and *Kishen Succa Mookerjee* for Respondents.

Where a mortgagor sues to recover possession of the mortgaged property on the ground that the loan has been paid off from the assets of the estate, and that he is entitled to recover surplus collections, and the Court finds that a large balance in favor of the mortgagee still exists, plaintiff is not entitled to a conditional decree, and the suit should be dismissed.

Loch, J.—We think there are no sufficient grounds for interfering with the finding of the Court below in regard to the accounts. It is evident that the special appellant in No. 3335, who are mortgagees in possession, did not put in the accounts required by law, and the Judge pronounced the accounts which they did file to be insufficient. They then asked the Judge to accept the sum of Rupees 675 mentioned by the respondent as representing the assets of the estate. This the Judge has done, and found that plaintiff is entitled to obtain possession on paying to the special appellants, the mortgagees, the sum of Rupees 2,219-13 found to be still due to them.

The special appeal No. 3 is on the part of the plaintiff who seeks to recover possession from the mortgagees. He urges that the Judge should have calculated the assets at Rupees 845, and not at Rupees 675; but, from plaintiff's own showing, we do not think this would have been of any advantage to him; for, if expenses of collection be deducted from the larger sum, the net assets for the repayment of the loan correspond very nearly with the sum taken by the Judge.

As a balance has been found against the plaintiff, we question whether the Judge's order allowing him to recover possession on payment of such balance is a correct one. We think the order should have been for the dismissal of the suit with costs, for the plaintiff comes into Court and asks for possession, on the ground that the loan has been paid off from the assets of the estate, and that he is entitled to re-enter and to recover surplus collections from the defendant. It is found, however, that a large balance in favor of the defendant still exists; and, till it be paid off, plaintiff is not entitled to recover possession. The suit may be said to have been brought prematurely and should be dismissed, for he has no right to disturb the possession of the mortgagees so long as a balance exists in their favor. The balance, however, having been ascertained, the mortgagor might the next day deposit the amount and demand possession; and, if possession were not given, he could recover by action, and the mortgagees would be liable to the costs of such suit, as well as to account for all mesne-profits from the date on which the account was adjusted. It is said that it would be inconvenient and harassing to the mortgagor if he were obliged to institute a fresh suit, but we think it is more inconvenient to give a conditional decree; for, if the money be not paid immediately, a fresh account is rendered necessary to show what amount of mesne-profits have been realized in the interim; and, if a balance still exist against the mortgagor, he may still continue to delay payment preferring to let the mortgagees recover from the estate, and the suit will be continually before

the Court somewhat in the form of an execution of decree. As for the hardship to the mortgagor, we think he cannot complain of that. He takes his chance. He is supposed to know what are the assets of his property. He knows the amount of his debt with interest, and is able to calculate whether the assets are sufficient with a reasonable allowance for contingencies sufficient to pay off the loan within a certain period; and, if he comes rashly into Court, he must run the risk of every suitor who, failing to prove his allegations, has his suit dismissed. It is urged, however, by Mr. Allan for the other side that, whatever was the practice formerly, the more recent decisions show that conditional decrees have been given; and, in support of his allegation, he produced a judgment of a Division Bench, in which a conditional order had been passed. But it does not appear that in that case any question was raised as to the form which the decree was to take, and, therefore, we think we shall not be acting in opposition to the rules of this Court if we pass the order which in this case appears to us the proper one, and dismiss the plaintiff's suit with costs.

The 19th August 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Recovery of possession after ouster—Onus—Possessory suit—Section 15, Act XIV. of 1859.

Case No. 172 of 1867.

*Application for review of judgment passed by the Hon'ble Justices Kemp and Glover, on the 4th April 1867, in special appeal No. 2739 of 1866.**

Musst. Tukroonissa Begum and others (Respondents), *Petitioners,*

versus

Musst. Mogul Jan Bebee (Appellant), *Opposite Party.*

Mr. C. Gregory and *Baboo Mohinee Mohun Roy* for Petitioners.

Baboo Romesh Chunder Mitter for the Opposite Party.

In a case for recovery of possession after ouster in which the plaintiff is held to have a bad title, whilst the title of the defendant in possession has not been enquired into, the plaintiff cannot oust the defendant in possession simply by proving anterior possession, but must prove title. A possessory suit under Section 15, Act XIV. of 1859, should in such a case be brought within the proper time.

Glover, J.—THIS application for a review of our judgment of the 4th April last is based upon two grounds:—

(1.) That the long anterior possession of the plaintiff was sufficient to shift the "*onus*" of proving title to the defendants; and that, as they had been found to have no title, the plaintiff's case ought to have been decreed; and

(2.) That the order passed in the Regulation II. of 1806 case was not only not binding on plaintiff, her vendor being no party, but no evidence against her.

In support of the first position, several* rulings have been quoted, notably one by the Privy Council in the case of Rajah Pedda Vencatapa *versus* Aroovala Roodrapa (VI. Weekly Reporter 13). But none of them apply to the present case or go beyond this; that, supposing there to be no title proved on either side, the long anterior and peaceable possession by a plaintiff before ouster would be a sufficient evidence of his title as against the ejection. In one of these cases, the contest was about the right to hold certain water as a fishery, and, neither plaintiff nor defendant being able to give proof of title, long and exclusive possession of the right by the plaintiff was held sufficient to give him title against the defendant, who had neither title nor possession.

* 10 Moore's Indian Appeals, page 1—56.
Marshall 75.
1 Hay 567.
Sudder Dewanny Adawlut Reports, 1861, page 137.
7 Weekly Reporter 174.

But, in this case, not only has there been no distinct finding on the title of the defendants, but it has been held that the plaintiff's title was bad, and that she had nothing to go upon beyond her anterior possession; and, if that be the extent of her right to recover, I think, for the reasons given in this Court's former judgment, that she must fail.

But it is contended that her title has not been properly declared to be bad, inasmuch as the party through whom she claims, *viz.*, Muneeooddeen, was no party to the Regulation II. case before the Principal Sudder Ameen.

* *See* 7 Weekly Reporter, page 332.

On turning to my notes of this case as originally argued, I find that this point was fully gone into; and we held that the recital by the Principal Sudder Ameen in the body of his judgment of Muneeooddeen's previous intervention on the strength of his kabala from Sabir Bibee, and of the result of his objections, was sufficient proof that Muneeooddeen was fully represented in the suit, although his name did not appear amongst the intervenors (his brother and two sisters) at the head of the decree.

We have now heard this point re-argued (by a different vakeel), but nothing has been said to alter my view of the case, or to make me suppose that our former decision was an improper one.

As, therefore, this is not a case between parties neither of whom can prove any title, but between parties one of whom has been distinctly held to have a bad title, whilst the title of the other has not been enquired into, I consider that the one out of possession cannot oust the one in possession, simply by proving anterior possession. She must, in my judgment, prove a title. She had, as was shown in our former order, a remedy by applying in a possessory action under Section 15, Act XIV. of 1859, which she did not choose to take advantage of, and her case is now remediless.

I would reject this application with costs.

Kemp, J.—I concur.

The 19th August 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Proof of age of child—Onus probandi.

Case No. 471 of 1867.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 31st December 1866, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 30th December 1864.

Nil Monee Chowdhry (Plaintiff), *Appellant,*

versus

Musst. Zuheerunissa Khanum and others (Defendants), *Respondents.*

Mr. R. E. Twidale and *Baboo Gopal Loll Mitter* for Appellant.

Messrs. R. T. Allan and *C. Gregory* and *Moulvie Murhumut Hossein* for Respondents.

The incidental mention of a child's age in the recital of a will is no proof of the exact age of that child. The proceedings after the devisor's death granting a certificate to the guardian of the girl are merely proof of her being a minor at that time, and do not disclose what her exact age then was. In the absence of proof of the person who made a sale being a minor at the time she executed a deed of sale to plaintiff, the *onus* of which lay on the defendant, the sale by her was upheld.

Loch, J.—THE plaintiff claims the property in suit under two deeds of sale, the one executed on 2nd Falgoon 1221 Mughee, by Zuheerunissa, and the other dated the 24th Bysack 1222 Mughee, executed by Hyder Ali and his son, Didar Buksh.

The plaintiff's suit was dismissed, but the case was remanded by this Court on 24th April 1866, to allow the plaintiff to give the evidence which he had applied to the Lower Courts for permission to adduce; and on this evidence the Judge finds that both deeds of sale are genuine, but that the deed of sale by Zuheerunissa is inoperative, she having been a minor at the time she executed the deed, and that, with regard to the property comprised in Hyder Ali's deed, plaintiff is not entitled to eleven villages, they having been under attachment in execution of a decree when plaintiff purchased them.

A special appeal is preferred on the ground that the Judge's finding as to the age of Zuheerunissa is based upon no legal evidence; and, if Hyder Ali's share in the eleven villages was under attachment, that did not affect the sale by Didar Buksh of his share being legal and valid, and therefore the Judge was wrong in excluding the share of Didar Buksh in those eleven villages from the decree which he gave the plaintiff.

In the order of remand we find the following remarks: "It has been urged before us "that the vendor of the kabalah of 1221 "was a minor at the time of execution, and "that the property covered by the second "kabalah was under attachment at the time "of sale. We find that the evidence relied "upon to show that she was a minor is in-"conclusive, or that the whole of the pro-"perty covered by the second kabalah be-"longed to Hyder Ali. These points must "receive the consideration of the Judge."

No fresh evidence to corroborate that which the Judge pronounced to be inconclu-

sive as to the minority of Zuheerunissa has been supplied by the defendants. The Judge, taking into consideration the evidence on the record, has come to the conclusion that she was under age when she executed the deed of 2nd Falgoon 1221, and the special appellant challenges this finding of the Judge as based on no legal evidence.

It appears to us that the contention of the special appellant is correct, and that the Judge's finding on this point cannot be sustained. The incidental mention of a child's age in the recital of a will is no proof of the exact age of that child. Considering how inexact the people of this country are as to the age of their children, except when a horoscope is taken, the devisor is as likely as not to have made a mistake in the child's age. The proceedings after his death granting a certificate to the guardian of the girl are merely proof of her being a minor at that time, and do not disclose what her exact age then was. This was a point for the defendant Zuheerunissa to prove, and she has evidently failed to give sufficient legal proof, and has not appeared in this Court, though made a respondent to the appeal, and we think so much of the judgment of the Lower Court must be reversed with costs, and plaintiff must get a decree for the eight-annas share of all the property sold to him by Zuheerunissa.

We see no ground for interfering with the judgment as regards the property of Hyder Ali, for it is not shown us that Didar Buksh, either under the will of Kurun Ali, the father of Zuheerunissa, or under the Mahomedan Law, had any share in the property during the life of his father, though he was permitted to be a party to the deed of sale. This part of the special appeal we dismiss with costs.

The 19th August 1867.

Present :

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Sale for arrears of Government revenue—Highest bidder—Suit for damages against Collector personally for sale to other than highest bidder.

Case No. 635 of 1867.

Special Appeal from a decision passed by Moulvie Anwar Ali Khan, Principal Sudder Ameen of Tipperah, dated the 31st December 1866, affirming a decision passed by Baboo Ram Monee Sein, Moonsiff of Begumgunge, dated the 30th July 1866.

Mr. Cornell, Collector of Bullooah (Defendant), *Appellant,*

versus

Musst. Oodoy Tara Chowdhrain and others (Plaintiffs), *Respondents.*

Baboo Romanath Bose for Appellant.

Baboo Shushee Bhoosun Bose for Respondents.

At a sale for default of payment of Government revenue, the Collector is *bound* to sell to the highest bidder, even though (as in this case) that bidder be the husband of the person in arrear.

In a suit against the Collector personally for damages on account of loss sustained by sale to the second highest bidder, the difference between the two bids is the proper measure of the plaintiff's loss, and not the actual or probable value of the estate.

Phear, J.—In this case it appears that Mr. Cornell, the Collector of Bullooah and defendant in the suit, sold a mehal belonging to the plaintiff for default of payment of Government revenue.

From a consideration of the sale-rooboo-karee and the facts found by the Lower Court, it seems to us that, after the sale-proceedings were concluded, it was pointed out to Mr. Cornell by one of his amlahs that Golab Chunder Sein, the highest bidder, was husband of the plaintiff, the defaulting zemindar. Thereupon he declared Kisto Kanto Roy, the next highest bidder, and not Golab Chunder, to be the purchaser.

Neither the plaintiff nor Golab Chunder at any time took steps to get this mistake set right by appeal to the Commissioner; and, at the expiration of 30 days, the usual sale-certificate was issued to Kisto Kanto.

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After the lapse of more than 12 months from the day of sale, the plaintiff instituted this suit to recover from the aforesaid Collector personally damages as caused to her by his not having sold the estate to the highest bidder, and the Lower Courts have awarded her Rupees 257, the full amount of her claim.

It is objected before us on special appeal—

Firstly.—That the suit is *barred* by *lapse of time.*

Secondly.—That, if any damage has been done to the plaintiff, the amount awarded in respect thereof is *excessive* and *improper.*

Thirdly.—That no damages *at all* ought to have been awarded.

We are of opinion that the first objection must fail, because we think that the cause of action does not fall among those for which one year's limitation is provided, and it is admitted that this suit has been brought within any of the other periods which have been set out by the Legislature.

The two other objections may be taken together. It is clear that the Collector committed a wrongful act by selling the property to the *second highest* instead of to the *highest bidder.* But we think that the difference between these two bids was the proper measure of the plaintiff's loss. The sale was at an end before Mr. Cornell fell into his error, and his conduct in this respect could have had no influence in checking the bidding. There is nothing to lead even to the suggestion that there was any one in the room who had offered or was ready to offer a higher price than Golab Chunder's bid.

On this state of facts, we are of opinion that the Lower Courts have taken a wrong measure of damages. The actual or probable value of the estate, if it could be arrived at *dehors* the bidding, affords no guide to the loss which the plaintiff sustained. *She* certainly was only entitled to the surplus proceeds of the sale after the Government claims had been satisfied, and therefore can only complain that the highest bid was not finally accepted. As Golab Chunder's bid was Rs. 700, and Kisto Kanto's Rs. 625, the plaintiff's damages ought to have been assessed at Rupees 75.

We, therefore, direct that the damages be diminished to this sum, and that the special appellant have his costs of this appeal in proportion to the amount cut off from the damages as decreed below.

The 19th August 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Limitation—Possession under a Magistrate's order which is reversed.

Case No. 812 of 1867.

Special Appeal from a decision passed by Mr. W. DaCosta, Principal Sudder Ameen of Purneah, dated the 4th October 1866, reversing a decision passed by Baboo Kylash Chunder Mookerjee, Officiating Moonsiff of that District, dated the 28th June 1866.

Firingee Sahoo and others (Defendants), *Appellants,*

versus

Sham Manjhee (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellants.

Baboo Motee Lall Mookerjee for Respondent.

Possession under a Magistrate's order, which is set aside by the decision of a Civil Court, cannot avail against a plea of limitation.

Glover, J.—This was a suit by the putneedar of Mouzah Bhagdakhee to recover possession of 3 beegahs, 17 d. of land, on the ground that it was within his putnee and in his possession till ousted through his ryot Munnoo.

The defendant (another ryot), Firingee Sahoo, alleged that the land was situate in Talook Koolaspore, the property of Sengrihal and others, and that the plaintiff was barred by limitation.

The first Court dismissed the plaintiff's suit on the issue in bar. But the Principal Sudder Ameen held that the plaintiff had recovered possession by the Criminal Court, and that, therefore, limitation did not apply. On the merits he found for the plaintiff.

It is urged in special appeal that it has not been found on evidence that the plaintiff did ever get possession under the order of the Magistrate's Court; and that, even if he did, the Civil Court decree, which set aside that order, set aside at the same time the possession given under it.

It is not very clear what was the nature of the criminal proceedings referred to. It is not stated in the order itself that the proceedings were taken under Section 318 of the Criminal Procedure Code, nor was there anything in the order itself to induce to suppose that they were so taken.

It appears from that order that Firingee Sahoo, the present defendant, complained against the present plaintiff for not permitting the erection of a house on certain land. The plaintiff was called upon to answer, and the result was that the defendant was retained in possession on proof apparently that he had the right so to retain it. This order was passed in July 1864.

The civil suit, which altered this state of things, and gave possession to Firingee Sahoo, was not decided till April 1865.

The decision turned upon the fact of Firingee's right and long anterior possession.

And the question is which finding is to prevail.

We think that the order of the Magistrate retaining the present plaintiff in possession was with all its effect extinguished by the decision of the subsequent civil suit which was instituted to set aside that order. The case before the Moonsiff was to recover possession on proof of title, and the Court found that, not only had the party who had been victorious before the Magistrate no title, but that the title, as well as the possession of the other side, had been clearly proved, both at and before the time of the Magistrate's order.

That order, therefore, was no proof in this case of the plaintiff's possession in 1864; and, as the Principal Sudder Ameen has relied solely upon it, we must reverse his judgment, and direct him to find whether there is any other evidence on the record whereby the plaintiff can escape from the defendant's plea of limitation.

Costs will follow the result.

The 20th August 1867.

Present:

The Hon'ble W. S. Seton-Karr and Dwarkanath Mitter, *Judges.*

Invalid pottah—Right of occupancy—Section 6, Act X., 1859.

Case No. 1038 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Moorshedabad, dated the 31st January 1867, reversing a decision passed by the Moonsiff of Jungeepore, dated the 10th March 1866.

Shibnath Roy (Plaintiff), *Appellant,*

versus

Messrs. R. Watson & Co. (Defendants), *Respondents.*

Baboo Gopal Lall Mitter for Appellant.

Messrs. R. T. Allan and *J. S. Rochfort* and *Baboo Onookool Chunder Mookerjee* for Respondents.

Even if a ryot's pottah be declared by a Court to be null and void, his title to the occupancy-right laid down in Section 6, Act X., 1859, is not affected, provided he has held or cultivated continuously for a period of 12 years.

Seton-Karr, J.—THE decision of the Principal Sudder Ameen, to the effect that the plaintiff is not to derive any benefit from the former pottah of 1255, is legally erroneous for this reason. The plaintiff, if he can prove possession by cultivating or holding land for 12 years, is entitled to the occupancy-right laid down in Section 6 of Act X. of 1859. It is immaterial whether the title of the grantor of the pottah of 1255 was declared by a Court to be null and void as against the defendants, Messrs. Watson. A declaration that an izardar, such as the grantor of the first pottah, had no good title, would not necessarily invalidate the holdings of all the ryots under that izardar, and, according to Section 6, a ryot, *whether he holds under a pottah or not*, acquires a right of occupancy by simply holding or cultivating continuously for a period of 12 years.

In this case the Court must try, not whether the izardar had a good title or not, but whether the plaintiff had held possession or cultivated for 12 years previous to the application to the Collector. If he has so held, or if those from whom he inherits have so held, he would not be liable to ejectment, and would have a right to call on the Courts to restore him that which he had lost.

In trying this question, the Court may consider a plea of the defendant to the effect that, for a portion of the above period, they had themselves been in khas possession of the land.

But the Court must try the mere fact of possession for 12 years; and, if it be proved in the plaintiff's favor, and within the scope and meaning of Section 6, the plaintiff would be entitled to a decree, but not otherwise.

The case is remanded accordingly.

The 21st August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Procedure in case of a Lunatic—Act XXXV. of 1858—Onus probandi.

Case No. 346 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Tipperah, dated the 16th May 1867.

Shaikh Busharutoollah, *Appellant,*

versus

The Collector of Tipperah, *Respondent.*

Baboos Otool Chunder Mookerjee and *Kalee Mohun Doss* for Appellant.

Baboos Kishen Kishore Ghose and *Jugodanund Mookerjee* for Respondent.

Before a Judge can, on the application of a Collector under Act XXXV. of 1858, order the property of an alleged lunatic to be placed in charge of somebody else, he must observe the procedure laid down in that Act, and pronounce the alleged lunatic to be of unsound mind after instituting a proper enquiry on the point.

The High Court can set aside an order of the Judge made under the Act without evidence being taken, without remanding the case to the Judge, there being no analogy in this respect between an ordinary civil suit and proceedings under this Act.

The burthen of proving an allegation as to the lunacy of any person rests on the Collector, or the person who makes the allegation.

Jackson, J.—I REGRET to find that we are again under the necessity of setting aside the order of the Civil Court in the case of this alleged lunatic Busharutoollah.

On the previous occasion, an order had been made under the provisions of Act XXXV. of 1858, and, that order coming before a Division Bench of this Court, it was found that the proceedings had not commenced upon any verified information, as declared to be necessary in the precedent of this Court, 5 Weekly Reporter, pages 54 and 55, Miscellaneous Rulings, and thereupon the Court ordered that the whole proceedings be quashed. On this order going down to the Zillah Court, the alleged lunatic made application to the Judge that his property should be released from control. The Judge at first made an order in accordance with the petition, but subsequently on a renewed application from the Collector stayed his order, and, the Collector having in the meantime put in a verified petition, the Judge recorded this order: "As the Collector has "now petitioned on the part of the Court of "Wards regarding Busharutoollah's estate, "and has verified the petition, and as I am "convinced that it is necessary for the pre-"servation of the estate that it should remain "in the charge of the manager of the Court "of Wards, I again, under Act XXXV. of "1858, direct that the Collector keep the "management of the said estate in his hands." It appears that, on the receipt of the verified application from the Collector, the Judge instituted a new enquiry. He says: "I am "convinced that it is necessary for the pre-"servation of the estate that it should remain "in the charge of the manager."

Section 9, Act XXXV. of 1858, is in these terms: "When a person has been adjudged "to be of unsound mind and incapable of "managing his affairs, if the estate of such "person or any part thereof consist of pro-"perty which, by the law in force in any "Presidency, subjects the proprietor, if "disqualified, to the superintendence of the "Court of Wards, the Court of Wards shall "be authorized to take charge of the same." Therefore, it was necessary for the Collector to satisfy himself upon an enquiry duly held after the receipt of such verified application that the person therein named was of unsound mind, and incapable of managing his affairs.

Then Baboo Jugodanund Mookerjee, who appears for the Collector, states that the Court is not competent to set aside the order of the Judge arrived at under these circumstances. He contends that this case is analogous to the case of a civil suit, in which, if the proper evidence has not been recorded, and the Court thinks fit to direct that further evidence should be recorded, the case is remanded or remitted to the Court below, in order to further evidence being taken. Now, it seems to me that there is no analogy in this respect between an ordinary civil suit and proceedings under this Act. In an ordinary civil suit, if the parties having appeared, and evidence more or less having been offered, the Court arrives at a decision, and either dismisses the suit or makes a decree for the plaintiffs that becomes *res judicata*, and if the decree be set aside, there is an end of the plaintiff's claim; it cannot be again adjudicated between the same parties. In this matter it is otherwise. This is an application which may be renewed as often as necessity is shown to exist, and the previous adjudication would be no bar to its being again entertained. Therefore, there is not the same necessity for remanding the case that there is in the case of a civil suit.

Again, Baboo Jugodanund Mookerjee argues that the burthen of proving the matter alleged in an application of this sort does not lie upon the Collector who made it, and that the mode of conducting the enquiry rests entirely upon the Zillah Judge. From this doctrine, I must altogether dissent. It appears to me that the person who makes an allegation as to the lunacy of any person is certainly bound to prove it; and that, if he fails to support his allegation by proof, he is liable to have his petition dismissed with costs. It is for the Court to take care that proper evidence is adduced, and it will abstain from making any adjudication of lunacy against any person unless the allegation is fairly and fully sustained. I have no doubt that it was for the Collector in this case, as he thought fit to bring the matter into Court, to adduce satisfactory proof of the insanity of the person referred to. It seems to me, therefore, that we are competent, and that it is necessary for us once more to set aside the order made in this matter, and with costs.

I think that in this case 200 rupees will be a proper fee to allow to the appellant.

Hobhouse, J.—I concur, but wish to add a few words.

It seems to me that the procedure is very distinctly laid down in the Act; and, if the Judge had followed that procedure, there could have been no such mistake made as he has made.

First of all, by the Act the Collector is in certain cases entitled to apply that such and such a person be declared a lunatic, and that the management of his estate should be placed in the hands of the Collector. Well, that the Collector did. Then, after that, comes Section 2, by which the Judge is to institute an enquiry for the purpose of ascertaining whether such person was or was not of sound mind, and incapable of managing his affairs, and then there are certain Sections which lay it down how that enquiry is to be conducted. Then, after that, Section 7 says that the Court shall determine whether the alleged lunatic is or is not of unsound mind, and (Section 9) when it has adjudged or determined that matter, and also that the person is incapable of managing his affairs, then the Court may pass the order which it has passed in this particular instance. Now, not one of these proceedings was followed by the Judge in this case. What was simply done in this case was this, the Collector made his application verified in the proper manner; then, after that, no enquiry was held, and the Judge without enquiry adjudged the person to be incapable of managing his affairs. The Judge did not find that this person was of unsound mind; but, without any such finding, he directed that the estate should be managed by somebody else.

This being the case, I think undoubtedly the order must be set aside.

The 21st August 1867.

Present :

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Form of certificate under Act XXVII. of 1860—Appeal.

Case No. 330 of 1867.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 25th March 1867.

Banee Madhub Mookerjee, *Appellant,*

versus

Nilambur Banerjee, *Respondent.*

Baboos Khettur Mohun Mookerjee and *Poorno Chunder Shome* for Appellant.

Baboo Kishen Succa Mookerjee for Respondent.

There are no general words in any part of Act XXVII. of 1860, declaring that orders made by the Zillah Court under that Act as to the form of the certificate shall be subject to appeal to a higher Court.

Jackson, J.—It appears to me there is no reasonable ground for appeal in this case.

The appellant's complaint is that, whereas he applied to the Zillah Court Judge for a certificate in regard to the estate of Tara Chand Banerjee and Ooma Debea, deceased, and made a specific request that such certificate should enable him to draw interest upon and to renew certain Government securities standing in the names of those persons, the Judge in the certificate specified only the power to draw interest. It is urged that the appellant should also have been empowered to negotiate and renew such securities. The Judge, after hearing the application, and also a party who objected to the grant of the certificate, made his order that the applicant should receive a certificate, but that it should relate only to the Government promissory notes standing in the names of Tara Chund and Ooma

Debea, and that the petitioner should be empowered to draw interest upon such notes. It appears that, after the grant of the certificate, the applicant had occasion to have the notes in question renewed, and that the Bank refused to renew the certificate, without some power to that effect being inserted in the certificate. Thereupon, two months after the grant of the certificate, namely, on the 27th of May, the applicant came before the Judge, and stated that the certificate had not been completely drawn up in the terms of his order, inasmuch as it did not specify the promissory notes standing in the names of both Tara Chand and Ooma Debea, and also he expressly asked that the certificate should specify a power to renew and negotiate. Thereupon the Judge made the order that the application was to be heard with the proceedings. Within a month after the date of that order, the applicant came up to this Court in appeal against the original order of the Judge upon the certificate, complaining that the certificate is defective, and that the application subsequently made had been refused.

Now, as to the form of the certificate itself, it appears to me that the Act XXVII. of 1860 provides no appeal to this Court upon the matter. There are no general words in any part of the Act declaring that orders made by the Zillah Court under this Act shall be subject to appeal to a higher Court. It is only provided by Section 6 that the granting of the certificate described in the preceding Section may be suspended by an appeal to the Sudder Court, and that the Court may, upon petition after the certificate shall have been granted by the District Court, grant a fresh certificate. "Such further certificate," the Act goes on to say, "shall not affect any payments made to the person to whom any former certificate may have been granted." That seems to me clearly to show that the intention of that Section was to enable a person aggrieved by the granting of a certificate to some other person to come before the Sudder Court, and appeal against such grant. After that follows Section 7, which shows what the effect of such certificate shall be, and then comes Section 8, which enables the Zillah Court to insert in the certificate by express words a power to receive interest or dividends upon Government securities or Bank shares, or to negotiating the same. But there is no Section, and there are no words in any other part of the Act which enable the recipient to appeal against a refusal of the Judge to insert such words. The words "may empower," no doubt, imply a discretion that the Judge would be bound to exercise upon a reasonable view of the case on application being made to him; and, if a general appeal were allowed, I have no doubt we should enquire whether the Judge had properly exercised the discretion vested in him. No doubt, also, if the law had declared that the Judge was bound in all cases to insert such power in all certificates, and if the Judge without good cause refused to do so, we might then, as a Court of superintendence, command him to do that which the law requires.

Then, as to the second portion of the appeal, *namely*, that the Judge has refused to comply with the later petition, it appears to me that the complaint is altogether groundless. The application was made on the 27th May, on which the Judge passed the order that the application was to be disposed of when the record was before him. But the petitioner would not wait; and, having appealed against the order on the certificate itself, he includes in it prematurely the order made by the Judge on the 27th May. It is impossible to say what further order the Judge might have made in the matter. It does not appear that any further application was made to him; and, although perhaps a little more expedition might have been used, I have not the least doubt that, if the petitioner had waited, the Judge, on looking at the certificate and papers of the case, would have seen that the certificate was not prepared in accordance with the direction, and would have ordered it to be amended.

I think, therefore, that the appeal must be dismissed with costs.

Hobhouse, J.—I concur with my brother Jackson on both points.

I would only add that, as far as I can understand, there was not, in the petition before the Judge, any prayer to insert in the certificate the power to negotiate Government securities, and that, therefore, the Judge was quite right in not giving that which he was not asked to give.

The 22nd August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Claims to attached property—Appeal by decree-holder—Sections 229, 230, and 246 of Act VIII. of 1859.

Case No. 349 of 1867.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Shahabad, dated the 3rd April 1867.

Gobind Pershad (Decree-holder), *Appellant,*

versus

Rajah Ram Purkash Singh (Judgment-debtor) and another, Objector, *Respondents.*

Baboo Mohesh Chunder Chowdhry for Appellant.

Baboo Kishen Succa Mookerjee for Objector, Respondent.

On the application of a decree-holder of a *money*-decree for the sale of immoveable property belonging to the judgment-debtor, certain parties objected that they had purchased the rights of the judgment-debtor therein. Subsequently, some of the objectors who claimed 14-annas share in the property compromised with the decree-holder, who then applied that the remaining 2 annas, in possession of certain specified parties, should be sold. The Lower Court ordered that the sale of these 2 annas should not proceed if the objectors who claimed them paid to the decree-holder a sum equal, rateably, to that levied from the 14 annas. HELD on appeal by the decree-holder against the original judgment-debtor that the provisions of Section 246 (and not those of Sections 229 and 230) of Act VIII. of 1859 apply to this case, which really seeks to enforce a particular remedy against third party named, and not against the original defendant.

Jackson, J.—IN this case it seems the appellant before us purchased a decree which had been obtained against Rajah Ram Purkash. That was a decree for money, and it was provided that, in accordance with a pledge entered into by the judgment-debtor, particular landed estates should be liable, and the decree-holder should be competent to proceed to sell those estates in satisfaction of the decree. The purchaser accordingly proceeded to sell the mouzah Rutusenpore, which is one of the mouzahs pledged. Thereupon, certain persons objected, stating that they had purchased the rights and interests of the judgment-debtor, and were in possession of the property. They stated, however, the name of the mouzah which they purchased was Chumarun. The Principal Sudder Ameen at first refused to go into the question regarding Mouzah Chumarun, and reserved the sale of that estate. Thereupon the decree-holder appealed to this Court, then consisting of Mr. Justice Loch and Mr. Justice Glover, who heard the appeal, and directed that the matter should be enquired into, and remanded the case to the Court below.

Subsequently, some of the objectors, who were interested in the mouzah to the extent of 14 annas, entered into a compromise with the decree-holder, and paid him a certain sum of money, and thereupon the decree-holder petitioned the Court below, reciting this compromise between these parties, and asking the Court to proceed to sell the remaining two annas, which he stated were in the occupation of specified objectors, being Ram Oograh and Ram Surun. The Court, however, upon their objection apparently, ordered that the sale of the 2 annas of the estate should not proceed on condition of their paying to the decree-holder a sum equal, rateably, to that which had been levied from the remaining 14 annas, that is to say, a sum of 625 rupees.

Now, the decree-holder comes up again in special appeal to this Court, making the original judgment-debtor respondent, and asking the Court to order that these two annas shall be unreservedly sold in satisfaction of the balance of his decree. Thereupon Baboo Kishen Succa Mookerjee, who appears for the objector Ram Oograh, who is not properly a party to the suit, objects that no appeal will lie in this case, and upon that point we have heard argument from him, and also from Baboo Mohesh Chunder Chowdhry, who appears for the appellant.

The appellant's vakeel has contended that this is not a case to which Section 246 applies, but that the law applicable to this case is to be found in Sections 229 and 230 of the Civil Procedure. That appears to me to be an entire misapprehension on his part. This is not a decree for immoveable property, but a decree for money for the realization of which the decree-holder has a lien, and is entitled to proceed against specific immoveable property. The decree-holder could not have asked the Court to place him in possession of this immoveable property; all that he could do was to apply to the Court to attach and sell the property mentioned.

It is contended that a decree of the kind before us is really a decree for immoveable property, and it is said that the Madras High Court in various instances have ruled that, in respect of suits of this nature, that is to say, where the lender of the money has got a lien over certain specified im-

moveable property, the rules of limitation applicable to suits for immoveable property apply. It appears to me that that stands upon altogether different grounds. Of course, the law of limitation must be read strictly by its own terms, and where Section 1, Clause 12, Act XIV. of 1859, provides "as to suits for the recovery of immoveable property to which no other provision of this Act applies, the period of 12 years" is to be allowed, it may very well be held by the Madras Court—(I am not aware that it has been so held in this Court, but possibly it may be so held)—that an interest of the kind created by the mortgage-bond held by this decree-holder should be called an interest in immoveable property; and, if so, the period of 12 years would be applicable to it. That is another thing altogether; we have now to consider what the decree is, and what the mode of its execution is to be. It appears to me perfectly clear that this is a decree not for land but for money, and, *secondly*, we must look to the Sections relating to execution of decrees and to attachment of property for the law in this case. I think, therefore, that Section 246 would clearly apply. But we are relieved altogether of this question, as it appears to me, by the circumstances of the case before us. This decree-holder is not insisting upon the liability to sell all the particular property which was mortgaged to him; he does not insist upon his right to ignore a purchase made subsequent to decree; on the contrary, he recognizes that purchase, and he says that I am entitled to settle with certain of the parties who have purchased, and to proceed exclusively against the remainder. That is not a question between him and the judgment-debtor; it is a question between him and certain third parties, and therefore it seems to me that neither Section 11, nor any other Section of the Act, entitles him to prosecute this appeal. If he had ignored the parties who had purchased this property, and had said I insist upon this property being sold, or a certain portion of it, such as may be sufficient to satisfy my debt, he would have stood in altogether a different position. As it is, he is really seeking to enforce a particular remedy against a third party named, and not against the original defendant.

I think, therefore, that this special appeal must be refused.

Hobhouse, J.—I concur.

The 26th August 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Filing a cross-appeal orally—Written memo. of grounds—Absence of proper stamp—Grounds not advanced in regular appeal—Property pledged as security—Purchase by obligee.

Regular Appeals from a decision passed by Baboo Nurothum Mullick, Principal Sudder Ameen of Bhaugulpore, dated the 4th February 1867.

Case No. 90 of 1867.

Mussumat Hoolas Kooeree and another (Defendants), *Appellants,*

versus

Mussumat Bibee Sufeehun (Plaintiff), *Respondent.*

Baboo Debendro Narain Bose for Appellants.

Baboo Greesh Chunder Ghose for Respondent.

Case No. 127 of 1867.

Mussumat Bibee Sufeehun (Plaintiff), *Appellant,*

versus

Khajah Mahomed Hubeeboollah Khan and others (Defendants), *Respondents.*

Mr. R. E. Twidale and *Baboo Unnoda Pershad Banerjee* for Appellant.

Mr. C. Gregory and *Baboos Mohesh Chunder Chowdhry, Debendro Narain Bose,* and *Kalee Kishen Sein* for Respondents.

An application to file a cross-appeal orally was rejected, *firstly*, because a written memo. of its grounds had not been filed previously; *secondly*, because the objection, when taken, was not filed on the regulated stamp; and, *lastly*, because the ground now urged had not been advanced as an objection in a regular appeal previously filed.

Where a plaintiff's bond gives him a separate lien on each and all of several mouzahs pledged as security, he is free to elect for sale whichever of the mouzahs he thinks most likely to satisfy his claim.

When a portion of property pledged as security in a bond is sold in satisfaction, there is nothing to prevent the obligee from purchasing such portion.

Glover, J.—This was a suit to recover Rupees 20,153-6-6, principal and interest, due on a bond executed on the 4th Jeyt 1271 F. S. (1864), by Mahomed Hubeeboollah Khan, defendant No. 1, and to sell in satisfaction of the debt the two mouzahs Dheer Dowra and Sura Nowabad, which had been pledged as security in the bond.

These two mouzahs had passed by purchase from Hubeeboollah into the hands of defendants Nos. 2, 3, 4, and 5, where the plaintiff sought to follow them.

The defendant No. 1, Hubeeboollah Khan, whilst making some faint objection touching the payment of the entire consideration-money, admitted the execution of the bond and plaintiff's right to follow the property (*viz.*, the two mouzahs named in the plaint) pledged in it. He alleged that the defendants Nos. 2, 3, 4, and 5, bought the mouzahs of Dheera Dowra and Sura Nowabad, with notice of the plaintiff's lien, and paid a less price for them, in consequence of that knowledge.

Defendants Nos. 2 and 3 alleged that the bond put forward by the plaintiff was collusive, and that the case had been got up by her father-in-law, Shaikh Bheekun and Hubeeboollah, in fraud of third parties; that, supposing the bond to be *bond fide*, no less than 26 mouzahs were pledged by it to the plaintiff, some of which are still in Hubeeboollah's possession, and that plaintiff's claim ought to be satisfied from the sale of these and of two other unincumbered mouzahs pledged, instead of from mouzah Sura Nowabad which they (defendants Nos. 2 and 3) had bought for valuable consideration, and without notice of the plaintiff's lien, on the 12th of May 1865.

They also contend that the plaintiff having herself bought three of the pledged mouzahs had broken her lien on the others.

Defendants Nos. 3 and 4 urged that they bought the mouzah Dheera Dowra from Hubeeboollah on the 2nd May 1866 for value without notice. They also pleaded collusion between the parties to the bond, and urged generally the same objections as their co-defendants, adding that, previous to the sale to them, the mouzah had been mortgaged to their father-in-law under a zur-i-peshgee lease in 1863, to pay off which the sale was afterwards effected.

The Principal Sudder Ameen fixed two issues:—

(1.) Were more than the two mouzahs, Dheera Dowra and Sura Nowabad, pledged? And, if so—

(2.) Can plaintiff obtain a decree for the sale of those two alone?

On the first issue, he found that the bond executed by Hubeeboollah pledged 26 mouzahs, and not only the two above-mentioned; and, on the second, held that the plaintiff had split her claim improperly by proceeding against two mouzahs only, and that such splitting would, in the event of her demand not being satisfied by the sale of those two mouzahs, cause further litigation; that, at the then stage of the case, it was impossible to adjust the different liabilities of all the 26 mouzahs, and that the plaintiff's prayer to have the representatives of the 24 not before the Court made defendants to that end was inadmissible; that the obligor Hubeeboollah was still in possession of four of the pledged mouzahs, and that the plaintiff's suit should be decreed against Hubeeboollah alone.

The Principal Sudder Ameen also made an order that the other defendants should, under the circumstances, pay their own costs.

Note.—We presume from the context that this decretal order contemplates the sale of the four mouzahs in Hubeeboollah's possession, and the plaintiff seems to have taken that view of the order, although the words used do not go further than a personal decree against defendant No. 1.

Against this decision, all the parties to the suit save Hubeeboollah appeal; defendants Nos. 4 and 5, Mussumats Hoolas Kooeree and Dae Kooeree, on the question of costs; defendants Nos. 2 and 3, Mussumats Waheedoonissa and Malik Dobeh, under Section 348 of the Code of Civil Procedure, on the ground that the Principal Sudder Ameen has given no opinion as to the *bona fides* of the plaintiff's bond, and the plaintiff herself on the ground (1) that only two mouzahs were pledged to her; and (2) that, in any case, she had the right to elect any of the mouzahs pledged, and satisfy her debt from them.

We may observe in this place that the pleader for defendants Nos. 4 and 5, after both sides had been heard, wished to file a cross-appeal orally, on the ground that the effect of their father-in-law's prior mortgage in 1863 had not been considered by the Principal Sudder Ameen.

We rejected the application, *firstly*, because the petitioner had not complied with this Court's rule of practice to file beforehand a written memo. of the grounds of cross-appeal before the case came on for hearing; *secondly*, because the objection, when taken, was not filed on the regulated stamp; and, *lastly*, because these defendants had already preferred a regular appeal against the Lower Court's finding, and had made no objection therein to the Principal Sudder Ameen's decision on this ground.

We considered it unfair to the other side to allow an irregularly-taken cross-appeal to be heard at the eleventh hour, when the plaintiff would be taken altogether by surprise, and be unable to meet the objection, an objection, moreover, which does not appear to have been in any way pressed in the Lower Court.

The hearing of the cross-appeal of the defendants Nos. 2 and 3 was, at the request of their pleader, postponed till the case had been heard on the plaintiff's regular appeal, these defendants considering that they should be able to uphold the Principal Sudder Ameen's judgment as it stood, and not wishing for a remand (which would be the effect of their gaining their cross-appeal) unless they failed in the first instance.

We proceed, therefore, to consider the appeal of the plaintiff, and the questions raised by it are these :—

(1.) What did the plaintiff's lien consist of? Did it extend over the two mouzahs of Dheera Dowra and Sura Nowabad only, or over the whole 26 ?

(2.) If the 26 mouzahs were pledged, can the plaintiff, who seeks to follow the property pledged, and which has been purchased by third parties, sue, on the allegation that only two mouzahs were bound, and bring only the purchasers of these two mouzahs into Court, and not only the representatives of the remaining pledged mouzahs who may have as amongst themselves rights of contribution? And—

(3.) Has not the plaintiff, by purchasing herself three of the pledged mouzahs at a price more than sufficient to extinguish Hubeeboollah's debt, placed herself in a position to repay herself? And, if she has allowed such funds to go out of her hands, can she now follow other portions of the property covered by the mortgage, which have passed for value to third parties?

In support of the first position, the appellant contends that the word "*Oghaira*" used in the bond is vague and general, and cannot be meant to include any mouzahs not distinctly specified by name, and that of the 24 mouzahs thus said to be included no less than 19 had been sold to other persons at the date of the bond, and that, therefore, the obligor could not have intended to hypothecate them. We have read the plaintiff's bond, and think that there can be no reasonable doubt as to its meaning. After reciting that certain sums were due, partly on the theekadaree of certain mouzahs (naming them) and partly on other accounts, it goes on to say that the obligor binds for the repayment of these sums on a certain specified date, "mouzahs Dheera Dowra, Sura Nowabad, and the rest, which appertain to the theekadaree of the above-named theekadar," *i.e.*, the plaintiff. Nothing can be clearer than that the mouzahs pledged were those which had been in the plaintiff's possession as theekadar, admittedly 26 mouzahs, including those the plaintiff now wishes to sell.

With regard to appellant's objection that 19 of these mouzahs had been already disposed of at the time the bond was executed, we observe that there is no proof of the fact, the deeds of sale being neither produced nor proved. Nor has any one of the alleged purchasers been brought into Court, whilst the grave improbability that the plaintiff would be content with two mouzahs, the yearly rental of which was not, as appears from the record, more than Rupees 451, as security for a debt of Rupees 13,000 remains in full force. But, however this may be, and whether or no the plaintiff had reason to believe that only those two mouzahs were pledged to him, we have no doubt that the words of the bond bound the whole 26; and on this issue, therefore, we agree with the Principal Sudder Ameen.

On the *second* issue, it is contended by the purchasers (respondents) that the plaintiff was bound to join the representatives of all the 26 mouzahs pledged to him as co-defendants in his suit for recovery, and that, by his not doing so, he has destroyed any equities they might have had amongst themselves for contribution, supposing that the amount of the plaintiff's claim had been realized from one or more of them only.

On this, we observe in the first place that the plaintiff did endeavor to bring the present owners of the remaining mouzahs into Court, but the Principal Sudder Ameen refused his application, on the ground that, at that stage of the case, it would have been difficult to apportion the respective liabilities of each.

But we do not understand what legal obligation the plaintiff was under to bring in all these parties. This was not a regular suit for foreclosure, in which all incumbrancers ought to be made parties; but, even if it had been, the only result of not making them parties would be that the decree for foreclosure would not bind them (*vide* Story's

Equity Pleadings 177). Moreover, the plaintiff's bond gave him a separate lien on each and all of the 26 mouzahs charged with the debt. He might undoubtedly have made the representatives of all defendants, and have recovered his dues by the sale of all, one after the other, unless his debt had been sooner extinguished, but at the same time the terms of the bond left him free to elect which of the mouzahs he thought most likely to satisfy his claim, and all further question would be between the purchasers and their vendor Hubeeboollah, against whom, supposing them to have bought without notice, they would have a remedy for selling what was not in his power.

The *third* issue depends on a question of fact, of which there is no evidence to be found on this record. If the plaintiff bought the three mouzahs and retained their price, his original debt would have been extinguished, but this is not the defendant's allegation. They wish to show that the mere fact of the plaintiff's having bought three of the mouzahs pledged to him has broken up his lien on the others, and has changed the mortgage into a simple unsecured debt.

In support of the first contention, we have been referred to the case of Monshee Kally Pershad, plaintiff, appellant, *versus* Lalla Behary Lal and others, defendants, IV. Weekly Reporter 67. But we see no analogy between the two cases. In the case quoted, a creditor obtained a money-decree and acquiesced in an order made by the Court that out of four villages, the property of his judgment-debtor, the two last should only be sold if the price of the two first fell short of the amount of his decree. The two first villages did sell for more than enough to satisfy the decree, but the creditor applied part only of the money to clear that account, placing another part to the credit of some old debts due to him by the judgment-debtor. Under these circumstances, the Court held that, under the arrangement made by the judgment-creditor, the latter had no right to have the last two villages sold in satisfaction of what remained of his debt.

In the present case, there was nothing to prevent the plaintiff from purchasing any of the mouzahs pledged to him, and he bought them at the risk of lessening his own security. Whether in his new position as mortgagor of the three mouzahs in which he has purchased the equity of redemption, he is liable for contribution to the holders of the two mouzahs he is now proceeding against is another question, but we know of no law which prevents a transaction of this nature between a mortgagor and a mortgagee. If any injury is done, it is to the latter, inasmuch as so much of his lien is extinguished.

We think, therefore, that the plaintiff was entitled to a decree against Hubeeboollah, and to recover his money by the sale of the two mouzahs Dheera Dowra and Sura Nowabad, always supposing that the bond on which the plaintiff sued was a *bond-fide* document.

And this brings us to the cross-appeal of defendants Nos. 2 and 3.

On turning to their written statement, we find a most distinct allegation that the plaintiff's deed was collusive; that no money passed between the parties, and that the plaintiff's father-in-law, one Shaik Bheekun, had got up the whole case to defraud innocent third parties of their right.

The Principal Sudder Ameen appears to have been satisfied with Hubeeboollah's admission of the genuineness of the bond, and to have taken no notice whatever of the defendant's allegation of fraud, why we do not know, for the *bona fides* of this document was a condition precedent to plaintiff's recovery of his money by the sale of mouzahs admittedly in the hands of others, and for which value had been paid without notice. We must, therefore, remand the case for a finding on this point. The defendants will, of course, have to support the onus of proving fraud. If they do so, the plaintiff's case must be dismissed except with regard to Hubeeboollah personally, who admitted the claim, and has not appealed.

If the defendants fail to establish the *mala fides* of the plaintiff's bond, the latter will be entitled to a decree for recovery of his money by the sale of the two mouzahs mentioned in his petition of plaint.

Costs will follow the result as between the plaintiff and the appealing defendants.

The 26th August 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Ejectment—Clause 5, Section 23, Act X. of 1859—Onus.

Case No. 759 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 25th January 1867, reversing a decision passed by the Deputy Collector of that District, dated the 14th April 1866.

Asgur (one of the Defendants), *Appellant,*

versus

Goluck Chunder Chowdhry (Plaintiff) and others (Defendants), *Respondents.*

Baboo Greesh Chunder Ghose for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

In a suit under Clause 5, Section 23, Act X. of 1859, the question of illegal ejectment is the only question for adjudication. The *onus* in such a case is upon the plaintiff.

Mitter, J.—We think that this case must be remanded to the Lower Appellate Court. The relinquishment pleaded by the special appellant might not be binding against the plaintiff, but the latter is still bound to show that he was illegally ejected by the special appellant, and that he has sued within one year from that date. The suit is brought under Clause 5, Section 23, Act X. of 1859, and the question of illegal ejectment is the only question for adjudication. The onus is clearly upon the plaintiff to substantiate his allegations The case is, accordingly, sent back for trial with reference to the above remarks.

The 26th August 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Pre-emption—Ante-dated deed—Onus—Limitation—Clause 1, Section 1, Act XIV. of 1859.

Case No. 747 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 31st January 1867, reversing a decision passed by the Moonsiff of that District, dated the 15th May 1866.

Kumur Ali and others (some of the Defendants), *Appellants,*

versus

Azmut Ali and others (Plaintiffs), and others (Defendants), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellants.

Baboo Greesh Chunder Ghose for Respondents.

In a suit by *A* to enforce a right of pre-emption in which the purchase by *B* was admitted, but it was alleged that *B's* deed of purchase had been ante-dated, the *onus* lay on *A* to prove that *B's* deed had been ante-dated; and on the failure of *A* to substantiate that fact and to prove that *B* had taken possession within one year previous to institution of the suit, *A* was held barred by Clause 1, Section 1, Act XIV. of 1859.

Mitter, J.—The judgment of the Lower Appellate Court in this case is extremely unsatisfactory. The plaintiffs, now special respondents, before us, brought this action to enforce their right of pre emption under the Mahomedan Law. They did not deny, however, that a sale had been actually made in favor of the special appellant, nor were they in a position to make any such assertion, as the right of pre-emption claimed by them entirely rested upon the fact of a sale having been made in favour of the special appellant. The Lower Appellate Court has gone on to find that the defendant, special appellant, had failed to prove his purchase or that he had obtained possession of the property in suit. We are clearly of opinion that this finding is contrary to the allegations of both the parties to the suit. The possession of the special appellant was never denied in the Court of first instance, though an attempt was made in the plaint to state

the deed of sale relied upon by the defendant had been ante-dated. We think that, under the circumstances of the case, it was incumbent upon the respondent to prove that the deed of sale had been ante-dated, and that the special appellant had taken possession within one year prior to the institution of the suit. The deed purports to have been executed in 1216, and the present suit was brought 11 years afterwards in 1227 Mughee. The respondents have given no evidence to prove their allegations regarding the deed of sale being an ante-dated document. On the other hand, it appears from the judgment of the first Court that their own evidence went to prove that the purchase relied upon by the special appellant had been made some five or seven years ago. Upon this state of facts, their suit is clearly barred by Clause 1, Section 1, Act XIV. of 1859. This appeal is, accordingly, decreed with costs.

The 26th August 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Decree for arrears of rent and sale under Section 105, Act X., 1859—Intermediate sale in execution of a Civil Court's decree.

Case No. 736 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 10th January 1867, affirming a decision passed by the Moonsiff of Howlah, dated the 28th March 1866.

Musst. Sufuroonissa (one of the Defendants), *Appellant,*

versus

Saree Dhoopee (Plaintiff) and others (Defendants), *Respondents.*

Baboo Nubo Kishen Mookerjee for Appellant.

No one for Respondents.

A zemindar, who has obtained a decree against a registered tenant for arrears of rent, is fully justified in proceeding to sale under Section 105 of Act X., 1859, notwithstanding the tenure was purchased subsequently to the date of the above decree, at a sale in execution of a decree of the Civil Court.

Mitter, J.—We think that the judgment of the Lower Appellate Court should be reversed with costs. The plaintiff, who is now special respondent before us, instituted this suit for confirmation of his right as the purchaser of a ryotee tenure at a sale in execution of decree, and also for the reversal of a sale held under Section 105 of Act X. of 1859, at the instance of the zemindar, defendant, who has appealed specially to this Court. We do not think that the Lower Appellate Court has come to a correct conclusion regarding the real character of the sale held at the instance of the special appellant. The facts found by the Lower Appellate Court do not legally justify any conclusion of fraud against the special appellant. It is not denied that the arrears of rent sued for by him were really due to him. It is also admitted that the person sued was the registered tenant whose name appeared on the books of special appellant's serishtah, and it is further admitted that the decree for arrears of rent was obtained prior to the date of the plaintiff's purchase at a sale in execution of a decree passed by the Civil Court. Under such circumstances, the mere fact that the Lower Appellate Court has used the vague and indefinite expressions of fraud and collusion cannot prevent us from interfering with his judgment on that point. The special appellant was fully justified in proceeding in the manner he has done, and, in the absence of any legal proof of fraud on his part, the respondent has no right to question the legality of those proceedings. The respondent could have saved the tenure by depositing the arrears due to the special appellant, and it makes no difference that those arrears were due for a period prior to the date of his purchase. As the tenure has not been saved from sale owing to the negligence of the respondent, we decree this appeal, and dismiss his suit with all costs in this Court as well as in the Courts below.

The 27th August 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Separate collections and management—Severance of tenancy without actual division.

Case No. 845 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 30th December 1866, affirming a decision passed by the Moonsiff of that District, dated the 10th February 1866.

Musst. Mohroo Kooeree (Plaintiff), *Appellant,*

versus

Musst. Gunsoo Kooeree and others (Defendants), *Respondents.*

Baboo Nil Madhub Sein for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondents.

Where it is found that the collections and management were separate, it is clear that the joint-tenancy has been severed, though not immediately followed by actual division of the subject-matter.

Kemp, J.—THE only point taken in special appeal is, that the plaintiff's case ought not to have been dismissed until the defendants prove a complete and formal partition, and that a separate enjoyment of the collection is not sufficient.

The learned Judges who remanded this suit intimated an opinion that separate collection and management may constitute a separation of estate without a partition by metes and bounds, and this view has been taken by the Privy Council in a very late decision. (*See* Weekly Reporter, Vol. VIII., Privy Council Rulings, p. 1.)

The Lower Court has found as a fact that the collections and management were separate; in short, that ownership was exercised over the property in certain defined shares. It is, therefore, clear that the joint tenancy was severed, though not immediately followed by a *de-facto* actual division of the subject-matter.

This being the case, the defendants' contention that the property is divided, and not joint, is correct, and the special appeal must be dismissed with costs and interest.

The 27th August 1867.

Present:

The Hon'ble W. S. Seton-Karr and Dwarkanath Mitter, *Judges.*

Suit on ground of forcible dispossession—Permissive possession by tenant—Notice to quit.

Case No. 397 of 1867.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 11th December 1866, affirming a decision passed by the Moonsiff of Shahazadpore, dated the 29th August 1865.

Mr. C. J. Phillips (one of the Defendants), *Appellant,*

versus

Nund Coomar Banerjee (Plaintiff), *Respondent.*

Baboo Issur Chunder Chuckerbutty for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

A suit to recover possession of land on the ground of *forcible* dispossession, in which it was pleaded by defendant and found as a fact that the defendant's holding was of a *permissive* character, should be dismissed at once, the defendant's possession not being a wrongful one of the kind alleged by plaintiff. The right mode of action in such a case would have been for plaintiff to serve the defendant with notice to quit the land, and thereby put an end to the permission relied upon by him.

Mitter, J.—THIS was a suit instituted by the plaintiff, now special respondent, before us, to recover possession of certain lands appertaining to his zemindary, on the allegation that he had been forcibly dispossessed of the same by the defendant, special appellant, on the 25th Assin 1271. The special appellant denied the act of wrongful dispossession, and pleaded that he had acquired a right of occupancy in the land in suit under Section 6, Act X. of 1859.

The Lower Appellate Court has found it as a fact that the allegation made by the special respondent regarding forcible dispossession is false, but at the same time it has given him a decree upon the ground that the special appellant has failed to establish his plea of occupancy. With reference to the nature of the possession held by the special appellant,

the Lower Appellate Court has come to the conclusion that it was of a "permissive character," and could not, therefore, be held as the basis of a right of occupancy.

We are not sure that we exactly understand the reasoning of the Lower Appellate Court, but we think that we can take it for granted that the possession of the special appellant did not originate in fraud or violence, but that it was derived from the permission of the special respondent, who has received rent from the special appellant and his predecessor. Nor do we wish to enter into the question as to whether the special appellant has acquired any right of occupancy in the land upon the facts found by the Court below. But we are clearly of opinion that, looking merely to the fact of the special respondent's failure to prove the cause of action upon which he came into Court, and connecting it with the character of the possession held by the special appellant, the present suit, as brought by the special respondent, ought to have been dismissed.

Every plaintiff is bound to prove the cause of action upon which his suit is based. We do not think that the special respondent has fulfilled this obligation in any manner. We do not attach any importance to the particular date of dispossession alleged by the plaintiff, but we are clearly of opinion that he was bound to show that the possession of the special appellant was a wrongful one. It has been found, on the other hand, that this possession was of a permissive character. Under such circumstances, the special respondent's mode of action should have been to serve the special appellant with a notice to quit the land, and thereby put an end to the permission relied upon by the latter. The special appellant was sued as a mere wrong-doer, but the facts above referred to are sufficient to constitute a complete defence to such an action. We think it would be contrary to sound principles of law and justice to give a decree to the special respondent in an action framed like the present. Suppose that the special appellant had pleaded nothing more than the bare fact that he was in possession with the permission of the special respondent, and was not, therefore, guilty of the charge of wrongful dispossession brought against him by the latter; this reply would have been quite sufficient to procure a dismissal of the suit if its truth were established by evidence; and, if forcible dispossession were not proved, why then should the special appellant be deprived of his right to a favorable verdict, merely on the ground that he has taken a further plea which he has failed to substantiate?

The cases cited from Weekly Reporter, Volume VII., page 395, and Weekly Reporter, Volume V., page 228, do not appear to us to be in point, though the facts of the first case are somewhat similar. The objection does not appear to have been specifically taken in the last-mentioned case; but, though it was taken in the first, it was overruled upon the ground that the issues laid down in the Court below, and accepted by the defendant, had virtually altered the character of the suit, as it was originally instituted by the plaintiff. In the case before us, the very first issue laid down by the Court of first instance clearly and distinctly referred to the fact of dispossession alleged by the special respondent. For the reasons above set forth, we decree this appeal with costs. The plaintiff's suit is dismissed with all costs.

The 27th August 1867.

Present:

The Hon'ble W. S. Seton-Karr and Dwarkanath Mitter, *Judges.*

Jurisdiction—Suit for immoveable property on ground of dispossession—Title—Adverse and prior possession—Limitation—Section 15, Act XIV. of 1859—Sections 318 and 319 of the Code of Criminal Procedure.

Case No. 766 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Rajshahye, dated the 16th January 1867, reversing a decision passed by the Moonsiff of that District, dated the 16th June 1866.

Khajah Enaetoollah Chowdhry (one of the Defendants), *Appellant,*

versus

Kishen Soondur Surma and others (Plaintiffs), *Respondents.*

Baboo Kishen Dyal Roy and *Hem Chunder Banerjee* for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

The Civil Courts are competent (Section 15, Act XIV. of 1859, notwithstanding) to give a decree for immoveable property on the bare ground of illegal dispossession in a suit brought after six months from the date of such dispossession, in which suit the defendant has failed to prove his own title to the land.

In considering the point *irrespective* of Section 15, Act XIV. of 1859—HELD that possession for a period of 60 years and upwards is sufficient to create a title, in the possessor which no one in the world can question or repudiate; that adverse possession for any period sufficient under the Limitation Act is itself a title even against the rightful owner himself; that prior possession, however short, is itself a title against a mere wrong-doer.

In deciding the question *with special reference* to Section 15, Act XIV. of 1859, the object and effect of that Section considered, and the bearing of Sections 318 and 319 of the Code of Criminal Procedure with regard to cases of dispossession and the jurisdiction of the Civil Courts illustrated.

Miller, J.—THE special appellant in this case contends that the Lower Appellate Court has committed an error in law in decreeing the julkur in dispute to the special respondent solely on the ground of prior possession and illegal dispossession without any proof of title. The special appellant, however, does not contend that the Lower Appellate Court has committed an error in law in rejecting the evidence produced by him to prove his own title and possession; so that the question, as it really stands before us for adjudication, amounts to this: Can the Civil Courts give a decree for immoveable property on the bare ground of illegal dispossession in a suit brought after six months from the date of such dispossession, it being borne in mind, however, that the defendant has failed to prove his own title to the same? We have given this question our most careful consideration, and have at length come to the conclusion that it must be answered in the affirmative, Section 15, Act XIV. of 1859, notwithstanding.

In the first place, let us consider the question as if Section 15, Act XIV. of 1859, had not been in existence. We cannot adopt the argument that has been pressed upon us by the pleader for the special appellant, that no length of possession is sufficient to create a title to land. That an absolute and indefeasible title binding against the whole world can be acquired by prescription, is a doctrine by no means unknown to the law as it is administered in this country. It is quite true that there is no express legislation on the subject, but our Courts, being bound to administer the principles of equity and good conscience in the absence of such legislation, have always recognized the principle in some shape or other. Prescriptive rights to the use of land are daily sanctioned by our Courts, and there seems to be no reason why such rights should be ignored in the case of the land itself. What difference does it make that the interest claimed in the one case is a right of way, and in the other a right to enjoy the rents and profits? But the question, we believe, has been set at rest by the Privy Council, in their judgment reported in page 39, Moore's Indian Appeals, Volume VIII.: "Assuming, however," their Lordships have observed, "that they all began in wrong "and violence, still that which had a vicious "origin may in course of time have been "legalized; since long enjoyment is itself a "title, as well in favor of the recipient of an "annual payment out of land as of the pos-"session of the land itself." Whether the period of possession found in this case by the Lower Appellate Court is sufficient to create an *absolute* title by prescription, we do not undertake to decide, though we have no hesitation in declaring that possession, for a period of sixty years and upwards, is sufficient to create a title in the possessor which no one in the world can question or repudiate. We do not think that the respondent is bound to go to this length for the purpose of recovering the property in dispute from the hands of the special appellant who has been found in the Court below to be a mere wrong-doer. Nor is he bound to prove a length of possession which would have entitled him to recover if the special appellant had established his own title. Adverse possession for any period sufficient under the Limitation Act is itself a title, even against the rightful owner himself. The question has been discussed at great length with special reference to landed property in the mofussil, by Sir L. Peel in his judgment reported in page 70, Boulnois' Reports. The same rule is also laid down in a judgment of this Court reported in page 261, Volume V., Weekly Reporter, and it appears to have been directly sanctioned by the Privy Council in their decision reported in page 69, Weekly Reporter, Vol. V., Privy Council Rulings. In speaking of the rights of a party in possession, but without a title, their Lordships remarked: "The appellant has a right to remain in possession subject to be dispossessed by any one showing a title *not barred by lapse of time.*" The necessary consequence of this proposition would be that, when the rightful owner has allowed his title to be barred by limitation, the party in possession would be competent to recover the land if he has been illegally deprived of it by the former. There seems to be no reason in justice or equity why any one, even though he is the rightful owner himself, should be permitted to accomplish that

by illegal means what he could not have done by legal ones. That the doctrine of remitter would not hold good, in the case of a person who has allowed his cause of action to be lost by efflux of time, has been clearly shown by Sir Lawrence Peel in his judgment already referred to; and we might, therefore, take it to be a settled proposition of law that adverse possession for a period prescribed by the Limitation Act is itself a title which the rightful owner himself cannot interfere with. This period, however, may vary according to the circumstances of each case. It may be a year or any number of years short of sixty years, after which period, however, no cause of action can be revived. But we do not see any reason why a mere wrongful dispossessor should require proof from his adversary of anything beyond the illegal dispossession complained of. He himself has not got and never had any title to the land. The act of dispossession committed by him has been entirely without any sanction from law. Justice and equity require that he should be compelled to restore the party wronged by him to the same position which the latter enjoyed before the date of the illegal ejectment. To adopt the contrary view appears to us to be tantamount to holding out a premium in favor of wrong and violence. That possession is *primâ-facie* evidence of title is an undisputed proposition of law. Mr. Best in his Treatise on Evidence, page 475, says that "the pre-"sumption of right in a party who has "possession is highly favored by every sys-"tem of jurisprudence, and seems to rest "partly on principles of natural justice, and "partly on public policy." This presumption might be weaker or stronger according to the length of time over which the possession has continued; but as observed by Mr. Taylor, Volume I., page 136: "In actions of ejectment, though it is an inflexible rule that the plaintiff must recover by the strength of his own title, yet proof of prior possession, *however short*, will be *primâ-facie* evidence of title." We do not think, however, that we are bound to apply this doctrine of presumption as against a mere wrong-doer. Prior possession, however short, is itself a title against such a person. In actions of trespass, says Mr. Taylor in page 135, Volume I., possession is *conclusive* evidence of title against a mere wrong-doer. It is immaterial whether the party in possession has lost it or not, provided the defendant has failed to prove his own title, and thereby to justify his illegal act of dispossession or trespass as the case might be The utmost that can be contended for is that the rightful owner at least should not be driven to the necessity of undergoing the trouble and expense of a law-suit, if he can otherwise manage to recover his own property. We have already seen that, even in his case, the law has laid down certain restrictions which he cannot violate with impunity. Why then should a mere wrong-doer be permitted to take any advantage of his position as a defendant in the cause, when that position has been acquired by illegal means? Suppose a number of evil-disposed men were to form themselves into an association for turning out every body whom they can find to be in possession of land without title. Why should the Civil Courts refuse to restore the parties dispossessed to their original status? And what would be the consequences to society if this lawless association were to be permitted to enjoy the fruits of their own wrongful acts? The Civil Courts have to determine the particular cause of action that has arisen between the parties to the suit; and it is with reference to that cause of action only that their determination would be final and conclusive as provided for by Section 2, Act VIII. of 1859. They cannot look beyond the parties to the suit, and proceed to find out who is the rightful owner if the plaintiff and defendant are not. Such an enquiry would be not only useless in its practical result, but illegal, as declared by the Privy Council in the case reported in page 69. Volume V., Weekly Reporter, already referred to.

The plaintiff has failed to show that he is the rightful owner, but nevertheless he has succeeded in proving that he was in possession. The defendant had no right to disturb this possession. As between the two, the plaintiff is the only person who ought to be maintained in possession. The rightful owner might afterwards bring an action against him if his cause of action has not been barred by lapse of time; but, until that is done, he has a clear right to remain in possession as against every one else in the community. In a suit between *A* and *B*, the Civil Courts might to-day declare that the title of *A* is a perfectly good and valid one, but to-morrow it might be found to be otherwise in a suit between *C* and *A*. Why then should anybody be required to prove an *absolute* title in a litigation between himself and another *person* when a relative

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title is all that the Civil Courts can undertake to deal with?

The following proposition laid down by Domat in his work on the Civil Law, Volume 1, page 889, directly supports our view: "Force does not interrupt possession. He, whose possession has been interrupted by an act of violence without any form of law or justice, is nevertheless considered as a possessor, because he has the *right* to enter into possession again." Nor do we think that this proposition is wholly unsupported by precedents. The procedure laid down in page 174, Weekly Reporter, Volume VII., is but a necessary consequence flowing from it. It was held in that case that, the illegal dispossession being established, the defendant should be called upon to prove his own title. If he fails to do it, the plaintiff is entitled to a decree; if, on the other hand, he succeeds, the plaintiff should then, and *not till then*, be called upon to prove a better title.

The ruling of the Privy Council reported in page 47, Volume X., Moore's Indian Appeals, also supports our view. In that case the plaintiff and the defendant had both failed to prove their title to the land in dispute; but the former had succeeded in showing that he was in possession at and prior to the time of attachment. Their Lordships held that he had the better title of the two. It is true that the plaintiff's possession had been found to have continued at least for a period of 18 years, but this finding had been arrived at upon an issue as to which party was in possession *immediately prior* to the date of attachment. Nor does it make any difference that the defendant was not in possession at the time of suit, the property being held under attachment by the Collector of the district. It is immaterial whether the defendant had succeeded in taking wrongful possession, or that the public authorities had attached the property in consequence of an unjust quarrel raised by him with the plaintiff in the cause.

The case, in page 69, Volume V., Weekly Reporter, Privy Council Rulings, is no real exception. The defendant was in possession under a settlement obtained from Government, and their Lordships remarked at the very outset of their judgment that the plaintiff had failed to prove, as alleged by him in his plaint, that the settlement and the possession under it had been acquired by fraud. Plaintiff's prior possession went for nothing in consequence of his failure to prove his title by adoption. In other words, the case was not one of wrongful dispossession at all.

In another case, however, the Privy Council appear to have directly sanctioned the principle we have been trying to lay down. It is reported in page 12, Volume 6, Weekly Reporter, Privy Council Rulings. There was long possession proved by the plaintiff it is true, but the duration of the possession appears to have been specially adverted to, because of the fact that the plaintiffs were the servants of the defendant, and as such their possession was of a very doubtful character. The concluding words of the judgment are directly in support of our view. "The *title* by possession must prevail until a good one is shown to the contrary." The case itself was one founded upon a charge of illegal dispossession.

Now, as to the provisions of Section 15, Act XIV. of 1859, which is set out in the margin. What is there in that Section to bar the claim of the special respondent? It merely says that a person, who has been dispossessed otherwise than by due course of law, shall be entitled to recover, *notwithstanding any other title* that may be set up, provided the suit is brought within six months from the date of dispossession. But it does not say that a person illegally dispossessed shall not be entitled to recover, notwithstanding that the defendant has failed to prove any other title if the suit has not been brought within six months from the date of dispossession. The object of this Section appears to have been to give a special remedy to the party illegally dispossessed by depriving the dispossessor of the privilege of proving a better title to the land in dispute. Section 15 is to be read as a part of the Limitation Act, and its object is to put an additional restraint upon illegal dispossession, with a view to prevent the author of that dispossession from getting rid of the operation of that Act, by his own unlawful conduct. If the suit is brought within the period prescribed by that Section, even the rightful owner of the land is precluded from showing his title.

"If any person shall, without his consent, have been dispossessed of any immoveable property otherwise than by due course of law, such person or any person claiming through him shall, in a suit brought to recover possession of such property, be entitled to recover possession thereof, *notwithstanding any other title that may be set up in such suit*, provided that the suit is brought within six months from the date of such dispossession."

But what right has a mere wrong-doer to complain that the party wronged by him has not availed himself of the summary remedy laid down in Section 15? The suit being brought after six months from the date of dispossession, is a matter of no consequence if 12 years have not passed away from that date. It would fall within the express wording of Clause 12, Section 1, Act XIV. of 1859, it being a suit for the recovery of immoveable property, and instituted within 12 years from the admitted date of the cause of action.

It has been said that the policy of the Legislature in enacting Section 15 has been to prohibit all suits brought after six months in which the plaintiff is unable to prove anything higher than the mere fact of illegal dispossession, whether the defendant has succeeded or not in proving his own title. But we are clearly of opinion that this policy, as far as we can gather it from the laws and regulations in force, is just in the contrary direction. Throughout the whole system of our laws, we find a constant solicitude to widen the distinction between legal and illegal dispossession, and to discourage the latter as much as possible. The Criminal Courts cannot any longer restore a party to possession who has once lost it; but, in every case in which a dispute regarding the possession of land is likely to lead to a breach of the peace, the Magistrate is called upon to interfere and to take the necessary steps to maintain the party in possession in the enjoyment of that possession, until he is ousted "by due course of law." It is only when neither party has succeeded in proving his possession, or when the case is one of doubtful possession, that the Magistrate is authorized to attach the property as provided for in Section 319 of the Criminal Procedure Code. It must not be supposed, however, that the prevention of a breach of the peace is the only object to be kept in view, although it is the paramount object. If that were so, the Magistrate is vested with plenary powers to accomplish that object without wasting the public time in enquiring under Section 318 as to which of the disputants is in actual possession. The inference we draw from these provisions is that the existing status of the parties should be respected as much as possible, even though the ultimate object is the preservation of the public peace. Then, again, the words "claims of any party to *a right of possession*" used in Section 318, and who *ought* to be maintained in possession in Section 319, clearly indicate that the question reserved for the Civil Courts is not one of absolute but of relative title to the possession of the land, which, as between the parties to the suit, the Civil Courts might determine in any manner which justice and equity may require. In Act X. of 1859, a wide distinction is made between legal and illegal dispossession. A tenant, without any title to retain possession, is allowed to recover it, if he has been deprived of it in any manner contrary to law.

Then again, when the Civil Courts have to sell land in execution of their own decrees, or to put a decree-holder in possession, the utmost care is taken to prevent any wanton interference with the possession of a third party, as might be seen from the provisions of Sections 246 and 230, which require that such parties should be treated as defendants, and not as plaintiffs. But Section 15, Act XIV. of 1859, which has been so much and so often pressed upon us by the special appellant, appears to justify an inference the very opposite of that we have been called upon to draw from it. If our construction of that Section is right, it seems to be an additional restraint upon illegal dispossession by putting the rightful owner in the same predicament as a mere wrong-doer when the act of illegal dispossession has emanated from him. Then, again, the words "*any other title*" used in Section 15 rather go to indicate that possession itself is a title in the eye of the law which requires to be superseded by a better one. The special respondent might have obtained a summary remedy against the special appellant, if he had liked to do so by proceeding under Section 15; but there is nothing in that Section to prevent the institution of a regular suit like the present, provided the special appellant is allowed to prove a higher title than the title by possession established on behalf of the plaintiff. We do not see any reason why the suit is to be dismissed, when the defendant has failed to prove what he was bound to prove in justice and equity, as shown in the first part of our judgment. The very first Section of the Civil Procedure Code makes it obligatory upon the Civil Courts to take cognizance of all suits, not barred by any direct Legislative provision. Such extensive powers were never before possessed by the Courts in this country, as might be seen on a comparison of Section 1, Act VIII. of 1859, with Section 8

Regulation III. of 1793. If there is no bar in Section 15, Act XIV. of 1859, but, on the other hand, the case is expressly covered by the provision of Clause 12, Section 1, what ground is there for contending that the policy of the Legislature is otherwise than we have described it to be? It is also to be borne in mind that illegal dispossession is itself a good cause of action, such as our Civil Courts are bound to recognize; for, if it were not so, we fail to perceive how suits, such as those contemplated by Section 15, can be at all permitted to be instituted in the Civil Courts when the Section itself is silent as to the tribunal by which those suits are to be entertained.

Holding that the objection of the special appellant is erroneous in law, we do not think it necessary to decide whether the Lower Appellate Court has acted rightly in receiving a certain Nazir's report as evidence in the cause, for this plea does not affect the finding on the question of illegal dispossession upon which our judgment is exclusively based. We reject the appeal with costs.

Seton-Karr, J.—I concur in dismissing this special appeal, as I hold that the decision of the Principal Sudder Ameen in the plaintiff's favor has not been shown to be erroneous in law.

The 28th August 1867.

Present.

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Abadkaree Talookdaree—Effect of Government Settlement or of acceptance of farming leases on talookdaree rights.

Case No. 881 of 1867.

Special Appeal from a decision passed by Mr. C. E. Lance, Judge of Backergunge, dated the 6th February 1867, reversing a decision passed by Mr. F. A. Donough, Deputy Collector of that District, dated the 22nd August 1866.

Huro Pershad Bhuttacharjee (Plaintiff), *Appellant,*

versus

Bhyrub Chunder Mojoomdar and others (Defendants), *Respondents.*

Baboo Kalee Mohun Doss for Appellant,

Mr. J. S. Rochfort and *Baboo Shushee Bhoosun Bose* for Respondents.

Explains construction of the term "abadkaree talookdaree" in a lease.

A Government settlement, whether permanent or farming, so far from destroying the rights of a talookdar, always preserves them, if there be really a dependent tenure.

Neither the acceptance of farming leases by the widow *qua farmer*, subject to the Government proprietary right, nor the sale of that Government right, in any way *ipso facto* extinguishes any talookdaree right existing in the abadkaree talookdar in that capacity, if otherwise valid.

Bayley, J.—The decision in special appeal turns on the construction of the terms "*abadkaree talookdaree*" admitted to be those of the lease.

The plaintiff contends, and the Lower Appellate Court holds, that the terms do *not* convey *any talookdaree* rights, but merely those of an *abadkar*. The defendant contends, and the first Court held, that the defendant's tenure was one with *talookdaree* rights, and not one of an *abadkar* only, and that no intermediate settlement of Government affected the talookdaree right.

We concur with the first Court, and think that the Lower Appellate Court is wrong.

First as to the admitted terms of the lease. The words are admitted to be "*abadkaree talookdaree.*" An abadkar, with only abadkaree rights, can be easily defined by the word abadkar; but an abadkar, who has talookdaree rights, is specially denoted by those very terms which occur here. It is also clearly shown that this tenure has been termed always talook in the sense that havala and other dependent talooks are defined in the district (Backergunge).

In the *next* place, a Government settlement, whether permanent or farming, so far from destroying the rights of a talookdar, always preserves them, if there be really a dependent tenure. The most distinct and clear instructions are given on this point in all the Circular Orders of the Revenue authorities in their rules for the conduct of revenue-settlements.

Neither the acceptance of farming leases by the widow *qua farmer*, subject to the Government proprietary right, nor the sale of that Government right, in any way *ipso facto* extinguishes (as the Lower Appellate Court seems to think) any talookdaree right existing in the abadkaree talookdar in that capacity, if otherwise valid.

The same rule, in fact, exists for the preservation of intermediate rights down to

khoodkhast ryots. The widow may have asked for nothing but the temporary settlement; but that she asked for as any stranger might ask it, and the acceptance of her petition would not prevent her still holding her distinct and separate talookdaree right within the temporarily-settled mehal.

On the whole, I think that the Lower Appellate Court is wrong in saying that in this case there are no talookdaree rights; but what their validity or extent may be is another matter not now before us. I therefore think it would be right to reverse the decision of the Lower Appellate Court, affirming that of the first Court, and decreeing this appeal. No costs in this Court.

Phear, J.—I entertain doubts as to the true construction of the lease, but they are not strong enough to lead me to differ from Mr. Justice Bayley. However, I think there ought to be no costs in this Court.

The 29th August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Application to stay execution—Court's competency under Section 209, Code of Civil Procedure—Proof of complaints alleged.

Case No. 370 of 1867.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Cuttack, dated the 2nd July 1867.

Mittun Bibee, *Appellant,*

versus

Buzloor Khan and others, *Respondents.*

Baboos Onookool Chunder Mookerjee and *Mohendro Lall Shome* for Appellant.

Mr. R. T. Allan and *Baboo Obhoy Churn Bose* for Respondents.

When an application to stay execution of a decree is made to a Court in which a suit is pending against the decree-holder, the Court's competency, under Section 209, Act VIII., 1859, to grant the application, depends on the decree being its own decree.

An application of this nature ought not to be entertained without an affidavit or satisfactory proof of the complaints alleged in it, without the Court calling for such proof.

Jackson, J.—The petitioner before us was appellant to England in the suit of Buzloor Khan and others, in which final judgment was delivered by the Judicial Committee of the Privy Council on the 8th March last. Their Lordships' judgment was given in these words. After adding that, in their own opinion, the judgment of the High Court varying the decree of the Principal Sudder Ameen was right, they stated: "But first they humbly recommend Her Majesty to dismiss this appeal "with costs. They will add a recommendation that the order be without prejudice "to any proceeding on the part of the "appellant to establish any debt other than "her claim for *dain-mohur* against her husband's estate or any lien in respect of such "debt upon that estate." By the decree of the High Court which was then affirmed, the plaintiffs, respondents to England, were declared to be entitled to 12 annas of the estate of the deceased husband of Mittun Bibee. These parties are now seeking to execute that decree. Mittun Bibee, it appears, made an application to the Principal Sudder Ameen, who had the execution-proceedings before him, to stay execution, the ground of such application being that, acting upon what one may call the suggestion in their Lordships' judgment of the Privy Council, she has brought a suit against the opposite parties to substantiate the claim which she alleges she has against the estate of her deceased husband. She declares that these parties (now defendants) are residents of Cabul, and are persons having no property beyond the property lately in dispute; and that, if they be allowed to execute the decree, and recover from her mesne-profits and costs and other matters which pass under the decree, they will depart to their own country, and that she will be deprived of the means of executing her own decree, if she be successful in her present suit.

It appears that this application was not supported by any affidavit, or any matter whatever, except the allegations of the petitioner in the plaint. The Principal Sudder Ameen, taking up the application, recorded his opinion that it did not appear probable that the plaintiff would succeed in her suit; in other words, he probably considered that (the application being one under Section 209 of the Code of Civil Procedure) it was not just and reasonable to stay the execution of the decree. He, therefore, refused to comply with the application. The plaintiff now appeals, and, contending that the application was one properly made under Section 209, she insists that the Court below ought to have complied with it.

It appears to me that, in the first place, this was not an application which the Court would be competent to grant under Section 209 at all. The concluding part of that Section is in these words: "Whenever "a suit shall be pending in any Court "against the holder of a decree of such "Court by the person or persons against "whom the decree was passed, the Court "may, if it appear just and reasonable "to do so, stay execution on the decree, "either absolutely or on such terms as it "may think just until a decree shall be "passed in the pending suit." In order, therefore, to make the Court in such case competent to stay execution of a decree, it must be a decree of the Court in which the suit is pending. Now, this is not a decree of the Principal Sudder Ameen's Court, but it is a decree of the High Court of Judicature extensively varying the provisions of the decree of the Principal Sudder Ameen which has itself been affirmed on appeal to the Privy Council. This, it appears to me quite clear, is not a case within the terms of the Clause which I have just read. This seems to be a sufficient answer to the appeal of the plaintiff.

If it had been necessary to go further, I should be inclined to say that the application is not one which ought to be granted or entertained without an affidavit or satisfactory proof of the complaints alleged.

Baboo Onookoòl Chunder Mookerjee, who appeared for the appellant, remarked that his client had not been called upon for any proof.

I must emphatically protest against the supposition that a party making an application of this kind is to be called upon by the Court to prove his case. It is for him on making the application to support it by evidence upon which the Court can act.

As to the merits of the case, we are not in a position to say whether the application is well-grounded or otherwise.

I think, therefore, that the appeal must be dismissed with costs.

Hobhouse, J.—I have had some doubts in this case, because of the words contained in Section 362 of Act VIII. of 1859, which words declare that the decree of the Appellate Court shall be executed by the Court which passed the first decree in the suit, and according to the rules hereinbefore contained for the execution of original decrees. But, on consideration, I concur in the view taken by my learned brother that this is not a case to which Section 362 applies. If the decree had been a decree of the Court of first instance, simply upheld by the Appellate Court, then I should have been inclined to say that Section 209 would apply. But, in this case, as my brother Jackson has pointed out, the decree is not a decree of the Court of first instance, it is a decree of the High Court in appeal varying the decree of the Court below, and upheld by the Privy Council.

For these reasons I think that Section 209 does not apply, and that the Principal Sudder Ameen was right in refusing to pass an order to stay execution.

The 30th August 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Jurisdiction—Rent reserved in kind—Separate agreement to deliver certain articles.

Case No. 1108 of 1867.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 30th March 1867, modifying a decision passed by the Sudder Ameen of that District, dated the 11th September 1866.

Bhubo Soonduree Debia (Defendant), *Appellant,*

versus

Nawab Syud Jynul Abdin (Plaintiff), *Respondent.*

Baboo Romanath Bose for Appellant.

Baboo Kalee Kishen Sein for Respondent.

Act X. of 1859 applies where rent is reserved in kind just the same as in the case of suits for rent in money, but not where articles are to be delivered under a separate agreement unconnected with the question of rent.

Macpherson, J.—The appellant in this case, who was the defendant in the Court of first instance, holds a putnee from the respondent. The rent reserved in the putnee-lease was 5,800 and odd rupees. Simultaneously with the execution of a pottah, and the giving of a kubooleut by the defendant,

the defendant entered into a separate agreement, by which he undertook to deliver to the plaintiff a certain number of goats, certain quantities of straw, and other articles yearly. The present suit is brought to recover the value of goats, straw, and other articles, of which delivery has not been made according to the terms of the separate agreement.

A former suit under Act X. of 1859 was, as we are informed by the judgment of the Lower Appellate Court, dismissed by the Deputy Collector before whom it came on for hearing, who held that the suit was not cognizable by the Revenue Courts. That suit having been dismissed by the Revenue Court, the present suit is instituted, and the defendant now pleads that it is not cognizable by the Civil Court, but by the Revenue Courts. The question, therefore, which we have to decide is, whether the claim is one of which the Civil Court can take cognizance.

The defendant contends that the separate agreement for the delivery of the goats, straw, &c., is an agreement for the payment of a portion of the rent, inasmuch as the articles were to be deemed as so much rent, and that, therefore, this suit is substantially one for rent, and ought to have been instituted under Act X. of 1859. There is no doubt, according to decisions of this Court, that, where rent is reserved in kind, and not in money, Act X. applies to suits for rent, just the same as in the case of suits for rent in money. But the present suit is not a suit of this description. The only rent which is reserved, as it appears to us in the present instance, is the rent of 5,800 and odd rupees mentioned in the putnee-lease. The straw and other articles, which the defendant undertook to deliver, are the subject of a separate and special agreement which, in our opinion, is wholly unconnected with the question of rent; and the breach of contract, with respect to the delivery, could not, therefore, be made the subject of an Act X. suit.

We confirm the decision of the Lower Appellate Court, and dismiss the appeal with costs and interest.

The 3rd September 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mahtran tenure—Adverse possession—Limitation.

Case No. 859 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 31st January 1867, reversing a decision passed by the Sudder Moonsiff of that District, dated the 16th May 1866.

Oopendronath Roy and another (two of the Defendants), *Appellants,*

versus

Kalee Churn Roy (Plaintiff) and others (Defendants), *Respondents.*

Baboo Bhuggobutty Churn Ghose for Appellants.

Baboos Khettur Mohun Mookerjee, Obhoy Churn Bose, and *Bungshee Dhur Sein* for Respondents.

A defendant in a suit for recovery of land under a lease, who claimed the land as his mahtran tenure, is entitled, as a hostile claimant alleging a proprietary right and endeavoring to prove it, by a 12 years' occupation, to set up a plea of limitation.

Glover, J.—This was a suit to recover 4 cottahs 6 chittacks of land, claimed by the plaintiff under a lease granted to him in Phalgoon 1268 by the Mittra proprietors. Plaintiff alleges that he retained possession till 1270.

The defendant claimed the land as his mahtran tenure, on which he had planted an orchard and built a house. He likewise pleaded an adverse possession of more than 12 years.

The Court of first instance dismissed plaintiff's suit, holding that he had no possession, either himself or through his lessors, for 15 years, and was therefore barred.

The Principal Sudder Ameen reversed this decision, on the ground that the mere taking of possession of deserted land and planting a few trees there did not give any right to plead limitation, and that the plaintiff's title was good, whilst the defendant's was not established.

This decision appears to us incorrect. The defendant, who now appeals to this Court, is admittedly in possession; and it is not denied that the Mittra proprietors have not been in possession since the date of their abandoning the land, 15 years ago. The special appellant, as a hostile claimant alleging a proprietary right, and endeavouring to prove it, would, by a twelve years' occupation, be entitled to set up a plea of limitation (2 Hay's Reports 487, Kaleenath Bhuttacharjee *versus* Lall Bibee Chowdhrain). It is in evidence that the special appellant planted trees and built a house, and has been in possession of the land for several years, whilst it is admitted that the special respondent's lessors have had no possession, nor their lessee under them, for the last 15 years. When the Mittras abandoned the land, it probably remained waste and useless; but, now that the special appellant has improved it by planting trees and building a house, the field has become valuable, and the special respondents naturally wish to prove title.

Under the circumstances, we think that the special appellant was entitled to plead limitation, and that, on the facts as found by the Principal Sudder Ameen himself, that plea must succeed.

We, therefore, reverse the Principal Sudder Ameen's decision, and restore that of the first Court with costs on special respondent.

The 3rd September 1867.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges*.

Overlooking evidence—Ground of special appeal—Documents not on the record—Signature without a name—Production of pottah in adversary's presence—Presumptions arising from failure to prove allegations.

Case No. 715 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by Mr. G. G. Morris, Additional Judge of Nuddea, dated the 31st January 1867, reversing a decision passed by Mr. R. H. Pawsey, Deputy Collector of that District, dated the 4th July 1865.

Gunee Biswas (Defendant), *Appellant*,

versus

Sreegopal Paul Chowdhry (Plaintiff), *Respondent*.

Baboo Luckhee Churn Bose for Appellant.

Baboos Rash Beharee Ghose and *Bhowanee Churn Dutt* for Respondent.

Every Judge of a question of fact is bound to take into consideration all the allegations and proofs upon the record bearing upon that question, as well as the material presumptions arising therefrom, and to overlook them is a defect in law. But, before such defect can constitute a good and valid ground of special appeal, it must be of such a character that it may have caused an error in the decision of the case on the merits.

Pottahs cannot be assumed to be false, because contradicted by papers which are neither on the record nor are produced as exhibits.

A signature of a Rajah of the ancient Nuddea family was held to be valid, even though it did not contain the name of any particular individual.

The production of a pottah in the presence of the party most interested in challenging its genuineness is a fact legally of the utmost importance in determining its genuineness.

An adversary is entitled to the benefit of such presumptions as naturally arise from a party's failure to prove his allegations, even though the *onus* was in the first instance on the former.

Mitter, J.—The special appellant in this case urges that the investigation of the case by the Lower Appellate Court is defective and erroneous in law with reference to the following points:—

1st.—That the Lower Appellate Court has omitted to take notice of the proofs and allegations of the parties to the suit with regard to the fact as to whether the lands in dispute have been held at an uniform jumma by the special appellant and his ancestors for a long series of years.

2nd.—That the reasons assigned by the Lower Appellate Court for rejecting the pottahs of 1188 and of 1215 B. S. relied upon by the special appellant are erroneous in law.

With reference to the *first* point, we observe that, unless good and sufficient reasons exist to the contrary, every Judge of a question of fact is bound to take into his consideration all the allegations and proofs on the record bearing upon that question, as well as the material presumptions of law and fact which arise therefrom. It is remarked

by the Privy Council in their decision reported in page 628, Sutherland's Privy Council Judgments, that "the consideration of a "case upon the evidence can seldom be satis-"factory, unless all the presumptions for and "against a claim arising on all the evidence "offered, or on proofs withheld, in the course "of the pleadings and tardy production of "important portions of a claim or defence "be viewed in connection with the oral or "documentary proof which *per se* might "suffice to establish it." In the case before us, the Lower Appellate Court has committed the double mistake of overlooking these presumptions, as well as the material proofs and allegations on the record from which those presumptions would arise. We think that such oversights are defects in law in the investigation of the case, though we are far from saying that every such oversight would necessarily constitute a good and valid ground of special appeal. We must be satisfied that the error or defect in law complained of is of such a character that it may have caused an error in the decision of the case upon the merits. Now, in the present case, we are satisfied that the defect pointed out above must have produced a serious error in the investigation of the case upon the merits. The question of fact which the Judge below had to decide was, whether the pottahs relied upon by the special appellants were good and genuine documents or not. These documents profess to be of such ancient dates that direct proof of their execution is merely impossible. Under such circumstances, if the special appellant can succeed in showing that the rent payable by him has not been changed for a long series of years, this fact would raise a very strong presumption in favor of the genuineness of the pottahs relied upon by him. Now, it appears that the Judge below has overlooked the most important evidence and allegations bearing upon this point. It is admitted that the special respondent is one who has long been the zemindar of this estate, and that the special appellant has been holding the lands in dispute for very many years. The agent of the special respondent in his examination before the Deputy Collector was required to state as to when a variation had taken place in the jumma payable by the special appellant. He took time to answer this question, and a few days afterwards returned a reply to the effect that the rent had been changed in the years 1269 and 1270 only. The gomashtah of the special respondent was examined as a witness on his behalf, and he also reiterated the same statement, relying upon the jummawassil-bakee papers of those two years which, however, appeared upon his own showing to be mere copies from originals, neither produced nor accounted for. With regard to the dakhilahs produced by the special appellant, the gomashtah denied only two of 1269 and two of 1270, though with regard to the former he was constrained to admit that they bore his own signature, but he said that he did not know how they came into the defendant's hands. The special appellant, on the other hand, distinctly swore to the effect that his tenure was a very ancient one; that the rent thereof had been paid at an uniform rate for a long series of years; and that this rent was paid according to the terms and conditions of the two pottahs relied upon by him. He also produced a number of dakhilahs extending over a series of years, certain perwannahs of the Collector and the Civil Judge issued to the predecessors of the special respondent, prohibiting them from interfering with the jumma payable by the ancestor of the special appellant, and further a decree of Court dated 19th July 1861, showing that an attempt to vary this jumma by Mr. Larmour, a co-sharer and putneedar of the special respondent, had terminated unsuccessfully. The Judge below does not appear to have paid any consideration to these proofs and allegations, and we think, therefore, that the investigation of the case by him is defective in law. The Deputy Collector had, in the first Court, distinctly found that no variation had taken place in the jumma payable by the special appellant from the year 1215 B. S. down to the year immediately preceding the institution of the present action. It was, therefore, still more necessary for the Judge to see whether the Deputy Collector was right in this conclusion.

With regard to the *second* point, we observe that the Judge is wrong in assuming that the pottahs relied upon by the special appellant are false, because the rent specified therein is contradicted by the quinquennial papers of 1196, and a statement made by Haneef, ancestor of the special appellant, in a suit instituted by him in 1830. Neither of these papers are on the record; nor do we find that they were produced as exhibits in the cause by either of the parties to this litigation, as a reference to the lists of documents filed by them respectively will clearly show. We are unable to see likewise how any quinquennial paper, if

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that alluded to by the Judge be the ordinary talook and mouzawaree register of the Collectorate, could prove any variation in the jumma payable by an individual ryot. If the Judge means to refer to a certain hustobood paper of 1209, produced by the special respondent, he is clearly wrong in accepting it as evidence. This paper bears no attestation by any public officer, nor is there anything to show by whom it was filed in the Collectorate of Nuddea, if it is at all to be taken for granted that it was actually filed in that office, or ever accepted and acted upon. The Judge has further remarked that the state of the jumma, as it now stands, goes to show that the rent has been constantly fluctuating. But, in another part of his judgment, he admits that the jumma now paid by the special appellant is identical in amount with that specified in the pottah of 1215. Moreover, the only contention raised before the Judge by the special respondent in his grounds of appeal, with reference to a variation in the jumma, was that, the special appellant having admitted that new lands bearing a new assessment were added to his old holding of 1188, he was not in a position to claim the benefit of an unvarying jumma from before the time of the Permanent Settlement. If the Judge has so accepted the objection, he has misunderstood the purport of the defence set up by the special appellant. The special appellant's case was that his rights under the old pottah of 1188 were kept intact by the express provisions contained in the pottah of 1215, and the fact of an addition to his old tenure by the latter document does not constitute any variation in the jumma which is legally payable by him. It is to be borne in mind, however, that the special respondent had given up his contention of a variation in 1269 and 1270, the only variation relied upon by his agent in the Court of first instance. The Judge, therefore, could not have meant to say that there was any fluctuation in the rent since 1215, unless it was upon the ground of a supposed statement made by Haneef in 1830. Then, again, the Judge says that the signature affixed to the pottah of 1188 is worth nothing, merely because it contains the words "Maharaja Bajpay Sreeman Maharaja Dheeraj," and not the name of any particular individual. The Judge is clearly wrong in law in making this remark. The signature above referred to appears to be that of some Rajah of the ancient Nuddea family, who were the admitted owners of the estate within which the lands in dispute are situated. The fact that it does not contain the name of any particular individual does not affect its authenticity as the Judge has been led to suppose; because it is well known that these and other great zemindars were not in the habit of writing down their names upon documents like those in question. The Judge has further observed that the production of the pottah of 1188 by Haneef, in 1830, in the presence of this very plaintiff, is, in fact, of no consequence, because there was no adjudication upon its genuineness, and because the special respondent was not at all interested in disputing it at that time or at any subsequent period. We think that there is an error in law here. That the document was produced so far back as 1830 in the presence of the very party most interested in challenging it if it were false, at least goes to show that it has been in existence for the last 39 years; and such a fact is legally of the utmost importance in determining the genuineness of ancient deeds which cannot be reasonably expected to be proved by direct evidence.

Upon the whole, then, we are satisfied that this case must be remanded to the Lower Appellate Court for a fresh investigation regarding the genuineness of both the pottahs in question. The Judge will try, in the first instance, whether the rent payable by the special appellant has been substantially changed at any time subsequent to the year 1215, and, in disposing of this question, he will do so with reference to the remarks made by us in connection with it. He will then proceed to enquire, by summoning and examining both the parties to this suit, what grounds there are for impugning the genuineness of the pottahs in question. If he finds that they are really old documents, and if, at the same time, he finds that the special appellant has been holding the lands in dispute at an uniform jumma for a long series of years, he will either give his verdict for the special appellant, or state clearly and distinctly his reasons for coming to a different conclusion. If the special respondent, Sree Gopal Paul Chowdhry, denies upon oath that he has got any personal knowledge upon the matters in controversy, he is then to be called upon to produce some proper and responsible agent or amlah who has got that personal knowledge. The law, when it allows zemindars to conduct their suits through authorized agents or mookhtears, does not contemplate that, if they are not examined themselves, they may put the

Court off with agent or witness who has got no personal knowledge of the facts upon which the decision of the case depends. Every party to a litigation is expected to prove the allegations upon which he relies; and, although the *onus* of proof might be in the first instance upon his adversary, the latter is clearly entitled as to the burden to the benefit of such presumptions as naturally arise from the failure of the former to fulfil this obligation.

Remand accordingly.

The 4th September 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Certificates under Act XXVII. of 1860—Limitation.

Case No. 214 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Rajshahye, dated the 2nd February 1867.

Pulash Monee Dossee, *Appellant,*

versus

Anund Moyee Dossee, *Respondent.*

Baboos Kishen Dyal Roy and *Bhuggobutty Churn Ghose* for Appellant.

Baboo Nil Monee Sein for Respondent.

An heiress was held entitled to a certificate under Act XXVII. of 1860, although the owner of the property had died nine years previously, and the property had been previously managed by a third party.

Jackson, J.—THE Judge's order in this case, as admitted by the vakeel of respondent, is altogether erroneous. Petitioner, who is the widow of the deceased, Kisto Coomar Mojoomdar, was his heiress, and was, therefore, entitled to a certificate under Act XXVII. of 1860, to collect debts due to the estate of the deceased. No doubt, her husband has been nine years dead; and a cousin, Haranund, had previously managed the affairs. But this is no reason for refusing a certificate to the appellant, who is admittedly the heiress. With the motives by which the lady was actuated, the Judge has no concern. His duty is to administer the law, and to give the certificate to the person entitled. The law does not prescribe a limit of time within which application for such certificates should be presented; and the Judge ought not to have refused the certificate asked for.

The order of the Judge is reversed.

The 4th September 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Appeal—Section 11, Act XXIII. of 1861—Possession of lands not included in plaint—Sections 226 and 227, Code of Civil Procedure.

Case No. 279 of 1867.

Miscellaneous Appeal from the orders passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 22nd March and 11th April 1867.

Prannath Roy Chowdhry (Judgment-debtor), *Appellant,*

versus

Preonath Roy Chowdhry (Decree-holder), *Respondent.*

Baboo Motee Lal Mookerjee for Appellant.

Baboos Debendur Chunder Ghose and *Oopendur Chunder Bose* for Respondent.

An order relating to a question between the parties to a suit, arising in execution, comes under Section 11, Act XXIII. of 1861, and is appealable.

In order to bring a case under Sections 226 and 227 of the Civil Code, it must be shown that obstruction has been offered arising from the circumstance that lands have been taken which were not included in the plaint.

Jackson, J.—A PRELIMINARY objection was taken to the hearing of this appeal, because the order complained of was of the nature of an interlocutory order. There is nothing in this observation. The Principal Sudder Ameen's order relates to a question between the parties to the suit, arising in execution of the decree, and, as such, it comes under Section 11 of Act XXIII. of 1861, and was, therefore, appealable. The appellant is entitled to be heard; but, on hearing him, it appears to us that the appeal is unfounded. Plaintiff applied for execu-

tion of a decree for certain beel lands; and a Court Ameen was ordered to execute the decree, and give plaintiff possession. On going there, defendant seems to have made a representation that the decree-holder was not entitled to all the lands comprised within the boundaries stated in the decree, or to get possession according to the boundaries pointed out by plaintiff. The Ameen referred the objection for the orders of the Court, and thereupon the defendant appeared and contended that possession ought not to be given according to the boundaries mentioned in the plaint, as they included lands other than those decreed.

The Principal Sudder Ameen was of a different opinion; and an appeal is now made. The endeavour has been made to bring the case under Sections 226 and 227 of the Civil Code; but, in order to bring it under those Sections, it is necessary to show that obstruction has been offered, and that such obstruction has arisen from the circumstance that some lands of which possession was taken are not included in his plaint. Defendant in this case did not represent that he was dispossessed of any land not mentioned in the decree, and it did not appear that any obstruction had occurred.

The appeal in this case is premature; but if specific grievance arise, and the case can be brought under the Sections above quoted, the fact will be enquired into by the Lower Court.

Appeal dismissed with costs.

The 4th September 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Alienation of mortgaged property while foreclosure-suit is pending—Act I. of 1845—Fraudulent default on preconcerted arrangement—Equities following mortgaged property even when purchaser is a mere agent—Notice to agent, constructive notice to principal—Buying in the face of hostile claims—No distinction between legal and equitable right in Mofussil Courts.

Regular Appeals from a decision passed by Mr. G. Bright, Officiating Judge of Midnapore, dated the 29th September 1866.

Case No. 423 of 1866.

Seedee Nazeer Ali Khan Bahadoor (one of the Defendants), *Appellant,*

versus

Rajah Ojoodhya Ram Khan (Plaintiff) and others (Defendants), *Respondents.*

Messrs. A. T. T. Peterson, F. Barrow, and *C. Gregory,* and *Baboo Ashootosh Dhur* for Appellant.

Messrs. R. V. Doyne, J. T. Woodroffe, and *R. T. Allan,* and *Baboos Onookool Chunder Mookerjee* and *Obhoy Churn Bose* for Respondents.

Case No. 55 of 1867.

Nawab Syed Munsoor Ali Khan Bahadoor Nusrutjung, Nawab Nazim of Bengal (one of the Defendants), *Appellant,*

versus

Rajah Ojoodhya Ram Khan (Plaintiff) and Seedee Nazeer Ali Khan Bahadoor (Defendant), *Respondents.*

Baboo Ashootosh Chatterjee for Appellant.

Messrs. R. T. Allan and *C. Gregory* for Respondents.

Where a mortgagee alienates the mortgaged property while the foreclosure-suit brought by him is pending, such alienation cannot be allowed to stand between the mortgagor and those rights to redeem which that suit in its ultimate issue may have left open and affirmed to him.

Act I. of 1845 was not intended to afford statutable protection to a purchaser at a sale brought about by fraudulent default, on a preconcerted arrangement for the purposes of title.

No one ought to be allowed to take advantage of his own fraud even under a title from a Government sale for arrears of revenue.

When mortgaged property is sold at auction subject to mortgagor's right to redeem, the mortgagor's equities follow the property even when it turns out that the purchaser bought as agent, and not as principal.

Notice to a purchaser's agent is held to be constructive notice to his principal so as to fix the latter with a trust or a burden relative to the subject of purchase which without notice he would have escaped.

Where a man buys in the face of hostile claims, whether he honestly thinks he has reason to disregard them or not, he cannot afterwards set himself up as an innocent purchaser without notice.

In Mofussil Courts in this country, there is no distinction between legal right and equitable right to property. There is but one kind of proprietary right not divisible into parts or aspects.

Phear, J.—This is a suit brought to recover possession, on the usual terms as to redemption, of certain lands and zemindaries in Midnapore which were mortgaged by the

plaintiffs some 23 or 24 years ago, and which have since passed into, or through, the hands of the four last-named defendants and of other persons now deceased, but represented by the remaining defendants.

The facts of the case are by no means simple; and on nearly all material points the versions of them given by the several litigant parties are conflicting. The outline of the story, so far as it is free of contest, is pretty nearly as follows:—

Rajah Ojoodhya Ram, the plaintiff, while a minor, inherited from his father considerable estates in Midnapore, and became involved with his half-brother in expensive litigation with regard to them. This, with possibly other causes, reduced him to great straits for money; and, soon after he attained his majority, he borrowed upwards of Rs. 1,88,000 from Baboos Ashootosh Deb and Promothonath Deb, jointly, who were at that time monied men carrying on business in Calcutta. Both these gentlemen have long ago died, but they are represented in the matter of this suit by the three first-named defendants. The Rs. 1,88,000 was advanced in several sums, at different dates,

1844, Mortgage.

during the years 1843 and 1844; and the lands now sought to be redeemed, together with other property, were from time to time (the operations ending in a Bengalee deed of further charge, in the latter year) mortgaged to the Debs to secure its repayment. The loan was not repaid according to the terms of the mortgage or mortgages, and consequently in September

1845, Foreclosure-suit instituted.

1845 the Debs instituted a suit for foreclosure against the present plaintiff Rajah Ojoodhya Ram in the Supreme Court of Calcutta, which suit terminated

1847, May 25th. Decree absolute for foreclosure.

on the 25th May 1847 in an absolute decree for foreclosure.

On the 16th of the following month, the Debs executed a conveyance of the foreclosed property to one John Compton Abbott for the sum of Rs. 2,34,000, of which Mr. Abbott paid down Rs. 1,60,000, the payment of the remaining Rs. 74,000 of the consideration-money being secured by a mortgage of the same property contemporaneously made by Mr. Abbott to the Debs. Mr. Abbott, as well as the Debs, is now dead, and his place in the present suit is taken by his executors, the defendants Nos. 4 and 5. Mr. Abbott did not obtain undisputed enjoyment of the Rajah's estates without some trouble; but, according to his own account, he appears to have got into possession by October 1847.

1847, June 16th. Conveyance to Abbott.

1847, October. Possession obtained by Abbott.

In March 1848 he failed to pay the kist of the Government revenue, which then became due on the particular portion of the estates now sought to be redeemed, and consequently this portion was sold by the Collector, at public auction, on the 29th April 1848, when a Mr. McArthur became the purchaser, at the price of Rupees 85,000. Mr. McArthur did not purchase on his own behalf, but acted in the matter (whether with or without authority is an issue in the case) as agent for His Highness the Nawab Nazim of Bengal, who has accordingly been made a defendant in this suit. McArthur himself was also originally made a defendant, but he died a few months ago, and the suit has been revived against his representatives. Although McArthur bought in the capacity of agent, and not as principal, this circumstance does not seem to have been disclosed to the Revenue authorities, and the Collector made out the certificate of sale to him in his own name. Three months after the revenue-sale, *viz.*, on the 31st July 1848, McArthur executed a kabala of sale of this property to one Saduck Ali (a eunuch in the establishment of the Nawab Nazim at Moorshedabad), by which McArthur conveyed as owner without any mention of the Nawab, and Saduck Ali also pretended to take as absolute owner. But it is agreed on all hands, except by the Nawab Nazim himself, that this was merely a conveyance to Saduck Ali *benamee* for the Nawab Nazim. Saduck Ali died in March 1850, and the last-named defendant, Nazeer Ali, claimed to take all his estate and effects, as his executor or administrator. In this capacity, on the 15th April 1850, he executed a *la-davee*, or deed of release, to the Nawab Nazim of this very property. However, in the year following, a conveyance, bearing date the 15th November 1851, and purporting to be made by the Nawab Nazim to the defendant, Nazeer Ali, in terms reconveyed the property back to the last-named defendant. For this conveyance

1848, April 29th. Collector's sale.

1848, July 31st. McArthur's Kabala to Saduck Ali.

1850, March. Saduck Ali died.

1850, April 15th. La-davee by Nazeer Ali to the Nawab.

1851, November 15th.

Nazeer Ali maintains that he has given *valuable consideration*, and it is admitted that he is *de facto* in possession of the property. Under these circumstances, he is, of all the defendants, the one against whom it is material that the plaintiff should make out his right to redeem. Nazeer Ali's possession, nevertheless, does not now inure to his own benefit solely, for Emamee Bebee, sister and heiress of Saduck Ali, having disputed his right to represent her brother's estates, and having also set up that the alleged consideration for the reconveyance from the Nawab *really* proceeded from Saduck Ali, and not from Nazeer himself, brought a suit against him in the Civil Court at Moorshedabad, and, eventually, the litigation, thus set on foot, led to a compromise between this lady and Nazeer Ali, by which she took a $\frac{3}{5}$th share, and he a $\frac{2}{5}$th share, in the property now before the Court. Emamee Bebee, who is the last defendant but one, and Nazeer Ali are thus directly interested in defending the possession of the land, as well as in repudiating all liability to account. The other defendants are chiefly concerned in resisting the plaintiff's claim to have the accounts taken against them.

1860, May 31st. The present suit was filed.

The plaintiff instituted this suit on the 31st May 1860 in the Zillah Court of Midnapore. He was met on the part of those defendants who put in written statements by a preliminary objection, founded on the provisions of Act I. of 1845, to the effect that, inasmuch as the revenue-sale of April 1848 had not been impeached within the period limited by the Legislature for that purpose, it could not now be set aside, but must be allowed its full operation; and consequently the purchaser at that sale, as well as every other person claiming through him, took the property free of all incumbrances which had been created upon it since the date of the Permanent Settlement. The plaintiff pointed out that, according to the allegations of his plaint, the default in the payment of revenue, and the Collector's sale, had been brought about by the scheming of Abbott and McArthur, with the intention to *defraud* him (the plaintiff); and, under these circumstances, he urged that the provisions of the Act I. of 1845 did not apply. The Judge, however, thought otherwise, and,

1860, November 26th. Judge's decision dismissing.

held that the plaintiff's right of action was altogether barred.

The plaintiff then appealed to this Court from the Judge's decision. The Division Bench, which heard the appeal, was of opinion that the judgment of the Court below was wrong, and it laid down that the provisions of the Revenue Law were never intended to cover a fraud, and would not prevent an owner, who had been fraudulently deprived of his property by a Collector's sale fraudulently effected as against him, from pursuing that property, with a view to enforcing against the holder of it any equitable right to a reconveyance to which he, the owner, might be entitled. On this ground it remanded the case to the first Court for trial on its merits. The order of remand was made on the 1st January 1863, and confirmed on review on the 12th January 1864.

1863, 1864.

17th March 1866. Judgment of Privy Council.

The defendants appealed to the Privy Council against this order of remand, but without success, for their appeal was dismissed, and the decision of this Court was affirmed by a judgment of that judicial authority delivered on the 17th March 1866.

The hearing of the case on remand took place before the Zillah Judge of Midnapore, who, on the 29th September 1866, gave a decree in favor of the plaintiff declaring him to be "entitled to the possession "of the estate in suit upon settlement of "accounts by redemption of mortgage."

Against this decision the defendants have appealed to this Court, upon *seventy-seven* so-called grounds of appeal. These appear to me, however, rather to constitute an abstract or *précis* of the argument proposed to be addressed to the Court of Appeal by the Counsel for the appellants than to be *grounds of appeal* in the proper sense of the term. At any rate, I do not think it necessary now to regard them with any particularity; for, after the best consideration which I have been able to give them, they seem to me to amount on the whole to the one sweeping objection that the Judge miscarried in the conduct of the trial, wherever he had any discretion to exercise, and that he was wrong either in law, or in fact, or in both, with regard to every conclusion unfavorable to the defendants at which he arrived. In this condition the appeal has come before this Bench, and it has, therefore, been incumbent upon us to entirely re-try the case

upon such materials duly sifted, as the record furnishes us with, and such further evidence as we might think proper to procure.

In this task we have had the advantage of most elaborate argument furnished us by both sides. The hearing, on the whole, has extended over the space of *eleven days*. The result is that, although the transactions which we have been called upon to inquire into are both numerous and unusually complex in themselves, I cannot now say there is any doubt remaining on my mind as to the real aspect of such of those facts as are material to the contest between the litigant parties.

In order to explain my judgment, I feel obliged to set these out as I view them; though I fear that in so doing I shall unavoidably be carried to considerable length.

A principal occurrence in this matter, which up to this point I have omitted to mention, is a suit which the present plaintiff instituted in the late Supreme Court of Calcutta in February 1848, at first against the Debs only, but afterwards by successive amendments of the bill (namely, on 2nd May 1849, and 4th September 1850, respectively) against Abbott and McArthur, the Nawab Nazim, and the representatives of Saduck Ali also, to obtain a re-opening of the foreclosure-decree of May 1847. For the moment, it is only necessary to say that this resulted in a decree for re-opening the foreclosure as against the Debs and Abbott, that the suit was by consent dismissed as against McArthur (the matter of the agreement between him and Abbott, to be afterwards mentioned, not having been then disclosed), and that the other defendants never came within the jurisdiction of the Court. That suit is *still pending*, and the plaintiff has as yet obtained no relief under it. The present suit, in some senses, runs parallel with it, and has been spoken of as being supplemental to it; but the two are laid and prosecuted in jurisdictions which are independent of, and, so to speak, foreign to, each other, and it is only in regard to the execution of final decree that it can become strictly necessary in the one to look at what has been done in the other. However, the statements in the answers made by, and the conduct of, the various parties in the Supreme Court suit, even in the absence of any *res adjudicata*, furnish valuable evidence here against them respectively; and it is in this way that the record and documents of that suit have been used before us by both parties.

2nd February 1848.

I will now go back to the earlier stages of the narrative. It has been mentioned that the conveyance of the lands, at present in suit, from the Debs to Abbott, was executed after these gentlemen, the vendors, had obtained a foreclosure-decree which cleared their title to these lands from all equities of the present plaintiff, and before Abbott was made a party to the suit for re-opening it. It also appears from what I have just said that all the alienations which connect the later defendants with the original mortgagees took place before the re-opening of the Deb's foreclosure-decree was brought about. It has, therefore, been argued with much show of reason that these dealings with the property must be treated as having taken place after the final determination of litigation, and must not be considered to be affected by the circumstance that that litigation itself was afterwards *revived* by reason of irregularity in the conduct of the party who had obtained the decree. It was urged that, at any rate, strangers to that suit for foreclosure were entitled to claim the benefit of the decree absolute for foreclosure, being held to be final and conclusive, notwithstanding that it was, in fact, subsequently set aside. I shall not at present enter upon the many points for consideration which arise out of this contention, not the least prominent of them being, whether the Court, within whose local jurisdiction the immoveable property sought to be recovered is situated, ought to hold itself bound by the decision of a foreign Court as to the equities relative to that property between the parties claiming it adversely to each other. But, even if it be so bound, as it may be, I should find it difficult to say that a decree for foreclosure which only declares that, as between plaintiff and defendant, the former is entitled to hold and alienate the property free from the equities of the latter, could be insisted upon by a stranger, when it has been declared to have been inoperative *ab initio* between the parties. If it ought not to have been passed as against the mortgagor, how can any alienation, however innocent, even though made on the faith of it, be in a better condition in equity as regards the claims of the mortgagor, than if it had not been made? However, as I have said, I shall not enter upon these points, because it seems to me that the case

against Abbott, with which we are first concerned, is entirely disencumbered of them. His conveyance from the Debs is dated, it is true, after the decree absolute for foreclosure was made; but in his answer to interrogatories submitted to him by the present plaintiff, filed on the 20th July in the suit for re-opening the foreclosure, to which I have referred, he admitted that his treaty with the Debs for the purchase of the mortgaged property commenced in March 1847, and it is clear that this treaty must have been completed soon afterwards; for in the same answer Abbott says that he paid to the Debs Rupees 80,000 on the 30th April 1847, as a portion of the consideration-money of that purchase; and again, on the 10th May 1847, a further sum of Rupees 70,000 on the same account. Remembering, then, that the decree for absolute foreclosure was not given till the 25th May 1847, it appears to me obvious that the alienation by the Debs to Abbott took place while the original foreclosure-suit was pending, and, therefore, cannot be allowed to stand between the present plaintiff and those rights to redeem, which that suit in its ultimate issue may have left open, and affirmed to him. There are also other facts which lead me to consider that Abbott cannot derive any protection from the foreclosure-decree, whatever may be supposed to be the case in this respect with regard to persons (if such there were) who had purchased innocently during the interval, when the decree was not known to be invalid or voidable. For Abbott seems to have been the hand by which the Debs conducted that suit; he exhibits in the schedule annexed to his answer of the 20th July 1849 items for money paid by him to the Debs' solicitor in that suit on account of taxed bills of costs at various times from its very commencement in September 1845 to its termination in May 1847, and credits the Debs with payments to him of certain lump sums during the same period as cash *advanced* on account of costs in that cause, leaving on the whole a balance due to him from the Debs of Rupees 1,752. He was, undoubtedly, looking at the whole of his conduct, agent of the Debs throughout, and had full knowledge of the plaintiff's equities against them. The mere fact that he purchased from his principals in the *bond-fide* expectation that a forthcoming decree would give them power, as against the mortgagor, to sell free of his equities, cannot enable the agent, when it is discovered that the decree in question had *not* that effect, to say to the mortgagor that, nevertheless as between them, it must be treated as if it had. I have no doubt that we ought, as between the plaintiff and Abbott, to view the conveyance from the Debs as an assignment of the mortgage, and to hold that Abbott took the property *subject* to all the plaintiff's equities.

Next, then, comes the question, what was the legal operation of the Collector's sale? The default which led to it was to my mind clearly of purpose as regards Abbott. I think that he had the means in his power to have paid the kist if he had chosen, and I believe that he failed to pay simply with the intention of giving effect to an agreement for sale, which he had made with McArthur. As regards the voluntary character of the default, the evidence is ample, and I do not propose to specify it now. The agreement with McArthur is perhaps not so unimpeachably made out. In the first place, only secondary evidence of its terms has been laid before us, but we have thought this receivable under the circumstances of the case. The original, if such an agreement was ever made, would have naturally remained in the possession of either Abbott or McArthur, both of whom by their representatives are parties to this suit. Notice to produce this has been duly given to all the defendants, who together completely represent Abbott and McArthur both in person and estate, but it has not been forthcoming. Mr. J. C. Michael proves the *factum* of an agreement between Abbott and McArthur, and Michael's evidence satisfies me that the draft which is put in, endorsed the 15th April 1848, is a correct copy of the agreement which was executed by those two persons. Mr. McArthur's own evidence, given before the Master in the suit of the present plaintiff against the Debs, Abbott, and others, for re-opening the foreclosure, if receivable, puts this beyond all doubt. I think this evidence is receivable certainly as against Abbott and McArthur, for the witness is now dead. Abbott and McArthur were then in the same position relative to the present plaintiff as they now are, and the matter in issue between them was essentially the same as in this suit. Besides, as against Abbott, the deposition was made in a suit which was pending when he bought; inasmuch as the plaintiff's suit for re-opening the foreclosure may, with propriety for this purpose, be termed a *revivor* of or continuation of the foreclosure-suit. This deposition also serves to con-

firm the conclusion at which I had arrived on other evidence that the default by Abbott, in the payment of the Government revenue, was deliberately intentional. Moreover, if there had not previously been an undertaking to default on the part of Abbott, it is difficult to conceive why McArthur should have entered into the agreement at all; the whole burden of it falls upon him, and he gets no benefit whatever from it. If default past redemption had occurred, such as would have been the case if Abbott had failed to pay the revenue from want of means, there remained no consideration in Abbott's power to give for the agreement. I can, therefore, only account for the execution of such a document by McArthur, after default had been made, by the supposition that Abbott exacted it from him on the strength of being able to prevent the sale, by payment within the period allowed by law. In substance, the agreement amounts to this, *viz.*, that McArthur covenanted with Abbott to purchase the lands at the Collector's sale, provided that they should not be sold for any sum exceeding three lakhs of rupees; and, if they should be sold for less than three lakhs of rupees, then he covenanted to pay to Abbott the difference in amount between the sum of money at which he should become the purchaser of the lands, and the sum of three lakhs. It is suggested that McArthur, who was not acting as principal, but as agent on behalf of another, entered into this agreement, in order to secure for himself the *honorarium* or commission of 20,000 rupees which Abbott afterwards gave him in gratification at the bargain which he had obtained. But no stipulation whatever is made for this in the agreement itself, and, therefore, it would appear that, although McArthur could trust Abbott, the latter would not trust McArthur: a consideration which seems once more to point to the conclusion that Abbott had some source of pressure which he could exert on McArthur in the matter, *viz.*, the power of stopping the sale if he chose. I cannot say that I have the least doubt of the whole transaction having been concerted between Abbott and McArthur before the default was made. Abbott was to sell for three lakhs; but, for purposes of title, the sale was to be effected through the instrumentality of the Revenue Officer. And, inasmuch as this course of proceeding would almost certainly lead to an apparent price much below the three lakhs, the formal agreement of the 15th April was drawn up, not to be talked about, but to be shown to the principal, whenever it might become necessary to account for the disbursement of a larger sum than the auction-price. In my judgment, an arrangement of this kind, effected with the view of causing a statutory title to accompany a private alienation, is not within the policy of the Act. The injustice of barring any known or possibly existing private claims against the property is not balanced by the attainment of any public good, or any object proposed by the Legislature, and the result of giving the statutable protection to the purchaser under these circumstances, if the protection proved of value at all, would be to that extent to inflict injury upon innocent persons. I am disposed to think that a Court of Equity would, in such a case, always attribute the transfer of property to the date of the initial contract between the parties, and not to the subsequent Collector's sale. But, however this may be, the present case certainly appears to me independent of any nice equitable doctrines, for I believe that Abbott and McArthur entered into the before-mentioned arrangement with each other expressly with the view of defrauding the plaintiff. If the arrangement had borne an honest complexion, there would have been no need for secrecy with regard to it. As soon, at any rate, as the auction-sale was completed, it would have been avowed on the first occasion for disclosure occurring. But Abbott and McArthur were persistently silent about it until the last. When directly interrogated by the plaintiff, in the suit for re-opening the foreclosure, both these persons on oath mention 85,000 rupees and no more as the purchase-money. Abbott in his answer of 20th July 1849 says that "he had and "was in possession of the mortgaged "premises from the 3rd day of October in "the year of Christ 1847, until the said pre-"mises were sold by the Collector of "Midnapore for arrears of Government "revenue on the 29th April 1848; and that "he has not since, or at any time, sold or "parted with or conveyed any part of the said "mortgaged premises; but that the said Col-"lector sold the principal portion thereof for "arrears of Government revenue to the "following persons, and for the following "considerations, on the 29th April 1848, "that is to say, Pergunnah Midnapore, &c., "purchased by Mr. Alexander McArthur for "Company's Rupees 85,000," and so on. The object of Abbott in keeping back all mention of the remaining 2,15,000 rupees was obviously most fraudulent towards the plaintiff. He at least was not ignorant of the

plaintiff's claim; and, if he had confidence in the efficacy of the foreclosure-decree, and of the Collector's sale, in extinguishing them, why did he hesitate to tell the truth? It is certain, at any rate, that he deliberately perjured himself in his answer to avoid the risk of being obliged to account to the plaintiff for the Rupees 2,15,000. But how could he venture to do this, unless he had reason to be assured that the real facts would not come out through McArthur. No doubt, on some ground or another, he did place reliance on McArthur, and for a time McArthur did not fail him. Thus, we find that *McArthur*, having been made a party to the suit in September 1850, in answer to the following interrogatory, *viz.*: "Whether it "is not the fact that the said Alexander "McArthur bought the said *zemindaries and* "*talooks* for the said sum of Company's "Rupees 85,000 or some, and what other "sum of money, and at what date did he "buy them," declared on oath "that it is "the fact that this defendant, by the di- "rections and on account of His Highness the "Nawab Nazim of Bengal, bought the said "zemindaries and talooks for the said "sum of Company's Rupees 85,000 (eighty- "five thousand), on the 28th day of April "1848." This answer was filed on the 11th January 1851, therefore, there can scarcely be any doubt that, from July 1849 to January 1851, Abbott and McArthur were co-operating in a fraudulent endeavor to keep the plaintiff in the dark, as to the real nature of the transaction between them in April 1847, and that they did not hesitate to deliberately commit perjury for that purpose. Is not the inference irresistible that in the transaction itself they were actuated by a common dishonest motive against the plaintiffs, and what the motive was, is not difficult to see? They both wanted to rid the property of a very troublesome claimant. Abbott had been the agent of the Debs during the whole of the foreclosure-suit which terminated in May 1847, and it is hardly too much to presume, in the absence of anything to the contrary, that he was early made acquainted with the *bill* which the plaintiff filed against them in February 1848, seeking to have the foreclosure set aside, and with the charges of fraud relative to the foreclosure which it set up. But, even if he knew nothing of this until after the auction-sale, he had met the same charges from the plaintiff during the Act IV. proceedings which took place in July 1847, on his first attempting to obtain possession of the mortgaged premises. To sell in such a way as would relieve himself from all responsibility with regard to these, and at the same time would put a very large amount of money in his pocket, shielded by the secrecy of his agreement with McArthur from the chance of being called to account for it, was doubtless his main object in effecting the arrangement of a sale by default, while McArthur, to obtain the Collector's clear title, was ready to connive at his friend's concealment of the real amount of consideration-money, and did actually stand by him in this respect until after the suit for re-opening the foreclosure had been dismissed, as against him, McArthur, in the Supreme Court. It was only after this had taken place that he turned round and made the disclosures, which are contained in his deposition before the Master, sworn on the 19th August 1854. It seems to me in view of the facts, as they present themselves to me, that the plaintiff has entirely made out a fraudulent contrivance between Abbott and McArthur to deprive him of his rights to the lands in suit, or the surplus proceeds of sale. It must not be forgotten that the 2,15,000 *Rs. pocketed in secrecy by Abbott would have been amply sufficient to clear off the whole of the accumulated mortgage-debt*, and thus to have restored the remainder of the property unencumbered to the plaintiff. I therefore think that the plaintiff has a clear right to redeem the lands, notwithstanding the auction-sale as against Abbott and McArthur.

Now, McArthur says that he did not buy on his own account, but did so as agent and on behalf of the Nawab Nazim, defendant, and it is certain that the three lakhs purchase-money was paid by Messrs. Mackenzie and Lyall, at that time financial agents of the Nawab Nazim, and holding many lakhs of rupees to his credit. The Nawab Nazim himself, in the course of the very unsatisfactory evidence which he has given in this case, has wished to convey the impression that he never either authorized McArthur to purchase the zemindaries for him, or ratified the purchase after it was made. But he did not venture to deny his signature to the letter of release purporting to have been given by him to McArthur in respect of this very property; and I cannot say I have the least doubt the property was bought for and accepted by His Highness. Then comes the question, do the equities of the plaintiff, which would, under the circumstances of the case, rest

upon McArthur as purchaser, follow the property when it turns out that McArthur bought only as agent, and not as principal? I think it is clear that they do. All that McArthur got, as against the Rajah plaintiff, was the property in suit subject to the plaintiff's right to redeem. He could not get more for a third person than he could get for himself. The plaintiff cannot be in a worse position, relative to the agent's undisclosed principal, than he is towards the agent. The English cases which have been cited before us relative to the liability of a principal for the fraud of his agent do not seem to me to be very closely applicable. In Wilde *v.* Gibson, 1 House of Lords Cases 605, the purchaser of land sought to set aside the contract of sale on the ground of the fraudulent concealment by the vendor of the fact that a certain *right of way* existed over the land. It turned out that the vendor herself had no knowledge of that fact, and it was doubtful, even whether the agent, who conducted the negotiation of sale on her behalf, had ever possessed such knowledge. Certainly, no fraudulent intention was involved in the concealment. The plaintiff had, moreover, made no enquiry of the agent as to title, and had completed the transaction by payment, and taking possession before he came to Court for relief. The House of Lords merely held that a contract of purchase, perfected by conveyance and possession, could not be set aside as against the vendor, except on the ground of actual fraud. It further held that the allegations of the bill would not be supported by showing fraud on the part of the agent only. There was no question before the Lords as to the substance of the subject of conveyance, or as to whether the plaintiff was entitled to compensation in respect to his incompleteness. Most of the other cases belong to a different class. Whenever a defendant is sought to be made liable in *damages* for the consequences of a misrepresentation, it must be because the occurrence of the fact, contrary to the representation, either amounts to a breach of a contract, or is referable to personal fraud in the defendant himself, and, therefore, it may well be that, in an action for damages, the principal is not responsible for the fraud of his agent, unless the agent's fraudulent acts were done within the scope of the authority imparted to him by the principal. Cornfoot *v.* Fowke, 6 M. & W. 358; Omrod *v.* Huth, 14 M. & W. 651; Udel *v.* Atherton, 7 H. & N. 187, are all instances of suits for damages, and do not bear upon the question whether a principal can, through the hand of his agent, take land free from the mortgagor's equities, when the agent, by reason of his conduct, could not have done so himself. The present case seems rather to resemble those in which notice to the agent is held to be constructive notice to the principal, so as to fix him with a trust, or a burden relative to the subject of purchase, which, without notice, he would have escaped. In Dresser *v.* Norwood (11 Ju. n. s. 851 and 17 C. B. n. s. 466) the Court of Exchequer Chamber held that, "if a purchaser's agent "buys goods on behalf of his principal "from a factor, and such agent has notice "at the time, no matter by what means, "that the goods are not the goods of "the factor, the knowledge of the agent "must be held to be the knowledge of the "principal." And the effect of that vicarious knowledge was to deprive the principal of the benefit of set-off, which ignorance of the real state of things would have enabled him to make against the factor. As the agent, had he made the bargain for himself, could not, by reason of his actual knowledge of the facts, have availed himself of such a set-off to the detriment of the real vendor, so his principal, although ignorant, could not be in a better position. Similarly, in the present case, because the fraud of the agent in effecting the transaction would, if he had been dealing on his own behalf only, have been sufficient to lift the barrier of the Act, and to let in the plaintiff's equities, therefore, his principal also is *not* entitled to claim the protection of the Act, but must take the bargain in the same condition, and with the same incidents as if he himself had committed the fraud connected with it against the plaintiff. Therefore, as I have already said, it seems to me that the Nawab Nazim, by McArthur's purchase, took the land which is now in suit, subject to the plaintiff's right to redeem.

The Nawab Nazim's ownership extended at least from April 1847 to November 1851, for it does not appear that either McArthur's conveyance to Saduck Ali in July 1848, or the *la-davee* of April 1850, was intended to have any other effect than to change the name in which the property stood; and during those four years, nothing occurred to alter the relative positions of the plaintiff and the Nawab Nazim, that is, positions of mortgagor and mortgagee respectively.

The next important question, then, is, what was the true aspect of the alleged conveyance by the Nawab Nazim to Nazeer Ali in November 1851? Nazeer Ali maintains that it was a *bond-fide* transfer to him for valuable consideration; and that, at the time it was executed, he had no notice of the plaintiff's rights or of the facts out of which they are supposed to spring. On this ground he contends that, whatever might have been the plaintiff's equities against the Nawab Nazim, he (Nazeer Ali) takes the property discharged of them, or is entitled to claim the benefit of Act I., 1845. It appears to me sufficiently clear on the evidence that the kabala of 15th November 1851 was executed either by or on behalf of the Nawab Nazim, and that Nazeer Ali got possession under it; but I am not satisfied that any consideration for it passed from Nazeer Ali or any one else to the Nawab Nazim. Nazeer Ali admits in his evidence that he did not pay money for it. He says that, at the time of the purchase, the Nawab owed him and Saduck Ali, in joint account, a balance of some six lakhs of rupees, in respect of an *emambari*, *toshakhanah*, and *gowkhana*, which they had built for him; and other expenses which they had been at on his behalf; and he states that these accounts were adjusted, signed, and filed in the Nizamut sherishta *before* the kabala was executed; and that the balance to the extent of three lakhs was taken as the *consideration* for the kabala. He afterwards added: "The dewan took the accounts to "the Nawab. I did not. I was present when "the dewan showed the accounts to the "Nawab. He read it to the Nawab in "my presence. This reading took place "before the kabala was written. I got "no receipt for these accounts from the "Nawab; they were my account-books. "Therefore, I did not give them up "to the Nawab, after the money was paid." And he explained in re-examination: "The Nawab Nazim, Aman Ali, Major "Laing, and others suggested the purchase. "I acquiesced, because I thought I could "not get my money otherwise." It is possible that this story may be to some extent a true one; but none of the evidence which ought to be readily forthcoming, if it is so, has been placed before us to corroborate it. The Nawab Nazim was not asked a single question about this alleged settlement of accounts in his presence. What he would have answered, if he had been, may perhaps be gathered from the circumstance that he refused emphatically to "admit that "there was ever a sum of five lakhs and "thirty odd thousand rupees, or any-"thing like it due by me to Nazeer Ali "Khan, either in his own right, or as claim-"ing to represent Saduck Ali Khan." Some books of account of Saduck Ali Khan, one of which was said to contain the settled account relied upon, were put in, and one Beejoy, a book-keeper of *Saduck Ali*, deposed to their authenticity; but the entry of settlement, alleged to have been made in it on the part of the Nawab, was in no way attempted to be proved. Brijo Kishore Mitter, who might have spoken to it, was not called, nor were any of the many persons who must have been present at the time of the occurrence, if it actually took place; and no attempt was made to show that the alleged liabilities of the Nawab Nazim, to either Saduck Ali or Nazeer Ali, had any real foundation. Further, Joseph Mariam, who was a witness adduced by Nazeer Ali, because he attested the execution of the kabala from the Nawab, contradicted Nazeer Ali as to the seal having been affixed in the Nawab's presence. He said it was put on by Nazeer Ali himself, when His Highness the Nawab was *not* present; and there is no doubt that Nazeer Ali at that time had the custody or control of the seal. The evidence of Nazeer Ali appears to be of very small intrinsic value; it is, as a whole, inconsistent and indefinite. I feel it impossible to say on these materials that Nazeer Ali did either on his own account or for Saduck, or for both, take over the property which is in suit, by way of accord and satisfaction of an unpaid debt, or even that the alleged debt ever existed in fact. Mr. Peterson for Nazeer Ali applied to us, as he also had done to the Court below, asking to be allowed to supplement his case by the production of further evidence on this point. The Court of first instance refused this application, and as we think rightly. We also refused the like application made to us. Nazeer Ali has had ample opportunity during the protracted proceedings in this case, for bringing into Court all the evidence which he, now by his Counsel, expresses himself desirous of procuring; and nothing can be more hazardous in this country than to allow a party to a suit, after the place of pressure has been discovered by actual trial, to bring forward fresh evidence for the purpose of meeting the exigency. In this state of things, I am of opinion that Nazeer Ali has

failed to show consideration for the conveyance of the property into his name; and consequently that he, and those for whom he holds, must be treated as standing in the position of mere volunteer takers from the Nawab Nazim. They, therefore, cannot be in a better position relative to the plaintiff than the Nawab himself, and like him cannot shield themselves from the plaintiff's right to redeem.

On this view of the facts, it becomes unnecessary to determine whether Nazeer Ali, at the time of the transfer of the property to him, had such notice of the plaintiff's rights against the Nawab as would deprive him of the protection which a Court of Equity would extend to a purchaser for value without notice in the case of a private purchase. However, I will add that, to my mind, Nazeer Ali's own witnesses clearly establish that he was, at that time and long before, fully cognizant of the plaintiff's reiterated assertions of his right to redeem against Abbott and McArthur, and lastly against the Nawab Nazim, although I do not think it is shown that he was aware of the fraud of Abbott and McArthur, which has rendered the claims of the plaintiff valid, notwithstanding the provisions of the Act of Legislature. But knowledge of these assertions is enough for the plaintiff's purpose, treating the transaction as a private alienation. If a man buys in the face of hostile claims, he runs the risk of those claims eventually turning out to be well-founded. Whether he at the time honestly thinks he has reason to disregard them or not, he cannot afterwards set himself up as an innocent purchaser without notice. He must stand or fall by the strength of his own right as against that of the opposing claimant. Nazeer Ali has, I think, in this case no advantage against the plaintiff which the Nawab Nazim did not possess, supposing the revenue-sale out of the way. But I have said that I consider the revenue-sale to be out of the way, so far as concerns the Nawab Nazim, and it seems to me that the same must be the case with regard to any taker from him, who cannot support himself upon *both* valuable consideration and want of notice.

But, even if Nazeer Ali took the property from the Nawab upon valuable consideration, either for himself or others, without notice of any of the facts which support the plaintiff's claim, it may, I think, be questioned whether this Court ought, under all the circumstances of the case, to say that he took free of the plaintiff's equities.

The view which I have already expressed as to the facts renders it unnecessary for me to discuss this point at length, and I only now allude to it, because it was urged before us with considerable force by the Counsel for the plaintiff, and I think it right to say that their arguments have made much impression on my mind. The protection which in England is given to a purchaser for valuable consideration, without notice, simply by non-interference as between the holder of the legal estate, and the person who possesses an equity without it, is peculiarly the creature of the Court of Chancery; and it is to me difficult to see how it can find practical application in a country where there is no distinction between a legal and an equitable estate. In our Mofussil Courts, there is no distinction between legal right and equitable right to property. There is but one kind of proprietary right, call it legal or equitable as you choose, which is recognized by the Court; it is an entity, not divisible into parts or aspects. Now, I apprehend that, whenever a Court is free to look at all phases of a suitor's right equally, and is not obliged to separate it into portions for the application to them of different laws respectively, then this preliminary rule comes into operation, *namely*, that one person cannot pass to another a larger right in property, as against a third person, independently of that third person, or his behaviour, than that which he himself possesses. Justice, equity, and good conscience regarding the three parties alone can hardly lead to any other principle of decision, although perhaps expediency and motives of public policy may do so. If we pursued the plaintiff's rights against Nazeer Ali by this clue, the result would depend upon the conclusion to which we should come as to the amount of the proprietary rights residing in the Nawab Nazim, as against the plaintiff at the time when he passed the property to Nazeer Ali. And, in this investigation, the most important element of consideration would be the fact that the Government has the statutable power by a sale, on non-payment of revenue, to convey to the purchaser the fullest rights of ownership in the property sold, and that this power was exercised in good faith, so far as Government is concerned, in this case. As I have already said, I do not propose now to discuss

this matter. Considering, however, that the conveyance from the plaintiff to the Debs was in the form of an ordinary English mortgage-deed, and that the mortgagee's rights alone were intended to be passed by it; and considering, further, that the plaintiff has, on the facts, succeeded in passing beyond the revenue-sale, and in fastening on the Nawab Nazim, the purchaser thereunder, by reason of the fraud of the transaction, his equity of redemption, and so put him precisely in the position of a mortgagee, I am not prepared at present to hold that Nazeer Ali, whose purchase was made after his vendor had been made a party to the suit in the Supreme Court (subject to his coming within the jurisdiction), a suit to which this is in some sense supplementary, can maintain a clear title by saying that he purchased for value from the Nawab Nazim an owner's full rights of property, without notice of a third person's equities.

Thus, on the whole, as it seems to me, in whatever light this case is viewed, Nazeer Ali, the present possessor of the property, which is sought to be redeemed, clearly holds it subject to the plaintiff's unqualified right to redeem. The judgment of the Court below is, therefore, in my opinion, right, and ought to be affirmed with costs. It does not appear whether or not the Judge has yet given any directions as to the mode in which the accounts are to be taken, and we need not consider this point now, as it has not been brought before us in appeal. But I think it may not be useless to observe that this matter will need very careful handling, for the relations between the accounting parties are not very simple; and it must be remembered that every assignee of a mortgage who takes without the consent of the mortgagor takes, of course, at his own risk, and therefore subject to the state of accounts between the mortgagor and his assignor.

Bayley, J.—The judgment of Mr. Justice Phear is so full as to the facts, and as to the conclusions to be drawn from them, that it is not necessary for me to do more than give very briefly my view of this case.

In respect to the earlier proceedings, I need only say that, when the Zillah Judge, on the 26th November 1860, dismissed plaintiff's suit, because, in his opinion, there was no power to set aside the Government sale for arrears of revenue, I held that the suit of plaintiff was *not* to set aside that sale, but to have his title declared to the equity of redemption upon the allegation that the transactions which led to and followed the Government sale, by which plaintiff was held to have lost this right, were *all in fraud*, and that, therefore, no title was passed, of which the purchasers could avail themselves, to exclude plaintiff's right of equity of redemption.

I also held that there was a sufficient *primâ-facie* case made of this allegation of plaintiff being correct; and that, as no one ought to be allowed to *take advantage of his own fraud*, even under title from a Government sale for arrears of revenue, the case ought to be remanded to try this allegation of plaintiff, and to try how far, and as to what parties, fraud vitiated the subsequent acquisitions of the property in suit, and thus how far the plaintiff's right to a declaration of his equity of redemption, as against the defendants, might still exist, notwithstanding the Government sale.

This view having been upheld by the Judicial Committee of H. M.'s Privy Council, the case has been tried in the Zillah; and the Judge having decreed plaintiff's case, and defendant having appealed, it remains for us to decide that appeal.

As to Abbott.

I think on the whole evidence, and on the facts, and for the reasons so fully set forth by Mr. Justice Phear on this point, that Abbott's dealings with the Debs were really in fraud, and thus still subject to the Rajah's equity of redemption. No fair notice was originally given to the Rajah of the dealings of Abbott with the Debs, or of the earlier subsequent transactions with McArthur. I think, too, that it is, on the whole, shown that Abbott, with means to pay the Government revenue for the instalment, for the non-payment of which the estate was sold, defaulted, and that he did so with the fraudulent design of having the chance of letting the estate go at a low price, which it did for 85,000 rupees, while he had the prospect of receiving from McArthur some large portion of the high price of *three lakhs* under the agreement between the two. Further, I am of opinion that, with the credible evidence on record that they were "great friends," and McArthur's brother was Abbott's Assistant on the spot, it is unreasonable to believe that there was not an understanding that this secret agreement should, by means of a sale brought about by this fraudulent

default, result in pecuniary benefit to both Abbott and McArthur, and this too to the exclusion of plaintiff's right of equity of redemption which they thought would be extinguished under a Government sale for arrears of revenue, and so give Abbott and McArthur a free estate under the superior title of a Collector's sale-certificate to pass on to the Nawab Nazim at a price far higher than the real one, or that which the property under any other title would be likely to realize.

As regards Abbott and McArthur together.

The agreement between Abbott and McArthur and the deposition of the latter are, I think, admissible, as evidence under the circumstances set forth by Mr. Justice Phear. That agreement is, in my view, one of a character which does not indicate *bona fides*. For the ordinary purpose of bidding at a Government sale, what necessity was there for such an agreement? If Abbott defaulted from (what he alleges was) the poverty of the resources of the property, why should McArthur, who refers to the Collector for information as to the estate in his letter of the 3rd April, and *not* to Abbott, enter into any agreement with Abbott at all?

Again, if McArthur had made up his mind to give three lakhs, why should he enter into any agreement with Abbott? Further, Abbott, if acting in good faith, either could or could not pay the revenue, and could have got off his bad bargain of the property (which it is urged in argument was his only object in default) by the simple means of his inability to pay; and his default and sale would follow accordingly, *quite irrespective* of McArthur, or any one else. McArthur's deposition also illustrates the character of the agreement.

As to McArthur.—It is hardly possible to my mind to read McArthur's dark and apparently objectless agreement, *in connection with the facts on evidence*, without a fair legal inference of fraud.

Both knew of plaintiff's mortgage with the Debs. Both, however, by a pre-arranged default by Abbott, and by the agreement, clearly covenanted and expected to benefit pecuniarily, if McArthur, through the acts of Abbott by the sale, got the estate free of the equity of redemption existing in plaintiff—an equity of which McArthur's relations with Abbott, and the position of his own brother, Campbell McArthur, as Abbott's Assistant, and the litigation in the late Supreme Court, must have made them aware.

But, irrespective of the equity-suit in the late Supreme Court, it is impossible for me to say, with reference to the instructions accompanying the transmission of the Bank notes to Midnapore for the purchase by McArthur of the property which instructions contained such unusual suggestions for secrecy, taken *in connection* with McArthur's letter to Mackenzie, Lyall, and Co., stating that the *cost-price* of the estate was 85,000 rupees, and his letter to Dewan Setanath that the cost-price was 3,00,000 rupees, that McArthur could have acted otherwise than in fraud. And further this fraud, while it directly cost the Nawab Nazim Rs. 2,15,000 more than he should have had to pay (McArthur being clearly by his letter of the 3rd April to the Collector and by other evidence the Nawab Nazim's agent), did not at all less effectually (though less directly) fraudulently get rid of the plaintiff's equity of redemption, by the title so obtained through a Collector's sale. Lastly, but not least, is the clear misappropriation of Rs. 2,15,000 by Abbott, less a large commission to McArthur and Mackenzie, Lyall, and Co.

I think, then, that Abbott and McArthur's acquisition of the property were both tainted by fraud, as well in regard to the plaintiff as to the Nawab Nazim, and that they could not, under the system of equity, justice, and good conscience of our Courts, avail themselves of that fraud to acquire the usually superior title which is passed by a Government sale for arrears of revenue, when not brought about by such fraud.

As regards the Nawab Nazim.

The deposition of His Highness is intended to be to the effect that he knows nothing of these purchases. But the whole tenor of it is so unsatisfactory in its characteristic of general want of memory of all that it is important and likely that His Highness should have remembered, that I do not trust it *for that reason*. But, irrespective of that reason, it is difficult to believe that the Agents to the Governor-General would never speak to His Highness, on and after his majority, as to his large landed properties, supposing even the evidence on the records is *not legal* evidence to show that the Governor-General's Secretary was in correspondence with the Governor-General's Agents, or they with other public officers, on the subject of His Highness's landed property.

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Or, if the Governor-General's Agent had acted so, it is not likely that the Dewan Seetanath Bose, in general charge of the Nizamut affairs, should not speak to His Highness of these properties. Further, Saduck Ali as superintendent of the *kitchen*, and Nazeer Ali as superintendent of the *private purse*, would assuredly have spoken to him on the subject, for these are both of them, in oriental life, situations of confidence, if not of intimacy. Further, Michael's and Mariam's depositions show that Saduck Ali and Nazeer Ali were confidential servants, and the fact of these two accompanying His Highness to Alipore on his visit to the Governor-General also indicates it.

Lastly, it is not likely that *each and all of those persons* should have kept His Highness in such ignorance of the Midnapore and Sunderbun estates being his, as to justify His Highness deposing on the 14th July 1860: "I was not aware that "the Midnapore estate was held benamee by "Saduck Ali for *me*. *I am not even aware* "*now*. They did not (khubber) report to "me what they did?" Moreover, if His Highness cannot (as he says) now recollect anything on the subject, it will be legally correct to prefer the direct evidence of those who can.

That the Nawab Nazim was not aware of the fraud that Abbott and McArthur practised as to himself, *viz.*, that the thing which cost really 85,000 rupees, and was bought at that price for His Highness by his agent McArthur, should be charged to His Highness as costing 3,00,000 rupees is probable, for it was not intended that *that* fraud should go beyond the concoctors of it. But I hold the Nawab Nazim was aware that there was in plaintiff an equity of redemption. This is shown from the proceedings in the Deb's foreclosure-suit to which he was a party. Again, if the Nawab Nazim had never given the release, he could and ought clearly to have denied his signature thereto. He did not do so. His Highness must then, I think, be bound by McArthur's acts as the acts of his agent; and the property is consequently, in my opinion, affected by fraud, and still therefore subject, notwithstanding the Collector's sale, to the plaintiff's equity of redemption.

As regards Saduck Ali.

As to this individual, I quite agree with Mr. Justice Phear that he is an admitted *benamee* for the Nawab Nazim, and since his death his individual case requires no further consideration separately from that of Nazeer Ali.

As regards Nazeer Ali.

Nazeer Ali's real case is that he knew nothing of plaintiff's equities of redemption, and that he is an innocent purchaser, without notice, for valuable consideration, the consideration not being cash, but payment of a debt due by the Nawab Nazim to Saduck Ali, whom Nazeer Ali represents either as executor or partner, for he puts forth both claims. Now Mariam, a servant of 30 years' standing in the Nizamut, deposed that Nazeer Ali was one of the three (Saduck and Aman being the other two) who were the *chief managers* of the affairs of the Nawab Nazim. Looking to Michael's evidence as to Nazeer Ali's relation to the Nawab Nazim's affairs, and to Mariam's evidence as to Nazeer Ali's being "concerned in the said private arrangement"; and, having made it, it is not likely that Nazeer Ali should have been ignorant of plaintiff's rights of equity of redemption.

But, *irrespective of this*, what Nazeer Ali *really has to show* is that he gave *valuable consideration*. *No* accounts duly kept and proved are adduced to show this. The money was said to be due for preparing an *imambarah*, *toshakhanah*, *and gowkhanah* (*i. e.*, mosque, treasury, and cattle-stable) and for *sundries*. While, moreover, on the one hand, petty details of trivial entries of a rupee are entered, no details of the works which form the *main items of the basis of the valuable consideration* under which Nazeer Ali seeks to be free from the encumbrance of the plaintiff's equity of redemption, are shown us. Not one, likewise, of the many persons who must have been employed, and must have received some of the money which is said to have been expended by Saduck Ali on behalf of the Nazim for these matters, is called or examined; and, while Mariam's evidence and the Nawab's (however unsatisfactory the latter may be) go to show no such debt of the Nazim to Saduck Ali, we have positively *no reliable documentary evidence* on the other side, *nor anything* but these *two unproved accounts* which were placed before us. Next, taking Bejoy's evidence as the best for Nazeer Ali's case, we observe that the books are shown to have been kept in the most loose and unreliable manner.

There is certainly Major Laing's letter of the 29th October to the Collector of Midnapore, stating that the Nawab Nazim had written to Major Laing that he had sold the Midnapore estate to Nazeer Ali, but the letter is not produced, nor is there any deposition of Major Laing or other evidence than the copy of the letter.

It may be true that the Nawab Nazim did so sell, as for valuable consideration to Nazeer Ali, but I *cannot* consider that, in the way and from the extent evidence is adduced before us on *this most important point*, after full time to adduce all that was available, there is any *legal* proof of such sale, as one for *valuable consideration without notice.*

Concurring generally in the view expressed by Mr. Justice Phear of the facts of the case, and in the opinion that the purchases of Abbott and McArthur and the Nawab Nazim, and Nazeer Ali, are subject to the plaintiff's right of equity of redemption, I would affirm the decision of the Zillah Judge of Midnapore, now under appeal to us, and dismiss both appeals (423 and 55) with all costs.

The 5th September 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Compromise after conviction—Illegal pressure.

Case No. 708 of 1867.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 10th December 1866, reversing the decision passed by the Sudder Ameen of that District, dated the 29th May 1865.

Sheikh Nubbee Buksh and others (Defendants), *Appellants,*

versus

Mussamut Bebee Hingon and others (Plaintiffs), *Respondents.*

Messrs. R. E. Twidale and *C. Gregory* for Appellants.

Baboo Kishen Succa Mookerjee for Respondents.

Certain parties convicted of a criminal offence, in order to avoid apprehension entered into a compromise with complainant who agreed to accept a sum of money as costs and as compensation for the disgrace he had suffered. They accordingly sold him some property in lieu of cash. HELD that the sale was not made under illegal pressure.

Though the offence was one in which a compromise could not be legally admitted, yet, as the Magistrate did admit it, and the parties acted in good faith, the position of the latter was held not to have been affected.

Loch, J.—ROHEEM BUKSH brought a charge against the plaintiff's son Pygumbur, his father, brother, and sisters, for assaulting his (Roheem Buksh's) mother, and forcibly entering her house. The Deputy Magistrate sentenced Pygumber to a year's imprisonment, and issued warrants for the apprehension of the other accused parties. To avoid the disgrace of the females of the family being brought before the Magistrate, offers of compromise were made to Roheem Buksh. He agreed to compromise on the payment of Rupees 600, and the defendant, being unable to raise the money, caused the sale of the property now in suit to be made by the plaintiffs to Roheem Buksh. The compromise was admitted, and the sale was duly registered, and the name of Roheem Buksh substituted in the Collector's books for that of the plaintiffs in this suit, and possession was given. Plaintiffs now bring this action to set aside the sale on the ground that they were not free agents at the time, but made the sale under the pressure put upon them by the defendant Roheem Buksh.

From what can be gathered from the papers with the record, it appears that the criminal offence with which Roheem Buksh charged the defendants, who are the sons and daughters and father of or otherwise related to the plaintiffs in this case, was of a somewhat aggravated nature judging from the punishment inflicted on Pygumbur Buksh. The charge appears to have been proven both against the males and females charged; and it can be understood that, when warrants were issued for their apprehension, how anxious the defendant would be to avoid the disgrace of respectable females being dragged into Court; and how ready to come to terms in order to prevent it. Roheem Buksh

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was asked to settle. He agreed to do so for Rupees 600, which he considered sufficient to cover the costs of the criminal proceedings and compensation for the disgrace inflicted upon him, by the ill-treatment his mother had received at the hands of the defendant, a sum which he might have obtained as damages, had he brought a civil action after the successful results of the criminal proceedings. The defendant agreed to the terms, and the plaintiffs sold the property to Roheem Buksh in lieu of cash. It does not appear that Roheem Buksh used any pressure. The plaintiffs were not deprived of their friends or advisers, for the husband and son of one of them were still at large. The deed was executed without apparent demur, mutation of names and possession followed; and, after possession has been held for two years, the present suit is brought on the ground that the sale was made under pressure. Roheem Buksh might have allowed the law to take its course, and the whole of the parties charged might have been committed to prison. He might also have brought a civil action, and realized damages to a larger amount than the sum he agreed to take; and if, under such circumstances, the defendants in that criminal case persuaded their relatives, the plaintiffs in the present case, to transfer the property in suit to Roheem Buksh as the only means by which they could make up the sum they had agreed to pay to him for abstaining from further proceedings in the Criminal Court, we do not think that it can be said that Roheem Buksh was chargeable with causing an illegal pressure to obtain the sale of their property. He had perfect right to demand compensation for the insults and injury offered to him by the defendants. He agreed to take Rupees 600 as costs and compensation, for such in fact it was, though the sum is called costs in the deed. The defendant agreed to the terms; and, when they could not raise the money, and offered this property in lieu, he accepted it, and no doubt the plaintiffs were at the time willing to part with it in order to save the females of the family from disgrace. It may be observed that the criminal offence was one in which a compromise could not be legally admitted. As, however, the Deputy Magistrate did admit it, and the parties appeared to have been acting in good faith when they made it, we do not think that the error of the Magistrate can affect the position of the parties. We reverse the order of the Lower Appellate Court with costs.

The 5th September 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Pre-emption (on the score of vicinage)—Separation of estate.

Cases Nos. 943 and 944 of 1867.

Special Appeals from a decision passed by the Judge of Patna, dated the 9th April 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 26th September 1866.

Chowdhry Joogul Kishore Singh and others (Defendants), *Appellants,*

versus

Poocha Singh and others (Plaintiffs), *Respondents.*

Messrs. R. T. Allan and *R. E. Twidale* and *Baboo Boykuntnath Paul* for Appellants.

Baboos Unnoda Pershad Banerjee, Debendronarain Bose, Romesh Chunder Mitter, and *Oopendur Chunder Bose* for Respondents.

The Mahomedan Law of Pre-emption on the score of vicinage applies only to houses or small plots of land, and not to large estates, or to a claim based on partnership when it is in proof that a separation of the estate has been effected.

Seton-Karr, J.—THE question involved in these special appeals is one of Mahomedan Law.

There was a certain estate which, at a period before this litigation commenced, was regularly divided by butwarah into a share of 8 annas and 9 gundahs, and one of 7 annas and 11 gundahs.

Separate agreements, it is admitted, were drawn up for the separated shares; different numbers were entered on the Collectorate register, and the shares became practically two separate estates.

The estate formed out of the 7 annas 11 gundahs share contained shares of half an anna, of one anna, and of six annas one gundah.

The plaintiff is the owner of a fractional and minute share of some cowries in the other estate, and he has brought his suit

to recover the half-anna share in the estate made out of 7 annas 11 gundahs on the ground, both of vicinage and partnership.

The defendants, admitting that the plaintiffs are sharers, denied that any right could accrue to them on the score of vicinage.

The first Court, relying on a decision reported at page 261 of the Weekly Reporter, Volume II., March 27th, held that no claim on the score of vicinage could be sustained, and that the plaintiffs could not be termed partners in the strict acceptation of the term.

The Judge held that the decision relied on laid down no general rule, and that, before that case, no limitation of the right of pre-emption was known. The Judge, therefore, adhering to what he terms "the custom of the Court," remanded the case for trial on the remaining issues.

In appeal, Mr. Twidale for the defendants, appellants, urges that claims under the Mahomedan Law on the score of vicinage are confined to mansions, houses, and small plots of ground, and that the law never contemplated such a claim as applicable to estates or shares in estates.

The following decisions have been quoted in the course of argument:—

Weekly Reporter,	Volume II.,	page 261
Ditto	Volume V.,	page 170
Ditto	Volume VI.,	page 250
Ditto	Volume VIII.,	page 2

A decision of the Agra Court has also been quoted, 1856, page 145. And reference has been made to Baillie's Mahomedan Law. *See* Edition of 1865, Book VII., Chapters I. and II.

The case reported at Volume VI. throws no light on the case before us. That in Volume V. merely rules that a partner in the thing sold, which was apparently an estate, would have a right of pre-emption under the Mahomedan Law. Macnaghten, Chapter IV., page 205, and Hedaya, Volume III., Chapter I., page 562.

In the case reported in Volume VIII. nothing is decided; and the Judges only say that they are not prepared to lay down broadly the proposition that in no possible case, as between owners of adjacent plots of land, can pre-emption by right of vicinage not exist.

The case really bearing on the point is that reported at page 261 of Volume II. It is there held that the principle of vicinage does not apply to large estates which are not, in fact, such that any real vicinage of the proprietors results.

The case decided by the Agra Sudder Court, and alluded to in the above decision, takes exactly the same view, and the same ruling has been lately followed in a case recently decided by Justices Bayley and Phear, No. 963, on the 18th of August 1867, not yet printed.

No case of a contrary tendency has been quoted, and the passages cited from Baillie's Mahomedan Law certainly seem to me to favor the contention that pre-emption on the score of vicinage was only intended to apply to houses or to small plots of lands, which, for obvious purposes, if put up to sale, it might be convenient for the next neighbour to purchase.

In the case before us, the claim on the score of partnership, as it seems to me, must at once fall to the ground. The estate has been regularly divided, and separate numbers have been entered on the Collectorate register for what are now two estates.

The plaintiff, we are told, sues for one-half anna share, which is said to amount to nearly two thousand beegahs.

The plaintiff contends, in reply to Mr. Twidale, that, even if vicinage be restricted to small plots, some portions of the share are mixed up with other shares and portions of shares; and that, if, on investigation, any portions were found to adjoin to the share which he holds in the larger estate, the claim of vicinage would apply.

The plaintiff's claim, as brought, entered into no details of this kind. It was simply for the entire half-anna share, and for nothing less.

It is unnecessary to remand this case, as we are pressed to do if we disagree with the Judge's ruling on the point of law. Claim on the score of partnership is out of the question, and I think the Judge, who quotes no ruling to the contrary, ought to have followed the ruling of the Divisional Bench reported in Volume II., which has not been objected to, and which has just been adopted by another Bench in Regular Appeal from Sylhet, No. 367* of 1866, 8th of August 1867, Bayley and Phear, JJ. I concur in that ruling, and cannot think

* See *ante*, p. 309.

that the Mahomedan Law of Pre-emption, so special in its character, was even intended to apply to cases like the present.

The special appeals are decreed with costs.

Macpherson, J.—I also think that there is in this case no right of pre-emption on the ground of vicinage (II. Weekly Reporter 261; Regular Appeal 367 of 1866, decided August 8th, 1867; Baillie's Mahomedan Law, page 474, and note).

The plaintiffs based their right on vicinage and partnership, claiming the whole estate. It appears to me that they have failed upon both grounds, and that their suit ought to be dismissed. The case now attempted to be relied on, that certain parcels belonging to the estate are subject to the right of pre-emption as being mixed up in or adjoining the plaintiffs' property, is not the case originally made; and I see no reason why the suit should be remanded in order to enable them to raise it now.

I would decide in favor of the appellants, and dismiss the plaintiff's suit with costs in all the Courts.

The 7th September 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Attachment—Sale (in execution of decree)—Omissions from sale-proclamation—Sale of Government Promissory notes—Distribution of sale-proceeds—Sections 201, 248, 249, and 270, Act VIII. of 1859.

Case No. 40 of 1867.

Regular Appeal from a decision passed by Mr. W. DaCosta, Principal Sudder Ameen of Purneah, dated the 17th September 1866.

Baboo Luchmeeput and another (Plaintiffs), *Appellants,*

versus

Baboo Lekraj Roy (Defendant), *Respondent.*

Messrs. R. V. Doyne, R. T. Allan, and *C. Gregory,* and *Baboo Sreenath Doss* for Appellants.

The Advocate-General and *Mr. R. E. Twidale* for Respondent.

The attachment of property by a judgment-creditor ceases on his execution-case being struck off the file, and he is remitted to his former position of a simple judgment-creditor, and must begin *de novo*, and re-attach the property before a sale at his instance can take place.

No sale in execution of a decree can take place, either of moveable or immoveable property, under the provisions of Act VIII. of 1859, without previous attachment, and a sale without prior attachment is illegal. The words "attachment and sale" in Section 201 must be taken together, and not distributively.

The omission in a sale-proclamation to mention particulars as to the numbers, value, &c., of Government Promissory notes, under attachment for sale, is not such an irregularity as will vitiate the sale, though the Lower Court would have exercised a sound discretion, under Section 249 of the Code, if it had called for such particulars.

The sale of such notes through a broker is permissive under Section 248, and not obligatory.

The production of the notes in Court was not essential as they were in the custody of the Collector, Section 238 applying to cases in which property is in the possession or power of the judgment-debtor.

Under Section 270 of the Code, the judgment-creditor, whose attachment subsists at the time of sale, is entitled, according to priority of date of attachment, to be satisfied first; and where the attachment of *A* under Clause 1, Section 5, Regulation II. of 1866, of the Government Promissory notes subsisted up to the date of sale, and the attachment of *B*, though prior in date to that of *A*, subsequently fell to by his case being struck off the file, it was held that *A* was entitled to the *whole* of the sale-proceeds of the notes.

Kemp, J.—This was a suit to recover damages assessed at Rupees 49,570 under the following circumstances:—

Certain Government Promissory notes belonging to the judgment-debtor Rajah Rajendur Narain Roy were under attachment. The plaintiffs aver that they were the attaching creditors, and that it was through their sole exertions, by removing by suit a fictitious lien upon the said notes set up by the daughter of the judgment-debtor, that the notes remained available in part-satisfaction of the debts of the said Rajah.

It is further alleged by the plaintiff that the defendant Lekraj Roy had no attachment subsisting, and therefore that he had no power to bring these notes to sale in satisfaction of his decree against the said Rajah; that the sale of the notes was brought about by the defendant in an illegal and irregular way; and that the defendant became the purchaser of the same at a very inadequate consideration; that, in distributing the sale-proceeds, which amounted to Rupees 36,500 the Principal Sudder Ameen, by order of the 4th June 1866, gave the plaintiff only Rupees 25,430; that the plaintiff has sustained serious loss by these illegal proceedings, and therefore institutes this suit to recover damages.

The following detail of claim is appended to the plaint :—

	Rupees.
A moiety of 70 pieces of promissory notes belonging to Rajah Rajendur Narain Roy, *pro-formâ* defendant, worth Rupees 57,250, including interest	75,000
Amount received by plaintiffs under the order of the 4th June 1866	25,430
Balance claimed as damages ...	49,570

With reference to the irregularities in conducting the sale, the plaintiffs aver that they consist of the following instances:—

1st.—That there was no attachment by defendant subsisting at the time of the sale.

2nd.—That the numbers and values of the notes, and the interest due thereon, ought to have been stated in the sale-proclamation for the information of purchasers.

3rd.—That the notes ought to have been sold through the agency of a broker.

4th.—That the sale of the notes, which are moveable property, is not valid, as they were not produced in Court.

The defendant, Lekraj Roy, answers briefly to this effect, that the plaintiff has not specifically stated what rule of law has been broken in the sale of the promissory notes in satisfaction of his, the defendant's, decree; that the plaintiff had acquired no lien on the notes by attachment; that he was simply in the same position as the defendant, *viz.*, a judgment-creditor; that the claim is barred under Clause 2, Section 1, Act XIV. of 1859; that the sale of the notes in satisfaction of the defendant's decree was quite regular, an attachment by the defendant subsisting at the time of the sale; that the attachment of the notes prior to decree and under the provisions of Regulation II. of 1806, taken out by the plaintiff's father in suit No. 22 of 1858, fell in owing to the dismissal of the suit, and that no further attachment prior to sale was taken out by the plaintiff; that the notes were sold by public auction; that there were several bidders, and amongst them plaintiff's agents; that the defendant was declared to be the purchaser; that, the sale being conducted in the authorized mode, the plaintiff cannot take objection to the price obtained, nor estimate the damage at a supposed valuation of his own; that the apportioning order of the 4th June 1866 was based upon a mistaken view of plaintiff's position; that the payment of even Rupees 25,430 to him was unjust; and that the defendant reserves to himself the right to sue the plaintiff for the recovery of the same.

The Principal Sudder Ameen, Mr. W. DaCosta, laid down the following issues for trial.

1st.—Is the suit barred by limitation, not having been instituted within one year from date of sale?

2nd.—Can the plaintiffs maintain an action for damages, they not having been the owners of the notes, supposing that the notes were irregularly sold as stated by the plaintiffs; and was there any irregularity in the sale or not?

3rd.—Did the plaintiffs acquire any right to the notes by their attachment made by their ancestor pending his suit against the debtor and Pitumburree Dayee, and was that a preferable right to that acquired by Lekraj Roy by the attachment made by him in execution of his decrees, and did it debar the defendant from causing the sale of the notes in realization of his judgment-debts?

4th.—Did the fact that plaintiffs' ancestor and the plaintiffs went through the trouble and expense of a litigation to prove that the share in the notes sold belonged to the judgment-debtor invest the plaintiffs with a preferable right to cause their sale?

5th.—Whether the attachment of the notes by Lekraj Roy in execution of his decree was subsisting when the notes were sold; if it was not, was the attachment made by the plaintiff's ancestor subsisting? If this attachment too was not subsisting, can the plaintiffs object to the sale held in the case of Lekraj Roy?

6th.—Are damages recoverable, and are the plaintiffs right in assuming Rupees 75,000 as the sum that would have been obtained as proceeds by sale of the notes, but for the irregularities stated by them. If not right, what is the sum accruing as damages, and should both the plaintiffs, or Luchmeeput alone, recover them?

These issues have been copied *verbatim* from the Principal Sudder Ameen's decision.

The Principal Sudder Ameen gives a detailed history of these notes. We may briefly state that it appears that the judgment-debtor, Rajah Rajendur Narain, and his brother, Mohendur Narain Roy, were wards of the Courts, and that the notes

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were the vested profits of their estates in the hands of the Collector.

The money increased at compound interest, and amounted at last to the sum of 1,14,500 rupees, of which Rajendur Narain was entitled to a moiety, or Rupees 57,250.

Mohendur Narain's moiety has been purchased by one of the plaintiffs, *viz.*, Dhunput Singh. The moiety of Rajendur Narain remained in the Collector's hands on his, Rajendur Narain's, reaching majority, as he appears to have become considerably involved.

The Principal Sudder Ameen, on the issue in bar, observes that, as the claim is for damages arising by the sale of personal property, for which no express provision is made in the limitation-law, and is not for damages to personal property, the limitation under Clause 2, Section 1, is not applicable, and that of six years under Clause 14, Section 1, governs the case.

The defendants do not appeal against this finding.

On the second issue, the Principal Sudder Ameen observes that, by Section 252 of Act VIII. of 1859, the right to sue for damages by reason of any irregularities in the sale which, it is expressly declared, shall not vitiate the sale of moveable property, is given generally to any person who may sustain injury by such irregularity. If, then, the plaintiffs have, by the attachment taken out by their father under Regulation II. of 1806, suffered injury, though they may not have been the owners of the notes, they have a right to sue for damages by proving irregularities.

The Principal Sudder Ameen proceeds to remark that he is willing to admit that it was necessary that the defendant should have re-attached the notes, for, with the orders striking off his case in execution from the file, the previous attachment necessarily fell in and ceased to subsist; that it was not necessary to bring the notes into Court as the Collector was the Court's custodian of them; that the notes had been attached under the principle recognized in Section 237 of Act VIII. of 1859 while in the custody of the Collector as trustee; and that, therefore, it was sufficient to direct the Collector to hold them subject to the further orders of the Court.

With reference to the omissions to specify the numbers and values of each note, whether in Sicca or Company's rupees; and the amount of interest and dates on which it fell due—omissions which, it is alleged, led to a sale at a depreciated value—the Principal Sudder Ameen observes, first, that these omissions were favorable to the plaintiffs, and he asks, "Why did they not purchase?" That, at the time of sale, it was well known that the judgment-debtor's share, *i. e.*, one-half of 70 Government promissory notes, was to be sold, and that the amount which that share represented was Rupees 57,250; that, notwithstanding the plaintiffs possessed this information, they permitted the defendant to purchase the notes for Rupees 36,000, and this, too, although it is admitted that Luchmeeput's gomashtah and Dhunput's treasurer were present at the sale, and bid against the defendant obviously, says the Principal Sudder Ameen, on behalf of their employers.

The Principal Sudder Ameen proceeds to observe that no rule of law has been broken by the omission in the sale-notification of the points under exception, for Section 249 of Act VIII. of 1859 prescribes that, in all cases of intended sale by public auction of moveable property in execution of a decree, "a proclamation of the intended sale specifying the time and place of sale, the property to be sold, the amount for the recovery of which the sale is ordered, together with any other particulars that the Court may think necessary, shall be made in the current language of the district."

The Principal Sudder Ameen on this head of the case observes that these provisions are entirely permissive, and that it is within the discretion of the Court to particularize any other detail than the particulars expressly provided for by the words of the law, together with other particulars that the Court may think necessary; that the Court did not deem the notification of these particulars necessary, and that, therefore, there had been no irregularity in the sale.

A decision of this Court, Weekly Reporter, Volume II., page 60, is quoted in support of this argument.

The Principal Sudder Ameen then proceeds to consider the 3rd, 5th, and 6th issues. He observes that the attachment of Pertap Sing, the father of the plaintiffs, under the provisions of Regulation II. of 1806 was good only to the extent of Rupees 39,876-13-5¼; that this attachment was never withdrawn, and had, therefore, efficacy up to the time of sale. With reference to the

argument of the plaintiffs' pleader, that on the attachment of Lekraj Roy falling in his clients were entitled to consider that their attachment under Regulation II. of 1806 extended over the whole of the notes in the Collector's custody, the Principal Sudder Ameen remarks that it was necessary, when Lekraj Roy's attachment fell in, for the plaintiffs to have applied to attach the notes covered by Lekraj Roy's attachment in addition to those already under attachment by the plaintiffs. For these reasons, the Principal Sudder Ameen was of opinion that the plaintiffs had preferential right as against a subsequent attaching creditor, but that this right extended only in proportion to the amount attached, *viz.*, Rupees 39,876-13-5½.

On the fourth issue, the Principal Sudder Ameen was of opinion that the plaintiffs' having taken trouble and expense in litigation with the view of proving that the notes belonged to the judgment-debtor would not give them any preferential right, as, after winning the case, the plaintiffs took no steps in execution to cause sale.

The Principal Sudder Ameen concludes his judgment, which is a very lengthy one, but the main points and arguments of which we have given, by stating that no damage of any kind has arisen to the plaintiffs except in their own flighty imagination. The suit was, therefore, dismissed with costs and interest.

In appeal, the plaintiffs have been heard through Mr. Doyne and Mr. Allan. The defendants, who prefer a cross-appeal, have been heard through the Advocate-General.

The cross-appeal is to this effect: "That "the plaintiffs can bring no suit for damages "against the defendant as purchaser in "execution, or an execution-creditor, sup- "posing that the sale was irregular as "stated in the plaint."

The points for consideration in this appeal are—

1st.—Have the plaintiffs sustained any injury by reason of any irregularities in the sale of the Government promissory notes; and, if so, are they entitled to recover damages, and to what extent?

2nd.—Whether the distribution of the sale-proceeds was a proper one with reference to Section 270, Act VIII. of 1859?

On the first point, the property sold was moveable property consisting of 70 Government promissory notes. These notes were sold in March 1865 by the Principal Sudder Ameen of Purneah, and were purchased by the defendant Lekraj Roy for Rupees 36,500. The Section of the Code of Civil Procedure, which refers to sales of moveable property, is Section 252. That Section runs thus: "No irregularity in "the sale of moveable property under an "execution shall vitiate the sale, but any "person who may sustain an injury by reason "of such irregularity may recover damages "by a suit in Court."

The sale at the instance of Lekraj Roy took place when no attachment by that party was subsisting. The attachment previously taken out by Lekraj Roy had ceased on his execution-case being struck off the file, and he was remitted to his former position of a simple judgment-creditor, and had to begin *de novo*, and to re-attach the properties before a sale at his instance could take place.

The learned Advocate-General has contended, *first*, that the striking off of a case in execution does not necessarily cause the attachment previously taken out to become null and void; but that, on the case being restored to the file, the case is revived with all its incidents, including the attachment, and without fresh process. *Second*, that a sale without previous attachment in execution of a decree is not illegal, although attachment is of importance to the judgment-debtor when the sale-proceeds come to be distributed between rival judgment-creditors. The learned Counsel has not been able to show any authority in support of his first position. On the other hand, there are many decisions which rule that, on a case in execution being struck off the file, the attachment falls in. We quote some of these decisions in the margin. We may also on this point observe that the Principal Sudder Ameen has found that, when the sale took place at the instance of the defendant Lekraj Roy, the attachment which had been previously taken out by that party no longer subsisted, and against that clear finding of fact the defendant has preferred no cross-appeal.

January 24th, 1866, Kemp and L. Jackson, JJ., Weekly Reporter, Volume V., page 4. Weekly Reporter, Volume VIII., pages 49-51.

On the second position taken up by the learned Advocate-General, we entertain no doubt that no sale in execution of a decree can take place, either of moveable or immoveable property, under the provisions of Act VIII. of 1859 without previous attach-

ment, and that a sale without prior attachment is irregular.

Chapter 4, Act VIII. of 1859, treats of execution of decrees.

Section 201 enacts that, if the decree be for money, it *shall* be enforced by the imprisonment of the party against whom the decree is made, or by the attachment and sale of his property, or by both, if necessary. Section 205 points out what properties are liable to attachment and sale, and, amongst the properties mentioned, we find Government Securities, and it is this description of property which is the subject of the present suit.

Again, by Section 212, the application for the execution of the decree must be in writing, and the mode in which the assistance of the Court is required, whether by arrest and imprisonment of the judgment-debtor or attachment of his property, must be stated. This information is obviously necessary to enable the Court to adopt the mode of execution in each case to the nature of the particular relief sought to be enforced by the decree-holder.

In Section 201, the words "attachment and sale" must surely be taken together, and not distributively; and it is difficult to understand how moveable property, which has not been attached, and consequently cannot be said to be "in custodia legis," can be sold. *See* also Section 250 of Act VIII. of 1859, which treats of the process of attachment prior to sale as a usual process.

The sale, therefore, at the instance of the defendant Lekraj Roy, without previously taking out attachment, was, in our opinion, clearly irregular, and, as the defendant put the Court in motion, he is justly liable for any damages on account of any injury which the plaintiffs or any other person may have sustained by such irregularity, although such irregularity was the act of the Court. This brings us to the all-important question in this suit, *viz.*, whether the plaintiffs have sustained any substantial injury by the irregularity in the sale within the meaning of Section 252 of Act VIII. of 1859.

What are the irregularities which the plaintiffs set forth, and by which they allege they have sustained injury? They are as follows: In the plaint, the irregularities are not set forth. It is stated that they will be given at the time of the "first hearing of the case." It is, however, stated in a general way that the defendant caused the sale in a very irregular manner, and that Government promissory notes, the fair price of which was Rupees 75,000, were sold for the inadequate consideration of Rupees 36,500, and purchased by the defendant.

In the written statement, the irregularities are stated to be—

1st.—That it would have been proper to mention, in the sale proclamation, the numbers of all the notes and their respective values, the interest due on each note, with the amount of interest due, and how many of the notes were for sicca rupees, and how many for Company's rupees.

2nd.—That it would have been proper under the law to sell the said notes at the market-rate through a broker.

3rd.—That the notes ought to have been produced in Court.

Under Section 249 of the Code of Civil Procedure, in all cases of intended sale by public auction, whether of moveable or immoveable property in execution of a decree, any particulars which the Court may think necessary ought to be specified in the sale-proclamation. In this case, no particulars were given, and we think that the Court would have exercised a wise discretion, if all particulars, such as the numbers, the value, the year of the loan, the amount of interest due, and the rate of interest, &c., had been given; but we cannot say that the omission of these particulars, which it is in the discretion of the Court to give or to withhold, caused such an injury to the plaintiffs as will enable them to sustain an action under Section 252 of Act VIII. of 1859. A decision reported at page 60, Weekly Reporter, Volume II., Civil Rulings, supports this view. In this particular case, the plaintiffs cannot possibly say that they have been substantially injured by the omission of the above particulars, for they were the purchasers of the other moiety of the Government promissory notes which were the property of the other ward of the Court, the brother of the judgment-debtor. They were, therefore, in possession of all the information which they could reasonably require, and knew perfectly well what was to be sold and the probable market-value of the property.

It would have, perhaps, been better if the Principal Sudder Ameen, instead of directing the sale of the property which consisted of negotiable securities, had authorized their sale through a broker at the market-

rate of the day. It was in his competence to do so, Section 238, Act VIII. of 1859; but such a proceeding was not obligatory on him. It may be questionable whether purchasers at a distance from the Zillah Court would have been willing to buy the undivided moiety of the judgment-debtor in Government promissory notes. It seems to us probable that a broker would meet with some difficulty in disposing of such securities. Be this, however, as it may, we cannot say that the Lower Court could not exercise its discretion, and consequently the plaintiffs have sustained no substantial injury under this head.

As to the production of the notes in Court, Section 238 enacts that, "where the property "shall consist of a negotiable instrument, "the attachment shall be made by actual "seizure, and the instrument shall be brought "into Court by the Nazir, or other officer;" that is to say, if the property so to be seized and brought into Court is in the possession or power of the judgment-debtor—(*see* Section 233 of the Code). The notes were in the custody of the Collector. Intending purchasers were not prevented from inspecting these notes, and obtaining any information as to their value which they might require. It was not in our opinion essential that they should be brought into the Court of the officer conducting the sale; they were to all intents and purposes in "custodia legis."

For these reasons we are of opinion that the plaintiffs cannot recover any damages from the defendant under the provisions of Section 252 of Act VIII. of 1859. No fraud is imputed to the defendant. The sale was a public one brought about by the act of the Court, though irregularly. There were other bidders, and there is nothing on the record or in the proceedings to lead to a conclusion that purchasers were kept back, or that they would have bid more had the particulars, the absence of which the plaintiffs consider to be sufficient to have caused them an injury, been supplied.

We now proceed to consider the second question, *viz.*, whether the distribution of the sale-proceeds was a proper one, with reference to Section 270 of Act VIII. of 1859. That Section runs thus: "Whenever property is sold in execution of a "decree, the person on whose application "such property was attached *shall* be entitled to be *first* paid out of the proceeds "thereof, notwithstanding a subsequent "attachment of the same property by "another party in execution of a prior "decree."

It is clear that, under this Section, the judgment-creditor whose attachment subsists at the time of sale is entitled, according to priority of date of attachment, to be satisfied first. In this case, the plaintiff's decree against Rajah Rajendur Narain Roy, the judgment-debtor, was for a very large sum, upwards of two lacs of rupees. The decree of the defendant against the same judgment-debtor was for the comparatively small sum of Rupees 17,352 omitting fractions. The sale-proceeds were Rupees 36,500. This sum the Principal Sudder Ameen divides thus: to the plaintiffs, he gives Rupees 25,430; to the defendant, Rupees 11,070.

By this distribution of the sale-proceeds, the plaintiffs, whose attachment subsisted at the time of sale, get, comparatively speaking, nothing; the defendant, who had no attachment subsisting, gets 11,070 of the sale-proceeds in liquidation of a decree for only Rupees 17,352; he also gets the whole of the Government promissory notes. Now, these notes on a rough calculation are worth at least 75,000 rupees. The value of the notes was 57,250; deducting say 10 per cent. discount, at which rate 4 per cent. paper was selling at that time, the value was 51,525. The interest at 4 per cent. was accumulating from 1858, the year in which they were attached by the plaintiffs, under Regulation II. of 1806, in the Collector's hands. This interest would not be less than 23,000 odd, so that the defendant purchases notes worth 75,000 rupees; he gets his decree of Rupees 17,352 paid in full. This leaves 57,648 rupees, of which he has to pay, according to the distribution-order, Rupees 25,430 to the plaintiffs, leaving a clear profit to him of Rupees 32,218. This estimate, we desire to state, is a rough one, and may not be very accurate. We use it merely in illustration of the respective positions of the two judgment-creditors. The plaintiffs, who have been the diligent suitors, and have preserved the property intact from alienation by the judgment-debtor by keeping on the attachment, which alone prevented alienation, are the sufferers; whereas the defendant, who has done little or nothing, and that little in an irregular form, reaps all the benefit by the sale.

The plaintiffs' attachment was taken out under the provisions of Regulation II. of

1806, and under the following circumstances: The judgment-debtor, Rajah Rajendur Narain Roy, doubtless with a view of defeating the claims of his judgment-creditors, amongst whom were the plaintiffs, set up a conveyance to his daughter of the notes, the subject of this suit. The plaintiffs brought a suit to set aside this alleged conveyance, and, to secure the execution of the ultimate judgment in the cause, attached the notes in the Collector's hands. This attachment was made under Clause 1, Section 5, Regulation II. of 1806, and was subsisting up to date of sale. This fact is found by the Principal Sudder Ameen, and against this finding the defendants have not preferred a cross-appeal. It is true that the suit of plaintiffs was dismissed in the Court of first instance; but in appeal to the High Court it was decreed, and the attachment was continued during the trial of the appeal under Section 7, Regulation II. of 1806. The Collector appears to have thought it necessary to attach the notes, not as a whole in satisfaction of the claim of each attaching creditor, but in integral portions as far as they went *pro rata* with the decrees obtained by the attaching creditors. The defendant's attachment, which subsequently became void by the execution-case being struck off the file, was first in date, and the Collector reserved Rupees 17,352-11-6½ to meet his decree. When the plaintiffs attached, the Collector reserved for them the balance, Rupees 39,876-13-5½. The Principal Sudder Ameen has divided the sale-proceeds according to the proportion which they bear to the above sums. It appears to us that the Collector was wrong in apportioning the notes amongst the attaching creditors, and that, when the attachment of the defendant, which was preferential to that of the plaintiffs, simply because it was prior in date, fell in, the plaintiffs' attachment under Regulation II. of 1806 extended over the whole of the notes. Taking this view of the case, and as there was admittedly no attachment by the defendant subsisting at the time of the sale, the plaintiffs are clearly entitled, under Section 270, to the whole of the sale-proceeds, of which they have received only Rupees 25,430. The defendant must, therefore, refund the balance, *viz.*, Rupees 11,070.

The decision of the Principal Sudder Ameen is reversed, and the plaintiff's suit decreed to the extent of Rupees 11,070, with interest on that sum from date of sale at 6 per cent. per annum. Costs of the Court below and of this appeal to be paid by the defendant, respondent, in proportion to the amount decreed, with interest. Excess costs to be paid by the appellants, plaintiffs, to the defendant, respondent, with interest.

The 12th September 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Certificate under Act XXVII. of 1860—Presumption of husband's death.

Case No. 378 of 1867.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 21st June 1867.

Shurno Moyee Dossee, *Appellant.*

Baboos Mohendro Lall Seal and *Nil Monee Sein* for Appellant.

A Hindoo female is not entitled to apply for a certificate under Act XXVII. of 1860, on the presumption that her husband is dead, when he has only been absent 9 years.

Jackson, J.—It appears to me that the decision of the Judge is right.

It is not proved that the husband of the applicant was dead. It was proved that he had been absent from his home for nine years. It is not contended that any presumption arises from this circumstance as among Hindoos, that he is dead. It is admitted, in fact, that his relatives have not yet performed his *sradh*.

In these circumstances, under the provisions of Act XXVII. of 1860, the applicant is not entitled to ask for a certificate.

Hobhouse, J.—I concur.

The 14th September 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Intervention under Section 246, Code of Civil Procedure—Fabricated hibba—Non-appearance of a witness.

Case No. 970 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sylhet, dated the 4th February 1867, affirming a decision passed by the Moonsiff of Nubeegunge, dated the 24th July 1866.

Syud Abdool Huq and another (Plaintiffs), *Appellants,*

versus

Syud Ambur Ali and others (Defendants), *Respondents.*

Baboo Poorno Chunder Shome for Appellants.

No one for Respondents.

In a case wherein lands were sold in execution notwithstanding intervention, under Section 246, Code of Civil Procedure, by a plaintiff who claimed under a *hibba* which was held by the Lower Courts to be false, the High Court refused to interfere merely because the auction-purchaser had not appeared to give evidence.

Glover, J.—This was a suit for a declaration of title in certain lands under a hibbanamah, dated 20th Jyet 1264. The lands had been sold in execution of a decree notwithstanding the intervention of the plaintiff under Section 246 of the Civil Procedure Code.

Both Lower Courts held that the hibba under which the plaintiff claimed was false.

It is urged in special appeal that, as the auction-purchaser who had been made a defendant and summoned under Section 162 of the Civil Procedure Code to give evidence did not appear, the plaintiff's case should have been decreed against him *ex parte.*

We do not think that we should be justified in interfering in this matter. We are not shown that the special appellant took the necessary steps to enforce the auction-purchaser's appearance; and, in the face of the very strong reasons given by the Principal Sudder Ameen for holding the *hibba* to be collusive, it would be in the highest degree improper to decree that the *hibba* was genuine, merely because a witness did not choose to appear, which would be the effect of granting the special appellant's petition.

No doubt, the auction-purchaser was to some extent interested in the suit; but Section 246 appears to us to contemplate a suit against the decree-holder who has brought the property to sale, and not against the purchaser at that sale who has a much smaller interest. But, however this may be, and in the absence of any proof on the part of the special appellant that he fulfilled the requirements of the Regulation, and looking, moreover, at the very strong finding of fact against the validity of the *hibbanamah* by the Lower Appellate Court, we think that this appeal should be rejected. No one has appeared for the special respondent; therefore, no order is made regarding costs.

The 14th September 1867.

Present :

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Evidence—Judgment in a former Suit—Waste land.

Case No. 665 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 18th January 1867, reversing a decision passed by the Moonsiff of that District, dated the 19th April 1866.

Mahomed Ali (Defendant), *Appellant,*

versus

Shurum Ali (Plaintiff), *Respondent.*

Baboos Bhuggobutty Churn Ghose and *Nil Madhub Sein* for Appellant.

Baboo Dwarkanath Sein for Respondent.

A judgment in a former suit against plaintiff to which defendant was no party is not evidence between the parties to a present suit.

The fact of land lying waste does not of itself show that no one is in possession.

Phear, J.—The plaintiff obtained a settlement of certain lands from the Government ijaradar in 1214 Mughy. He alleges in his suit that at first he had some sort of enjoyment of them through a tenant, one Bajoo, but they fell out of cultivation, or could not be cultivated, and his ostensible possession of them ceased. He then states that the defendant took possession of them in 1221, and he brings this suit to recover them.

The defendant raises the plea of limitation, and the Court of first instance, in an exceedingly good judgment, finds that the plea is made out by the facts of the case.

The Lower Appellate Court reverses this finding partly basing its conclusion on a judgment passed in some suit brought against the present plaintiff in 1865, to which the present defendant was in no way a party but mainly supporting it by the argument that the land was lying waste up to 1221, and, therefore, could not be in the possession of any one. We need hardly remark that the judgment referred to was not evidence between the parties to the present suit. And, even if it had been admissible here, its terms were not such as to justify the inference which the Lower Appellate Court drew from it. As to the fact that the land was lying waste, we would observe that it does not of itself show that no one was in possession. It only leads us to look for other acts indicative of possession than those which are usually done by cultivating occupants. What there might be in any given case, we need not stop to suggest, for it is clear to us here on the finding of the Lower Appellate Court that there has been possession of the land in question by some one ever since 1216 at least, and the judgment of the Court of first instance, so far as it is not disturbed by the findings of the Lower Appellate Court, shows that the person in possession was the defendant. Accordingly, we think that the decision of the Lower Appellate Court is wrong in law, and ought to be reversed.

We, therefore, reverse that decision, and affirm that of the first Court with costs against the special respondent.

The 19th September 1867.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Refusal to register a deed—Remedy under Section 15, Act XVI., 1864—Limitation—Section 84, Act XX. of 1866—Suit to enforce a contract from which vendor has resiled.

Case No. 1338 of 1867.

Special Appeal from a decision passed by the Judge of Patna, dated the 29th March 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 5th January 1867.

Bheemul Mahtoon (Plaintiff), *Appellant,*

versus

Mussamut Olimussa *alias* Begum Jan and others (Defendants), *Respondents.*

Mr. C. Gregory and *Baboo Omesh Chunder Banerjee* for Appellant.

Mr. R. E. Twidale for Respondents.

A sells certain property to *B*, and receives part of the purchase-money in advance, the rest to be paid after registration of the deed of sale. When the deed is executed and taken to the Registry Office, *A* objects to the registration on the ground that the full price has not been paid, and the Deputy Registrar returns the deed to him, and he sells the property to other parties.

HELD that, as the application for registration was made on the 27th March 1866 before the new Registration Law (XX. of 1866) came into operation, it was lawful for any person interested to institute a regular suit to establish his right to registration, under Section 15, Act XVI. of 1864, notwithstanding the provisions of Section 84, Act XX. of 1866.

HELD, however, that the case did not come under the provisions of Section 15, Act XVI., 1864, or of Section 84, Act XX., 1866. It was a suit to enforce a contract from which the vendor had resiled, and, notwithstanding the subsequent sale to a third party and registration of such subsequent deed, there was nothing in the Registration Law to prevent plaintiff from enforcing his contract.

Loch, J.—THE plaintiff's allegation is that the principal defendant agreed to sell certain property to him; that he paid half the purchase-money in advance, the balance to be paid when the deed of sale was registered and made over to him; that the deed of sale was executed and taken by the defendant's mookhtear to the Registry Office; that the defendant objected to the registration on the ground that the full price had not been paid, on which the Registrar returned the deed to the defendant; that the defendant then sold the same property to the other defendants, and the purpose of the present suit is to set aside the subsequent sale, and to enforce the contract entered into by the principal defendant with the plaintiff, and to have his purchase registered under a decree of Court.

Both the Lower Courts have rejected the claim, and dismissed the suit, the Judge of the Lower Appellate Court holding that the only course for plaintiff to adopt was,

to come in under Section 84 of Act XX. of 1866, and that having failed to follow the course prescribed by law, the plaintiff cannot be allowed to sue for the specific performance of the contract owing to the defective nature of the plaint.

The contract of sale entered into between plaintiff and the principal defendant is said to bear date 12th Chyet 1273 F. S. (13th March 1866), and the application for the registration of the deed was made on the 27th March 1866, when it was returned to the vendor by the Deputy Registrar. The new Registration Law, XX. of 1866, did not come into operation till May 1866, so that the provisions of the former law, Act XVI. of 1864, are applicable to this case, unless there be something in the latter law which limits or takes away any relief or remedy against the acts of the Deputy Registrar granted by the former law. Now, by Section 15, Act XVI., 1864, it was provided that, if a Deputy Registrar refuse to register any instrument falling within the provision of Section 13 of that Act, it should be lawful for any person interested to institute a regular suit in order to establish his right to have such instrument registered, The plaint was to be on a stamp of 8 annas, and the Deputy Registrar was bound to comply with any order made by the Court directing the registration of this instrument. By Section 62, the District Registrar was empowered to revise or alter any order of a Deputy Registrar refusing to admit a document to registration, if any appeal against such order were presented within thirty days from the date of the order, but not otherwise. So that, under Act XVI., two remedies were open to a party dissatisfied with the orders of the Deputy Registrar;—one by appeal to the District Registrar within thirty days from the date of the order appealed against, the other by a suit in the Civil Court, which, in the absence of words limiting the time for its institution, might be brought within the period allowed by the Law of Limitation. In this case, the plaintiff did not appeal to the District Registrar, but he instituted the present suit on 10th September 1866, or about six months after the order of the Deputy Registrar was passed. Section 83, Act XX. of 1866, provides for an appeal from an order passed by a Sub-Registrar to the Registrar within thirty days from the date of this order, and Section 84 provides that, if a Registrar refuse to register any document referred to in Section 29, or if a refusal to register shall have been made under Section 15 of Act XVI. of 1856, or if he reject an appeal made under Section 83, it shall be lawful for any person claiming thereunder, within thirty days after the making of such order of refusal, to apply by petition to the District Court in order to establish his right to have such document registered. Now, it is clear that, when Act XX. of 1866 came into operation, it was impossible for plaintiff to file his suit within thirty days from the date of the order passed by the Deputy Registrar under Section 15, Act XVI., 1864, for that period had already expired, and the question is whether, under the provisions of Section 84 of the new law, plaintiff is deprived of his right to bring a suit, the time for bringing which was not expressly limited in Section 15 of the former law; and a further question arises whether he cannot bring a regular suit on full stamp in the Civil Court, to establish his right to the property notwithstanding his failure to file a suit under Section 84 of Act XX.

Looking at plaintiff's case as one arising from acts done under Section 15, Act XVI., 1864, which was the law in force when the Registrar refused to register the deed, it appears to me that the provisions of the subsequent law, Section 84, Act XX., 1866, cannot deprive the plaintiff of his right to bring an action even after the period of thirty days has expired. It must be remembered that Section 15 of the former Act does not prescribe the period within which a suit to set aside the order of the Deputy Registrar is to be brought, and, in the absence of any directly prohibiting words, I think the plaintiff's present action would lie. Section 15 of Act XVI., 1864, was in force till the 1st May 1866, and it was to provide for cases in which orders had been passed under that Act during the month immediately preceding that date, that the words found in Section 84 were introduced, but it cannot be supposed that these words are applicable to the cases of persons who could not take advantage of them, the prescribed period of thirty days having already expired, but who, under the former law, were not limited to a period of thirty days to bring their suit.

But it appears to me that this case is not one coming either under the provisions of Section 15 of Act XIV., 1864, or of Section 84, Act XX., 1866, though the plaintiff asks for registration. It is a suit to enforce a contract from which the vendor has resil-

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ed, and the prayer for registration does not alter the nature of the suit. Plaintiff says that "the vendor defendant agreed to sell certain property to me. I paid part of the purchase-money, and was to pay the balance when the deed of sale was registered. When the deed was brought to be registered before it had been delivered to the plaintiff-vendee, the vendor broke off the contract, and has now sold it to a third party. I am entitled to enforce my contract." It appears to me that, notwithstanding the subsequent sale to a third party and registration of such subsequent deed, there is nothing in the Registration Law to prevent the plaintiff from enforcing his contract. The case should go back and be tried on its merits.

Seton-Karr, J.—I am of the same opinion, and think that the findings of the Lower Courts are erroneous and should be set aside, and that the case should go back to the first Court for trial on the merits.

The 20th September 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Suit against Police-officer—Section 42, Act V. of 1861.

Case No. of 1467 of 1867.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 18th April 1867, affirming a decision of the Moonsiff of Baripore, dated the 19th December 1866.

Narain Deen Tewaree (Defendant), *Appellant,*

versus

Rajah Ram Dass (Plaintiff), *Respondent.*

Baboo Nil Monee Sein for Appellant.

Baboo Anund Gopal Paulit for Respondent.

In a suit against a police-officer, the objection under Section 42, Act V. of 1861, that one month's notice has not been given, must be taken in the Lower Court; and the objection, if not taken advantage of and pleaded in the first instance, cannot be made use of as a ground of appeal.

Macpherson, J.—In this case the respondent has obtained a decree against the appellant, who is a police-officer, for damage for an illegal arrest.

The appellant urges that the decree against him ought to be reversed, inasmuch as the suit was brought without giving a month's previous notice as provided in Section 42 of Act V. of 1861. This objection was not pleaded in the Court of first instance; and it is clear that such an objection cannot be taken for the first time in the Appellate Court, because (if for no other reason) in Section 42 there is no declaration that a suit will *not* lie against a police-officer unless a month's notice is given.

There are certain Acts (such for instance as the Income Tax Act, XXXII. of 1860), which contain an express provision that no suit shall be brought unless notice is previously given. But Section 42 is of a different nature, being merely as follows: "Notice in writing of such action," that is to say, of an action against a police-officer, "and of "the cause thereof, shall be given to the defend-"ant, or to the District Superintendent, or "an Assistant District Superintendent of "the District in which the act was commit-"ted, one month at least before the com-"mencement of the action." There is no declaration that the suit shall not be entertained without such notice. Moreover, all such provisions are for the benefit of the person protected by them, and, if not taken advantage of and pleaded in the first instance, cannot be made use of as grounds of appeal.

Then, it is contended that the Lower Court does not find that there was any malice in the act of the appellant, and that, therefore, the decree is wrong. But the Lower Court finds, as a fact, that the arrest was "without any reasonable grounds," and, again, that "the arrest was wholly unjustifiable."

In such a state of things, there are ample grounds for the decree against the appellant, and I am of opinion that the appeal ought to be dismissed with costs and interest.

Seton-Karr, J.—I am of the same opinion.

The 21st September 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Limitation (onus on Plaintiff)—Ouster—Settlement Ameen's Proceedings—Evidence.

Case No. 612 of 1867.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 11th February 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 6th January 1866.

Lall Singh and others (Defendants), *Appellants,*

versus

Baboo Modhoosoodun Roy (Plaintiff), *Respondent.*

Mr. R. E. Twidale and *Baboo Unnoda Pershad Banerjee* for Appellants.

Baboo Onookool Chunder Mookerjee for Respondent.

A plaintiff in a suit for recovery of possession, on the ground of ouster, must prove that he has been in possession at some time within 12 years prior to suit, when limitation is raised and adverse possession is pleaded against his right of action.

The proceedings of a Settlement Ameen cannot be taken as evidence against a person who was not a party in those proceedings.

Kemp, J.—This case must be remanded. The decision of the Judge is a very bad one.

On the issue in bar, the Judge observes that, as the plaintiff avers that he was ousted in 1858, and the suit is brought in 1865, it is not barred. This is a very careless way of disposing of such an issue. It does not depend upon the bare assertion of a plaintiff as to date of ouster, whether a suit is in time or not. A plaintiff must show that he has been in possession at some time within 12 years prior to suit, when adverse possession is pleaded against his right of action.

In this case, the plaintiff and his lessor have been admittedly out of possession since 1858 or for seven years prior to suit. The defendant avers that a settlement of the lands of Mehal Bunee were made with him by Government in 1843, and that he has been in possession ever since. The question of limitation must be properly tried.

On the merits, the decision is equally faulty. The plaintiff and the defendant both derive title from the Government. The settlement of the defendant is for mehal Bunee, and is of prior date to that of the plaintiff. The plaintiff claims the disputed land as appertaining to Munee Mehal *alias* Mehal Bunee.

The first question is whether Munee Mehal and Mehal Bunee are distinct villages or not. Then comes the question whether the settlement-proceedings show that Munee Mehal was settled with an *alias* with the plaintiff, and what are the boundaries as per settlement-proceedings of the Mehal settled with the plaintiff.

On being asked by this Court, the pleader for the special respondent, plaintiff, declined to take a decree for Munee Mehal without an *alias*. From this, the Court is under the impression that the two Mehals are not distinct.

The Judge is also wrong in taking the Settlement Ameen's proceedings as evidence in favor of the plaintiff, as the defendant, special appellant, was no party to those proceedings, and it does not appear that these proceedings were accepted as correct by the Settlement Officers. The Deputy Collector simply tested the measurement of the Ameen. Anything that the Ameen may have chosen to report about the position and names of the Mouzahs cannot be accepted as evidence. The settlement-proceedings must be consulted and acted upon. With these remarks, the case is remanded. The Judge will re-open the whole case, and pass a clear judgment on the issue in bar and, if necessary, on the merits. Costs to follow the result.

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The 23rd September 1867.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Onus probandi—Suit for kubooleut—Accretions to a zimma tenure with a fixed rent—Regulations XI. of 1825 and VIII. of 1793—Section 15, Act X., 1859.

Cases Nos. 666 to 668 of 1867 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Backergunge, dated the 11th January 1867, modifying a decision passed by the Deputy Collector of that District, dated the 21st June 1864.

Juggut Chunder Dutt and others (Defendants), *Appellants,*

versus

Mrs. Despino Panioty and others (Plaintiffs), *Respondents.*

Baboos Nil Monee Sein and *Chunder Madhub Ghose* for Appellants.

Mr. Mun Mohun Ghose and *Baboo Gopal Lall Mitter* for Respondents.

In a suit for a kubooleut on an alleged right to assess lands which have accreted to a permanent zimma tenure, it is for plaintiff to prove that, under the Law of Accretion (Section 4, Regulation XI., 1825), the accretions are, either by custom or agreement, liable to assessment.

Where a permanent zimma tenure has been held at one rate of rent for more than 20 years, the terms of Section 15, Act X., 1859, as well as the provisions of Section 51, Regulation VIII., 1793, preclude the zemindar from assessing accretions to the parent talook.

Bayley, J.—The pleaders on both sides admit that one decision here will govern these three special appeals.

The remand-order of this Court, dated 20th August 1866, contains very fully the facts and points in the case.

The main question to be decided was, whether lands accreted to a permanent zimma tenure were liable to be assessed by the zemindar or not, and on what rates and conditions?

The Court held the zimma to be a tenure of a character that, if liable to enhancement, 20 per cent. (10 for collection charges and 10 for talookdaree profits) should be allowed as deductions.

The Court also directed the following specific issues to be tried, *viz.*:—

1st.—Is the settlement of 1198 proved?

2nd.—Has the defendant proved his right to hold the present tenure at a fixed rent under Sections 15 and 16 of Act X. of 1859?

3rd.—If the present tenure is held at a fixed rent, is it, according to the custom of the country, liable to any and what increase on account of alluvion?

4th.—If the present tenure is held at a variable rent, what is the rate at which land in excess of the original quantity is assessable?

On remand, the Lower Appellate Court has found on the *first* issue that the settlement of 1198 is not proved.

On the *second* issue, the Lower Appellate Court has found that "the receipts filed by "defendants, appellants, prove that they have "paid one rate of rent for their (zimma) "tenure for more than 20 years, and that, "therefore, they are entitled to hold it at "a fixed rent."

On the *third* issue, the Lower Appellate Court holds that, as to the accreted lands of the zimma, "there is no such custom shown "under which such lands can be held *rent-free*, and until such custom is shown, the "presumption is the other way, for *primâ "facie* a tenant is liable to pay rent for *all "lands he may hold* unless he is protected "by some agreement." The Lower Appellate Court also referred on this point to those provisions of Regulation XI. of 1825 which require zemindars to pay revenue for *all accretions*, and held that consequently accretions in use and occupation of tenants or dependant talookdars would be liable to pay the rents which are the means which enable the zemindars to pay such revenue.

On the *fourth* issue, the Lower Appellate Court held that, as defendants failed to prove by any document that they had any special rights, they ought to be assessed at fair and equitable rates for the accretions on their use and occupation, less the 20 per cent. deduction as for talookdars, prescribed by the High Court in the order of remand.

From this decree, the defendant appeals specially, urging as his main point that the burden of proving a right to exemption from custom or agreement was wrongly put on him, and that plaintiff should prove the custom under which he alleged he had a right to assess.

The petitioner also objects to the decision of the Lower Appellate Court as to its rejection of evidence on the part of defendant, that the land was a *re-formation* on the defendant's *old tenure*. Defendant further objected that the rates were not those of adjacent lands of a similar quantity, but of distant lands, and pleaded as to the dowl of 1193 that it was genuine.

But none of these latter points are seriously contested before us, nor, as the case at present stands, is it necessary they should be so.

We have no doubt that the burden of proof has been wrongly put on defendant. Plaintiff sues for a kubooleut on an alleged right *to assess these accretions*. It is for him to prove his allegation that, as under the Law of Accretion (Section 4, Regulation XI. of 1825), the accretions here are either by custom or agreement liable to assessment.

But the Lower Appellate Court has decided entirely on defendant's failure to discharge this burden on plaintiffs. We do not say that the wording of the second issue might not have led the Lower Court so to err; but, as the error in law is obvious, the judgment cannot be upheld against the special appellant's plea on this point.

But (although this is not a specific point in the petition of special appeal) the law itself requires us to notice in this case that, by the terms of Section 15, Act X. of 1859, specially the latter portion of it, plaintiff, zemindar, *cannot* assess these *accretions* on to the parent *zimma* of his dependant talookdar.

The Section is as follows, and the special portion to which we refer is italicized:—

"No dependant talookdar or other person, "possessing permanent transferable inter- "est in land, intermediate between the "proprietor of an estate and the ryots "who, in the Provinces of Bengal, Behar, "Orissa, and Benares, holds his talook or "tenure (otherwise than under a terminable "lease) at a fixed rent which has not been "changed from the time of the Permanent "Settlement, shall be liable to *any enhance- "ment of such rent, anything in Section "51, Regulation VIII., 1793, or in any "other law to the contrary, notwithstanding.*"

Then, let us see what did Section 51, Regulation VIII. of 1793, require, in all such cases, of excess area by accretions or otherwise.

It enacts that "no zemindar or other "actual proprietor of land shall demand an "increase from the talookdars dependant "on him, *although he should himself be "subject to the payment of an increase of "jumma to Government except upon proof "that he is entitled so to do either by the "special custom of the district, or by the "conditions* under which the talookdar "holds his tenure, or that the talookdar by "receiving abatement from his jumma has "subjected himself to the payment of the "increase demanded, and that the lands "are capable of affording it."

Thus, under the provisions of Section 15 of Act X. of 1859, Section 4, Regulation XI. of 1825, and Section 51 of Regulation VIII. of 1793, we hold that the zemindar in this case cannot assess the accretions to the defendant's zimma tenure in this suit.

In this view, we decree these three special appeals, 666, 667, and 668, with costs.

The 23rd September 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble F. B. Kemp, L. S. Jackson, A. G. Macpherson, and F. A. Glover, *Judges*.

Jurisdiction—Estoppel.

Case No. 236 of 1866.

Regular Appeal from a decision passed by the Deputy Collector of the 24-Pergunnahs, dated the 27th June 1866.

Prosunno Coomar Paul Chowdhry and another (Defendants), *Appellants*,

versus

Koylash Chunder Paul Chowdhry and others (Plaintiffs), *Respondents*.

Mr. R. V. Doyne and *Baboos Kishen Kishore Ghose* and *Hem Chunder Banerjee* for Appellants.

Mr. R. T. Allan and *Baboo Onookool Chunder Mookerjee* and *Otool Chunder Mookerjee* for Respondents.

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The Revenue Courts have no jurisdiction to try a suit for rent when the issue is not merely whether the defendant, by reason of his own possession or that of his agent (*e.g.*, one who holds for him *benamee*), is in the position of tenant, and as such liable for the rent, but whether, by reason of his having a beneficial or equitable interest of some sort in the tenure, he is, in equity, liable to be charged with the rent. It was not the intention of the Legislature by Act X. of 1859 to empower the Collector to try questions relating to rent depending upon equitable rights or liabilities arising from circumstances other than those of the relationship of landlord and tenant.

If a zemindar sues an agent for rent due from an estate, this is no bar to the zemindar's afterwards suing the principal for rent subsequently accrued due. But he cannot in the same suit sue both the principal and the agent: he must elect which of them he will proceed against.

This case was referred to a Full Bench by Peacock, C.J., and Loch, J., with the following order:—

KOYLASH CHUNDER PAUL CHOWDHRY and others have sued Gopal Chunder Mookerjee, Prosunno Coomar Paul Chowdhry, and his wife Benodemonee Chowdranee, in the Revenue Court for the rent due under a putnee. The putnee was sold for arrears of rent and purchased in the name of the defendant Gopal Chunder Mookerjee, and afterwards the zemindar treated Gopal Chunder as his tenant, and petitioned to sell the putnee for the arrears of rent which became due after the sale, and which he alleged to be due to him from the defendant Gopal Chunder Mookerjee. That rent was paid, and the putnee was not sold.

The plaintiff has now sued Gopal Chunder Mookerjee, Prosunno Coomar Paul Chowdhry, and his wife, jointly, in the Collector's Court, for subsequent arrears, alleging that the estate was purchased by Prosunno Coomar Paul Chowdhry and his wife in the name of Gopal Chunder Mookerjee benamee for them.

Evidence was given to show that part of the purchase-money was paid with notes which were the proceeds of a putnee which stood in the name of the lady, and which was sold, and there is no evidence as to the person by whom the remainder of the purchase-money was paid.

It was further given in evidence that the treasury of the husband and wife was a joint treasury.

It is necessary, in consequence of the decisions to which we shall presently advert, to refer this case to a Full Bench.

One question which we reserve for the opinion of a Full Bench is, whether the Collector was competent to try whether Prosunno Coomar Paul Chowdhry alone was beneficially interested in the putnee, which was bought in the name of Gopal Chunder, upon the ground that whatever interest his wife might have had in it was benamee for him, or whether Prosunno Coomar and his wife were jointly beneficially interested in the putnee bought in the name of Gopal Chunder, or, if not jointly, what were their respective interests therein, for the purpose of ascertaining whether Prosunno Coomar and his wife were jointly liable for this rent, or whether they were to be rendered liable according to their respective beneficial interests in it.

There are several cases to show that persons may be responsible in equity to pay rent, although they are not the legal tenants, or legally responsible. It is very doubtful, however, whether, in such cases, the liability which would have to be enforced in a Court of Equity in England could be tried and enforced by a Collector under Act X. of 1859.

Two of the cases in which persons not responsible at law have been held responsible in equity for the payment of rent and performance of covenants in a lease are, Clavering *versus* Westley and others, 3 Pere William's Reports, page 401; Lucas *versus* Comerford, 3 Vesey Junior's Reports 235. Cestuique trusts of a lease taken in the name of a trustee were held liable to make good, according to their respective beneficial interests, the rent due from the trustee, in the event of the lessors being unable to recover it from him. In that case, the equity against the cestuique trusts appears to have resulted from the fact of their entering into possession, and taking the profits.

In Lucas *versus* Comerford, 3 Vesey's Reports, page 235, which is also referred to in Wilkins *versus* Foy, 1 Merivale's Reports, page 264, as an authority, it was held that a person with whom a lease had been deposited as a security for a debt, and who had entered into possession of the property, was bound to take a legal assignment of the lease, in order that he might be responsible in law for the performance of a building covenant contained in it.

There are other cases in which persons have been decreed to be equitably liable for rent for which they could not be made legally responsible.

In similar cases in this country, if the same equities could be enforced here as in England, there would be strong grounds for contending that those equities must be enforced in the ordinary Civil Courts, and not in the Court of a Collector under Act X. of 1859.

We will not express any opinion upon that point, until it has been argued in the Full Bench. Several cases have been cited, from which it may be contended that the Collector has the power to try whether a person, who is not the actual tenant, is or is not equitably responsible for the rent. The first case is Goluck Chunder and others *versus* Teluck Chunder and others, in the Sudder Dewanny Adawlut Reports, 26th June 1862, page 283. There is another in Hay's Reports, page 449, reported in the Special Number of the Weekly Reporter, page 58. There was also a case before Bayley and Elphinstone Jackson, JJ., decided on the 17th December 1863, and another by Trevor and Loch, JJ., on the 6th June 1862, which bear upon this question, but which have not been reported.

The second question, which we refer for the opinion of the Full Bench, is whether the lessors, having made their election to treat Gopal Chunder as their tenant when they petitioned under Regulation VIII. of 1819 for the sale of the putnee for arrears of rent, can now elect to treat the persons beneficially interested as their tenants. On this point, the case in Vol. 3 of Wyman's Journal, page 15, decided on the 27th June 1864, is an authority to show that, having once elected to treat the furzee as their tenant, they cannot now sue the beneficial owner. The Deputy Collector, in his judgment in this case, has drawn a distinction between that case and the present. With regard to the case* cited from Hay's Reports, page 449, which was decided by me among other Judges, there appears to have been no question raised as to the extent of the beneficial interests of the defendants, inasmuch as there was only one person sued as the defendant in that case. The case was one of special appeal, and was treated as if the person who took the lease in that case had taken it in his own name, as agent for an unknown principal. That case was decided upon the rule applicable to contracts made by agents for unknown principals, and not upon the ground that the Collector could deal with equities and adjust the proportions in which cestuique trusts can be made liable for rent for which their trustee is legally responsible.

In this case, the lady denies having any right or interest. The plaintiff is willing to abandon all claim against her. The husband contends that the plaintiff cannot abandon his claim against the wife, if she is liable for any portion of the rent, and make him liable for the whole, if he is not liable for it; that the question must be determined whether the wife is beneficially interested in any, and what, proportion, and that the Collector cannot try that question. It appears to us that the plaintiff has no more right to abandon his claim against the lady, and to say that the husband is wholly responsible, than he would have to abandon his right against the husband, and say that the lady is solely responsible.

The following are the judgments of the Full Bench:—

Glover, J.—It appears to me that we ought to answer both the questions submitted by the Divisional Bench.

It may be that they were not raised in the Courts below, and that the objection was not taken here when the appeal was first heard. But it cannot be said that the points are not deducible from the pleadings, and it is clear that they were taken and argued at considerable length before the Division Bench which heard the case after remand.

It appears to me, further, that that Bench would have been justified in referring the question to the Full Bench of this Court, whether it had or had not been opened by the parties to the appeal, if it considered the point to be one of importance, and concerning which contradictory rulings of Division Benches were in existence.

A Full Bench of this Court is, I conceive, bound to afford every possible assistance to the Division Benches, and to give them the benefit of its authoritative opinion on all points referred, which are in any way deducible from the case sent up. Indeed, I am by no means certain that it ought not to take into consideration any and every question of law which a case might involve, whether it were apparent on the pleadings or not. However, there is no necessity for my going so far in the present case, as the points at issue, though not directly raised, are certainly to be found in the pleadings.

* *See* Special Number of the Weekly Reporter, p. 58.

I think that the *first* question should be answered in the negative, and that the Collector had no jurisdiction, under Act X. of 1859, to decide as to the amount of beneficial interest, if any, possessed by the three co-defendants. The proper Court to decide the equities between them and to fix their liability to pay rent would be the Civil Court, and that Court would have to find the relationship of landlord and tenant and the extent of each person's interest before the Collector could come in and adjudicate the rent due under Act X.

On the *second* question proposed, there can, I think, be no doubt whatever that a person suing a zemindar in the first instance is not estopped thereby from hereafter suing those whom a more correct and searching enquiry has shown to be the real beneficial owners. This question, therefore, should be answered in the affirmative.

Macpherson, J.—The first of the questions raised on this reference is one upon which it appears to me that this Court ought not to give an answer (to the full extent of the question), inasmuch as the points raised do not properly arise in the case.

Being of opinion that the question does not arise in the case, I am only following the practice which has been acted upon frequently by Full Bench Courts, if I decline to return any answer to it.

In the case of Grees Chunder Lahooree *v.* Fakeer Chand Khan (6 W. R., Misc., 72), a reference was made to a Full Bench by Mr. Justice Loch and myself upon a most important question, in which we differed from a judgment of another Division Court. We referred a general question as to the position of the assignee of a decree—"In the "event of there being cross-decrees, and "one of these decrees being transferred by "the decree-holder to a third party in a "*bond-fide* sale without any special notice to "the purchaser of the existence of the "cross-decrees, whether the purchaser does "not take it with all the liabilities and "equities of the vendor which attached to "it?" The case came on before the Full Bench, and the Court declined to answer the question which we put, upon the ground that that question did not arise upon the facts as stated by us. The Court (of which I myself was a member) held that, upon the facts as stated by us, it was unnecessary to answer the question, remarking: "It is there- "fore unnecessary for us to determine whether "the assignment made any difference or "not. If we were to determine that point, "our decision would be a mere *obiter* "*dictum*."

In that case, the fact that a decision upon the particular point referred was not absolutely necessary appeared from the statement of the case sent up by the Judges who referred it. So, in the present instance, a decision on this first question (to its full extent) appears upon the face of the statement of the referring Judges to be unnecessary.

The plaintiffs are, in the order of reference, stated to be suing, "alleging that the "estate was purchased by Prosunno Coomar "Paul Chowdhry and his wife in the name "of Gopal Chunder Mookerjee *benamee* for "them." It appears to me that, upon a plaint setting up such a cause of action, the various issues as to remote beneficial interests and equities which have been suggested in the first question referred to us do not arise. And, as a matter of fact, no such issues ever were raised by any of the parties, whether plaintiffs or defendants, in their pleadings, or before the Lower Court, or before Mr. Justice Loch and myself when the case was before us in January last, and we sent it back in order that further evidence might be taken on behalf of one of the defendants.

Again, there is a case (Gopal Chunder Roy *vs.* Gooroo Das Roy, 7 Weekly Reporter 135) in which the Full Bench was of opinion that the point which had been referred did not arise under the circumstances, and the Court declined to give any opinion. There the case, as stated by the referring Judges, did not disclose such a state of facts as showed that the question referred did not arise.

In the case of Ramkanth Chowdhry *vs.* Bhoobun Mohun Biswas (Weekly Reporter, Special Number, 183), the Chief Justice, upon the ground that it did not arise in the case, did not answer the question referred, but the rest of the Court did answer it.

Upon these authorities, I think that we ought not now to decide the first question to its full extent. But some part of the question does arise in the case, and that part I am prepared to answer. I think there is no doubt whatever, both on the authority of the decision in the case of Heeralall Bukshee *vs.* Raj Kishen Mozumdar (1 Hay's Reports 449) and of the other cases referred to, and on the general construction

of Act X. of 1859, that the Collector has power to try the question raised in the plaint in this suit, that is to say, to try the question whether or not Prosunno Coomar and his wife, or either of them, purchased this putnee *benqmee* in the name of Gopal Chunder. I have no doubt the Revenue Courts have jurisdiction to try whether these defendants or either of them, by reason of their own possession or that of their agent, are in the position of tenants towards the plaintiffs—whether, in short, they are substantially the tenants of the land, and, as such, liable for the rent now sued for.

As regards the second question, whether or not the plaintiffs are estopped in the present suit from proceeding against the defendants who are said to be principals, on the ground that they formerly took proceedings against the defendant, their agent, in order to recover rent for a period different from that the rent for which is now sued for, it appears to me that the former proceedings are no bar whatever.

The present suit is, no doubt, wrongly brought, in so far as it is brought against both the principals and their agent, and the plaintiffs ought to have been put to their election as to whether they would proceed against the agent or against the principals. This is the only point (bearing on the second question) that was decided in the case of Sheikh Kamyab, reported at page 88 of Sutherland's Reports for June 1864 (Act X. Rulings). That case does not decide that, because the agent was formerly proceeded against, the defendants who are now discovered to be the principals cannot be sued for rent for a different period: it merely decides that a suit is bad where the principal and the agent are sued together as jointly liable.

An unreported decision of the late Sudder Court, dated 6th June 1862, in special appeal No. 336 of 1861, was referred to, as showing that the present suit is barred. But it appears to me that the ruling in that case is not correct; and, however that may be, the circumstances of that case are very different from those now before us.

As regards the second question, I would answer that the present suit is not barred by the proceeding under Regulation VIII. of 1819.

Jackson, J.—I am of opinion that both the questions proposed to us by the Division Court ought to be answered. I entirely agree with Mr. Justice Macpherson in thinking that the Full Bench, on having a question referred to it for the decision of a particular law-point, if, on looking into the case as far as it is necessary for the purpose, it should find that that law-point does not arise, ought to desist from answering it. Very serious inconvenience arises from following an opposite course. For instance, not very long ago, a question was referred by a Division Bench to a Bench of five Judges, namely, whether a decision *inter alios* was admissible in evidence, and was conclusive evidence against parties in a suit before the Division Bench. The Full Bench went very fully into the whole matter, and decided that the judgment in question was not conclusive evidence, and was not admissible in evidence at all. Subsequently, the question of admissibility arose before a Division Bench, and that Division Bench, looking into the question which had come before the Full Bench, came to the conclusion that the point, whether or not such a judgment was admissible in evidence, had not fairly arisen upon the case in which the reference took place, and consequently declined to accept the decision of the Full Bench as conclusive authority upon that point, and went on to decide the point on its own view of the law in the opposite sense to the decision of the Full Bench.

It is quite clear to me that decisions of a Full Bench, if they are to be useful, must be conclusively binding on future Division Benches of this Court until they are afterwards set aside by the authority of the Full Court or of a Court composed of a larger number of Judges. Therefore I would abstain from giving an opinion on any point, unless I saw that it clearly arose in the case referred, as in the present state of the law there seems to be no power to state cases for the opinion of a Full Bench.

The question referred now is, whether the Collector was competent to try whether Prosunno Coomar Paul Chowdhry alone was beneficially interested in the putnee which was bought in the name of Gopal Chunder, upon the ground that whatever interest his wife might have had in it was benamee for him; or whether Prosunno Coomar and his wife were jointly beneficially interested in the putnee bought in the name of Gopal Chunder, or, if not jointly, what were their respective interests therein, for the purpose of ascertaining whether Prosunno Coomar and his wife were jointly liable for this rent, or, whether they were to be rendered liable

according to their respective beneficial interests in it.

Now, it is said that this question does not actually arise upon the plaint. That, no doubt, is so. The plaint has been framed entirely upon the allegation that those two defendants, Prosunno Coomar and his wife, had employed the defendant Gopal Chunder to purchase the talook for them, and that they had since been in possession of the talook, that is to say, a question of agency. But I observe that the Collector has gone into the question of beneficial interest. He has raised, though not very distinctly, the issue whether the other two defendants were beneficially interested in the talook or not. I also observe, as far as I had an opportunity of looking into the evidence, that evidence upon such an issue was adduced before the Collector. Now, I presume the Collector is authorized to frame the issues, under Act VIII. of 1859, not only from the plaint, but from the written statements, and from the examination of pleaders or persons who appear before him. I would, therefore, rather prefer to presume that the Collector had found, in some examination taken before him, or in the written statements, an allegation that these defendants were beneficially interested in the talook; and I the more readily do so because the plaintiff adduced evidence to support such an allegation. The question, being to that extent raised, I think fairly enough arises in the case before us to justify the Full Bench in giving an answer.

As to the particular answers to be given to the questions, I am quite clear that the Collector would not be competent to decide such a question as that involved in the first put to us by the Division Bench. This appears to be precisely such a case as in England would oblige a plaintiff to resort to a Court of Equity to obtain relief, and in which he would have no remedy at common law; and in like manner it seems to me to be such a case as is not within the jurisdiction of the Collector, who is restricted to try questions between a landlord and his actual tenants, persons between whom directly or indirectly some engagement has been entered into. But, where the landlord seeks to make other persons liable by reason of their having a beneficial interest in the tenure, he must resort to the assistance of the regular Civil Courts which take cognizance of all causes of action of which their cognizance is not expressly taken away.

As to the second question, it appears to me also perfectly clear that the plaintiff is not estopped by reason of his former proceedings against Gopal Chunder from now suing in the proper Court the defendants whom, upon further information, he has discovered, and whom he now declares, to be beneficially interested.

I would, therefore, answer the first question in the negative, and the second question in the affirmative.

Kemp, J.—I am of opinion that the first question put to this Bench is one that does not arise in the pleadings, or in the case as the parties put it in the Court below. I think, therefore, that we should decline answering the question.

I also observe that neither in the plaint, nor in the written statements, nor in the case made by the parties before the Court below, was any question of remote liability or equities raised; nor does any such question appear in the Collector's proceedings, as is quite clear on referring to the decision of the Collector at page 18, where he says: "The "defence, therefore, set up is that the "purchase in Gopal's name was benamee, "he being merely the servant of the other "defendants, who are solely liable for the "rent. The purchase not having turned out "so profitable an investment as was believ-"ed, the real proprietors are now anxious to "disclaim all connection with the under-"tenure, and represent the ostensible pro-"prietor as solely responsible to the zemindar. "This is the 'only' issue in the case, and "it is an issue which, it has been ruled, "the Revenue Courts must try."

Therefore, in my opinion, the first question put before us does not arise either in the written statements, or in the case made by the parties before the Court below, and I would therefore decline to answer it.

As to the *second* question, I am of opinion that the plaintiff is not barred by any proceeding which was taken against Gopal Chunder under Regulation VIII. of 1819.

Peacock, C. J.—I quite agree as to the second question that the plaintiff's having treated Gopal Chunder as the tenant when he was not aware of the whole circumstances of the case would not estop him from treating other persons as his tenants afterwards when he knew of those circumstances, if the facts showed that the other parties, and not Gopal Chunder, were the tenants.

With respect to the first question, it appears to me that it ought to be answered, and that it was one upon which the Division

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Court might fairly and properly ask the opinion of a Full Bench in order to enable it properly to deal with the whole case with reference to other decisions which have been passed by Division Benches.

The object of referring cases to a Full Bench is to prevent conflicting decisions between Division Benches, so that one Bench shall not be deciding a question one way on one day, a second Bench deciding the same question another way on another day, and a third Bench probably deciding it differently from the other two on a third day; and that, when a Court finds two conflicting decisions, or a decision conflicting with its own view of the case, instead of overruling the decision of a Bench having concurrent jurisdiction, it should refer the matter to a Full Bench, so that the public should not be subject to have conflicting decisions issued from the High Court.

In carrying out that rule, I have always endeavoured, as far as it has been in my power, to assist the Division Benches by which questions have been referred, by examining the authorities bearing upon the point, and by explaining the law upon the subject to the best of my ability, and by giving reasons for my opinions so as to settle the point as far as possible for cases in which it might arise in future.

In the case which has been referred to from 6 Weekly Reporter, p. 72 (Miscellaneous Cases), the case was this—*A* had recovered a judgment against *B* in the Judge's Court. *B* recovered a judgment against *A* in the Court of the Principal Sudder Ameen. *B* sold his judgment to *C*, who wished to enforce it against *A*. *A* asked to be allowed to set off the judgment which he had recovered against *B* in the Judge's Court, notwithstanding the sale by *B* to *C*, who was a *bonâ-fide* purchaser of the judgment recovered by *B* against *A*. The question which was asked of the Court was this: "In the event of there being cross-decrees, "and one of these decrees being transferred "by the decree-holder to a third party by a "*bonâ-fide* sale without any special notice "to the purchaser of the existence of the "cross-decree, whether the purchaser does "not take it with all the liabilities and equities of the vendor which attached to it."

In the statement of the case referred for the opinion of this Court, it was shown that the judgment which *A* had recovered against *B* was in the Judge's Court, whereas the judgment which *B* had recovered against *A* was in the Principal Sudder Ameen's Court, and the Court came to the conclusion, whether right or wrong, that the two judgments not being in the same Court for execution could not be set off one against the other under the terms of Act VIII. of 1859.

Being of opinion, therefore, that one of those judgments could not be set off against the other, and could not have been set off even if it had not been transferred, the Court answered the question, and pointed out that those two judgments could not be set off one against the other whether transferred or not, and it did not go into the other question which became unnecessary. The Court said: "In this case the decree of the Judge's "Court was not sent to the Principal Sudder "Ameen for execution. The two decrees "were, therefore, not decrees of the "same Court, nor was the decree of the "Judge's Court sent to the Principal Sudder "Ameen's Court for execution. The case "does not fall within the provisions of Section 209. It is, therefore, unnecessary for "us to determine whether the assignment "made any difference or not."

The question as to the effect of the assignment did not arise in that case, and the Full Bench would have misled the Division Bench if it had simply answered the question propounded without pointing out to the Division Bench that, in their opinion, the judgments were not judgments which could be set off against each other independently of the question as to the assignment. I, therefore, think that the Court was right in that case in not going on to determine the second question, especially as some Division Benches do not consider themselves bound by what they call *obiter dicta* of a Full Bench.

In another case the following question was asked, whether a decision upon the question of adoption was admissible in a suit between different parties. I was one of the Judges, and the learned Judge beside me (Mr. Justice Louis Jackson) was the other Judge who referred the question. We asked a Full Bench whether the judgment was admissible against the plaintiff who was not a party to the former suit, and, if so, whether it was conclusive or merely *primâ-facie* evidence against him. It was an important question whether it was admissible at all, even if it should be held that it was not conclusive as a judgment *in rem*. Two questions were referred: *1st*, was the judgment admissible and conclusive; *2nd*, was it admissible at all for any purpose whether as *primâ-facie* evi-

dence or in any other way? The two questions were distinctly raised, and they were distinctly answered. (*See* 7 Weekly Reporter, Civil Rulings, 339.) But in a subsequent case it was held by a Division Bench that the answer that the judgment was not admissible at all was an *obiter dictum*. If that ruling is to be acted upon, and if Judges of a Division Bench are to go into each case, and see whether the answer of a Full Bench is an *obiter dictum* or not, great difficulties will constantly arise.

I say, after careful reflection, that the two questions were absolutely necessary to be determined. If uniformity of decision in the High Court is desirable, as it undoubtedly is, one Division Bench ought not to decide contrary to a dictum of another Division Bench, without referring the question to a Full Bench. Still less ought it to decide contrary to a dictum of a Full Bench, at any rate without referring the question.

In the other case cited from 7 Weekly Reporter, p. 135, the question asked was, whether, where a pottah purporting to be of a date anterior to the Decennial Settlement is filed, and is found, as a fact, to be a forgery, the party propounding such forged pottah can have the benefit of the presumption arising from paying fixed rents for 20 years under Section 4, Act X. of 1859.

The Full Bench might have said that the party was entitled to the benefit of that presumption, and have answered that question affirmatively. If they had done so, they would have led the Division Bench into a most serious error, for it was admitted on the argument before the Full Bench that the suit was brought before Act X. of 1859 was passed; and therefore the Full Bench pointed out to the Division Bench that the question did not arise under the circumstances of the case. The Full Bench did not wish to mislead the Division Bench, as it would have done if it had merely answered the question; but, finding that the Division Bench was under a mistake in supposing that the Act applied to the case when the words of Section 4 were, "Whenever, *in any suit under this Act*, "it shall be proved," &c., said: "It being "admitted that this suit was brought before "Act X. of 1859 came into operation, the "question does not arise whether a party "who has propounded a forged pottah could "have the benefit of the presumption arising "from paying a fixed rent for 20 years, "Section 4, Act X. of 1859, applying only "to suits commenced under the provisions "of that Act. Therefore, the point which "has been referred to us does not arise." Instead of answering the question, the Full Bench pointed out to the Division Court that the case was not one in which Section 4, Act X. of 1859, was applicable or could be taken into consideration. I cannot think that the Bench was wrong in giving judgment in that way. For my own part, I can only say that I am always most desirous to give every assistance in my power to a Division Bench by answering every question which is propounded for the opinion of a Full Bench, when it can be done without leading the Court which asks the question into error.

Another case has been cited from the Special Number of the Weekly Reporter, p. 183. In that case the suit was brought to fix the rent of certain land, and to obtain a kubooleut from the defendant. It appeared to the Full Bench that the defendant was a mere trespasser, and not a tenant; and that the plaintiff could not therefore sue him to obtain a kubooleut under Act X. of 1859. The question whether a zemindar could sue for a kubooleut at an enhanced rent without giving notice of enhancement did not arise. If the Full Bench had answered the question, they would have misled the Division Bench; as, under the circumstances of the case, the zemindar could not, even if he had given notice of enhancement, have sued for a kubooleut.

I have made this explanation, because I think it ought not to go forth that the Full Bench is disinclined to answer any question that properly arises out of a case before a Division Bench, or that it has ever intentionally declined to answer any such question which has been referred for its opinion. It has always, to the best of its ability, answered such questions, and endeavored to throw as much light upon the case, and to give the Division Bench as much assistance as possible.

The only cases in which a Full Bench has not answered directly questions which have been raised for its opinion, are those in which, by giving direct answers to the questions, it would have been likely to mislead the Division Benches by which the questions were asked.

In this case, finding that there were conflicting decisions, the Division Bench, of which I was one of the Judges, felt bound to refer the case to a Full Bench. The Division Bench, before sending the case back to the Collector to be determined

finally, wished to know whether the parties were bound by equities, and whether the Collector had jurisdiction in such a case, or had power to determine mere matters of equity.

Three of the Judges of the Full Bench have answered the question; but the other two Judges think that they ought not to answer it.

I regret exceedingly that the Division Bench will not have the weight and benefit of the opinion of those two Judges. But, when the case goes back, the Division Bench will have the opinion of only a majority of Judges of the Full Bench, and it will have to deal with the case in the best manner it can under the circumstances, regretting that it has been deprived of the valuable opinions of the two Judges who have declined to express any opinion upon the case.

In my own opinion, the Collector had no jurisdiction in the case. I am of opinion that, when the Legislature took away from the regular civil tribunals of this country the right of determining questions with regard to rent, they intended to take away from them, and to vest in the Collectors, jurisdiction in those cases only in which the question might arise between a landlord and his tenant. Two persons may be joint-tenants, and, as such, may be jointly liable for rent. *A*, and not *B*, may be the tenant of certain lands. There may be circumstances under which *B* may be equitably liable to pay the rent legally due from *A*. But the liability of *B* does not arise from the legal relationship of landlord and tenant.

I apprehend it was never the intention of the Legislature to empower the Collector to try questions relating to rent depending upon equitable rights and liabilities arising from circumstances other than those of the relationship of landlord and tenant.

An Act by which the jurisdiction of the ordinary Courts of Judicature is taken away must be construed strictly. The jurisdiction of the ordinary Courts of Judicature is not to be taken away by putting a construction upon an Act of the Legislature which does not clearly say that it was the intention of the Legislature to deprive such Courts of their jurisdiction.

Looking at Act X. of 1859, I hold that it was not the intention of the Legislature to take away the jurisdiction of the ordinary Courts of Judicature of trying whether, under particular circumstances, other persons than the actual tenants of the land might not, according to the Rules of Equity, be liable to pay the rent of that land. That is the question which I wished to have answered when the Division Bench put the question in the form in which it was submitted. It appears to me that the question must be answered in the negative, and that the Division Bench should be informed that the Collector was not competent to try the points involved in the first question.

The case will go back to the Division Bench for the purpose of being determined by them, and I shall avail myself of the benefit which I have had of learning from my Hon'ble colleague on my right (Mr. Justice Kemp), what the plaint actually states. The Division Bench may possibly have asked this question unnecessarily, and may have been the cause of fruitlessly and unnecessarily wasting the time of two of the Judges of this Court for four or five hours on a matter which may ultimately turn out to be immaterial. I endeavor to be as accurate as I can. But a preliminary question having been raised that the Collector could not deal with matters of equity, I wished to know, before I went into the whole case both as to the plaint and the evidence, whether the Collector had jurisdiction to deal with mere equitable rights and liabilities, and whether the Division Bench, sitting in appeal from the judgment of a Collector, was entitled to deal with such matters before they had been tried in the first instance by a Court of Ordinary Civil Jurisdiction. It appeared to me that the Collector had no such jurisdiction, and that the case ought to have been brought before the proper Court of Civil Jurisdiction. Having now obtained the opinion of the majority of the Judges of the Full Bench, I shall be able to express my own judgment upon it when the case goes back to the Division Bench.

Kemp, J.—The majority of this Bench is against me; and the learned Judges constituting that majority have thought it right to answer the first question. I may add that, if I could bring myself to think that the question was raised, I should have answered it in the same manner as they have done.

Macpherson, J.—As the majority of the Court hold that the first question (in its full extent) does arise in this case, I think it right to add that, as regards the point of law involved, my opinion is the same as that which is expressed in the answer which the

majority of the Court propose to give. I am of opinion that the Revenue Courts have no jurisdiction to try a suit for rent when the issue is *not* merely whether the defendants are, by reason of their own possession or that of their agent (*e g.*, one who holds for them *benamee*), in the position of tenants, and, as such, liable for the rent, but whether, by reason of their having a beneficial or equitable interest of some sort in the tenure, they are, in equity, liable to be charged with the rent.

The 24th September 1867.

Present :

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Mahomedan Law—Pre-emption—Tenant's right.

Case No. 597 of 1867.

Special Appeal from a decision passed by Mr. W. M. Beaufort, Additional Judge of Tirhoot, dated the 11th January 1867, reversing a decision passed by Baboo Byjnath Suhaye, Moonsiff of that District, dated the 20th March 1865.

Gooman Sing (Plaintiff), *Appellant,*

versus

Tripool Sing and others (Defendants), *Respondents.*

Baboo Kalee Kishen Sein for Appellant.

Baboo Debendro Narain Bose for Respondents.

The Mahomedan Law nowhere recognizes the right of pre-emption in favor of a mere tenant upon the land.

Mitter, J.—We think that the judgment of the Lower Appellate Court in this case cannot be sustained. The Mahomedan Law nowhere recognizes the right of pre-emption in favor of a mere tenant upon the land. On referring to the Chapter on Pre-emption in the Hedaya, we find that there are only three classes of persons in whose favor this right is recognized, and a tenant does not fall within any of those three classes. That the latter cannot claim the right of pre-emption is clearly laid down in pp. 471 and 472 of Baillie's work on the Mahomedan Law, and there is also a ruling to that effect reported in Volume II. of the Agra Sudder Court Reports, page 406, Madaree Lall, appellant. However unreasonable it may appear at first sight, that a tenant who is actually upon the land is not to be permitted to claim a privilege which is extended to a mere neighbour, we are wholly unable to enlarge the scope of a law which we must apply to those cases which expressly fall within its provisions. We reverse the judgment of the Lower Appellate Court, and decree this special appeal with costs.

The 24th September 1867.

Present :

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Stamps—Note (e), Clause 11, Schedule B, Act X., 1862—Claim to fractional share of zemindaree.

Case No. 702 of 1867.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 26th February 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 8th August 1866.

Raj Chunder Roy (Defendant), *Appellant,*

versus

Chundee Churn Naik and others (Plaintiffs), *Respondents.*

Baboos Tarucknath Dutt and *Chunder Madhub Ghose* for Appellant.

Baboos Anund Chunder Ghosal and *Otool Chunder Mookerjee* for Respondents.

A suit for the declaration of title to a fractional share in a zemindaree paying revenue to Government is not a suit "for lands forming one entire mehal or a *specific* portion thereof with a *defined* jumma;" such share, being "an interest in land," should be valued according to the provisions of *note* (*e*), Clause 11, Schedule *B*, Act X. of 1862.

Mitter, J.—It is urged before us in this special appeal that the plaintiffs, special respondents, ought to have valued their claim according to the provisions of *note* (*e*), Clause 11, Schedule B, Act X. of 1862, and not according to those of *note* (*a*) as they have done. I think that this contention is sound in law. The suit was for the declaration of the

plaintiff's title to a certain fractional share in a zemindaree paying revenue to Government. I am of opinion that such a suit is not a suit "for lands forming one entire "mehal, or a *specific* portion thereof, with a "*defined* jumma. I think that, in order to bring a case within the meaning of these words, the suit must be for the whole of the land and for the entire interest in it, whether it constitutes one entire mehal or a specific portion thereof with a *defined* jumma. In the present case, the plaintiffs sued for a fractional share in a joint estate held in common tenancy. Now, this fractional share extends, no doubt, over all the lands comprised in the estate, but it cannot, therefore, be regarded as anything more than a mere interest in these lands. It cannot be held that a suit for a share in the lands is a suit for the lands themselves; and, although the share in question extends over the whole of the lands forming one entire mehal, a suit for such a share is clearly distinct and distinguishable from a suit *for lands* constituting one entire mehal. Nor can it be said that the share in question forms a *specific* portion of the mehal with a *defined* jumma; *1st*, because it does not cover the entire interest in the land; *2nd*, because it does not constitute a *specific* portion of the mehal; *3rd*, because there is no *defined* jumma attached to it. A combination of all these three elements is indispensibly necessary. I think that the word *specific* must have some meaning attached to it. It signifies, in my opinion, something that can be particularized—something that can be pointed out as having a *distinct* and *separate* existence by itself. A fractional share in a joint estate runs indefinitely and indiscriminately over the whole, and there are no means of distinguishing one fractional share from another of an equal extent. I think that such a share cannot be said to constitute a specific portion of the mehal, nor can it be said to bear a *defined* jumma. It is true that the amount of jumma payable for it can be ascertained by calculation, but this calculation is good as between the different sharers only. The jumma thus ascertained is clearly distinguishable from what is called a *defined* jumma. The word *defined* conveys the idea of something that has been laid down within its proper limits. Now, this can be done by the Revenue Authorities only. The Collector might define the jumma by opening a separate account under Sections 10 and 11 of Act XI. of 1859, or by an actual butwarrah. But, until this is done, and if the jumma was not otherwise defined at the time of the original settlement, I think that the share in question cannot be said to bear a *defined jumma*. For these reasons, I hold that the share in question is "an interest in land," and therefore falls within the purview of *note* (*e*). Now, it is admitted that, if the mode of valuation laid down in that note had been adopted, the suit ought to have been instituted in the Court of the Principal Sudder Ameen, and not in that of Sudder Ameen, where it was actually brought. As, therefore, the objection taken by the special appellant is correct in law, and as it affects the jurisdiction of the Court in which the suit was instituted, I would reverse the judgment of the Lower Appellate Court, and restore that of the first Court. I would accordingly decree the special appeal with costs.

Phear, J.—I concur in the judgment of my brother Mitter generally for the reasons which he has given.

The 24th September 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Evidence—Copy of a copy—Section 17, Regulation XXXVI., 1793.

Case No. 1417 of 1867.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of East Burdwan, dated the 29th March 1867, modifying a decision passed by the Moonsiff of Selimabad, dated the 24th February 1866.

Sreemunt Kowar (Plaintiff), *Appellant,*

versus

Akbur Mundul and others (Defendants), *Respondents.*

Baboo Kedarnath Chatterjee for Appellant.

Baboos Umbika Churn Banerjee and *Obhoy Churn Ghose* for Respondents.

A copy of a document purporting to be the copy of an original *kobalah* alleged to have been registered by a Cazee does not come within the provisions of Regulation XXXVI., 1793, Section 17.

It might possibly be receivable as evidence if the accuracy of the first copy, and the execution and loss of the original, were proved.

Macpherson, J.—THE question in this appeal is whether the Lower Appellate Court is right in admitting in evidence a copy of a copy of a certain *kobalah* on which the defendants relied as proving the sale upon which their title depended. This copy was rejected by the Court of first instance, on the ground that there was no cause shown why the original was not produced. That Court, moreover, was not satisfied upon the evidence that any such *kobalah* as alleged ever was executed. The Lower Appellate Court took further evidence on the question of the loss of the original, and admitted the copy on the strength of the evidence of one of the defendants that he had left the original with a certain person, and that, when he (the defendant) was away in Calcutta, there was a *dacoity* in that person's house, when the original deed was stolen, since which time it has never been seen.

In special appeal it is contended that a copy of a copy of a document is not admissible.

In this case, the copy produced is a copy of a document entered in the books of a Cazee, which document purports to be the copy of an original *kobalah* alleged to have been registered by the Cazee. An attempt has been made to bring the copy within the provisions of Regulation XXXVI., 1793, Section 17. But that Regulation does not apply to registration by Cazees; therefore this attempt fails.

If there were satisfactory proof of the execution and contents of the original, and of the accuracy of the copy from which the copy tendered as evidence was made, the latter might possibly be receivable, if the loss by the dacoity was proved. But it appears to us that there is on the record no legal evidence of a dacoity or of loss of this alleged *kobalah* in consequence; and, whereas the Court of first instance did not believe the *factum* of the *kobalah*, the Appellate Court does not say that it considers the execution of it proved.

There is, in truth, no evidence upon the record which justified the reversal by the Lower Appellate Court of the decree which the Court of Original Jurisdiction passed. We, therefore, reverse the judgment of the Court below with costs, and affirm the judgment of the Court of first instance.

The 24th September 1867.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Object of Sale Law (Act XI., 1859)—Irregularity in the conduct of the sale—Hardship or injustice—Remedies under Sections 25, 26—Jurisdiction—Commissioner—Government—Civil Court—Suit to set aside sale—Action for damages—Section 33.

Special Appeals from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 27th August 1866, affirming a decision passed by the Sudder Ameen of that District, dated the 27th January 1866.

Case No. 1232 of 1867.

Womesh Chunder Chatterjee (Plaintiff), *Appellant,*

versus

The Collector of the 24-Pergunnahs and others (Defendants), *Respondents.*

Baboos Kishen Kishore Ghose, Sreenath Doss, and *Poorno Chunder Shome* for Appellant.

Baboo Sreenath Doss for Respondents.

Case No. 1233 of 1867.

Womesh Chunder Chatterjee (one of the Defendants), *Appellant,*

versus

Isharutoollah (Plaintiff) and others (Defendants), *Respondents.*

Baboo Sreenath Doss for Appellant.

Baboo Poorno Chunder Shome for Respondents.

The object of the Sale Law (XI. of 1859) is to give a title to the purchaser which shall not be open to challenge by any body; and the only ground on which a revenue-sale can be set aside is (Section 25) that of irregularity in conducting the sale, in which case the Commissioner can set it aside on a petition of appeal presented to him within fifteen days of the sale. The petition may disclose a case of hardship or injustice where irregularity does not exist; as for instance, that the sale has taken place where no arrear is due, and under such circumstances the Government, under Section 26, may set aside the sale.

If the Commissioner will not interfere, the party aggrieved may, within one year from the sale becoming conclusive (Section [illegible]), bring an action in the Civil Court under Section 33, and the Court may set aside the sale on proof of irregularity and of substantial injury caused thereby.

If no irregularity producing substantial injury is proved, the Civil Court cannot entertain an action to set aside a sale for arrears, and the only course open to an injured party is by a suit for damages as provided for in Section 33.

Loch, J.—THE farmer of certain Government fisheries was supposed to have fallen into arrears, and the property of his surety, Mahomed Ali, was sold by the Collector to make good the deficiency, on 8th December 1864. On 16th June 1865, Womesh Chunder Chatterjee, the plaintiff in case No. 1232, having a decree against Mahomed Ali, sold his rights and interests in this property, and purchased them. He then brought an action against the Government to set aside the sale of the property for arrears of revenue, on the ground that, when it was sold, no arrear was due, the farmer never, as he alleged, having been put into possession, and having, in consequence, thrown up his lease. This suit has been dismissed by both the Lower Courts on the ground that, under the provisions of Act XI. of 1859, they have no jurisdiction, no appeal having been preferred from the order of the Court causing the sale to the Revenue Commissioner as provided for by Section 25 of that law.

The other suit, No. 1233, is instituted by the auction-purchaser at the Government sale to set aside the subsequent sale made by the decree-holder, and the Lower Courts have decided in his favor.

It appears that, on the petition of the son of Mahomed Ali, the case was brought to the notice of the Revenue Commissioner, who reported the matter to the Board, recommending the annulment of the sale, on the ground that, at the time of the sale, no arrear was in existence. He stated, further, that, as no irregularity in conducting the sale had occurred, he had no authority to cancel it under the provisions of Section 25, Act XI. of 1859, and he requested the Board to obtain the sanction of Government to the cancelment of the sale. On 9th August 1867, the Government ordered the sale to be cancelled under the circumstances mentioned.

This case was adjourned on a former occasion to enable the parties to ascertain and state to the Court the result of the application to Government which has been mentioned above.

The appellant, on the ground that the sale had been set aside, asked the Court to decree his appeal with costs, which application was opposed by the Government pleader on two grounds: *1st*, that such an action would not lie in the Civil Courts; and, *2nd*, that, even if a suit would lie, the present suit was premature, as the plaintiff should have awaited the result of the reference to Government.

It is urged before us that, this being a sale for arrears of revenue, the only course open to the plaintiff was by appeal to the Commissioner under the provisions of Section 25, Act XI., 1859, and that this appeal was required by law to be presented on or before the fifteenth day from the date of sale; and, if there had been irregularity in conducting the sale, the Commissioner, under the powers given him by that Section, might set it aside; that, under the provisions of Section 33 of the Act, a suit could be brought in the Civil Court to set aside a sale only where an appeal had been previously and unsuccessfully made to the Commissioner, and that the only grounds on which such a suit would lie were that it had been made contrary to the provisions of the Act, and then only on proof that the plaintiff had sustained substantial injury by reason of the irregularity complained of. It is further urged that the suit must be brought within one year from the date of the sale becoming conclusive as provided in Section 27, and it is contended that, in this case, plaintiff is out of Court on every one of the above grounds.

Then, again, it is urged by the Government pleader that, as soon as the mistake was brought to the notice of the authorities, steps to rectify the error were taken, and application was made to the Government to cancel the sale; and the plaintiff should have awaited the result of that application before he brought his suit. It is also pressed upon us that plaintiff cannot be in a better position than his judgment-debtor whose rights and interests he purchased.

The appellant has this day laid before the Court an authenticated office-copy of a letter from the Officiating Commissioner of the Presidency Division to the Secretary to the Board of Revenue of 5th July 1867, No. 307, from which it appears that Mahomed Ali, the original surety, died before the sale took place; that his son, Ishak Ali, did appeal to the Commissioner for the reversal of the sale within the period pre-

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scribed by Section 25, Act XI. of 1859; that no orders had been passed upon the petition owing to a long and intricate enquiry into the accounts of the Government farmer, the result of which established the fact that, at the time of the sale for arrears of revenue, no arrear was due by the farmer, but, on the contrary, money was due to him by the Collector. The Commissioner then observes that there was no technical irregularity about the sale, and that he does not think he has the power to annul the sale under the provisions of Section 25 upon the ground of its being discovered that no arrear was due; and he recommends the Board to move the Government to set aside the sale under the provisions of Section 26. This letter and the letter from the Board to Government of 25th July 1867, and the reply of Government dated 7th August 1867, No. 301, show clearly that, when the sale was made, no arrear existed, and that, after the sale, Ishak Ali, the son and representative of the surety Mahomed Ali, did file an appeal within the period and in the manner prescribed by law.

Such being the facts as now placed before us, the first question we have to dispose of is, whether the plaintiff could, under any circumstances, bring a suit in the Civil Court to set aside the sale. Plaintiff, we must remember, is in the shoes of the surety, Mahomed Ali, and can claim no higher rights than he possessed. To determine this, it is necessary to ascertain whether Act XI. of 1859 contemplates such a case as the present, and provides a remedy for it. Now, that law clearly supposes that an arrear is due, and that a sale takes place on account of an ascertained arrear, and it provides for the reversal of a sale if there have been irregularities in conducting the sale by appeal to the Commissioner under Section 25, and an ultimate suit in the Civil Court to set aside the order of the Commissioner, but such suit can be brought only on the ground of irregularity in conducting the sale, and the sale can only be set aside on proof of material injury arising from the alleged irregularity.

It is true that a special remedy is provided for cases of hardship and injustice by Section 26, but does the existence of that Section oblige a party to apply to the Revenue Authorities where no irregularity in conducting the sale exists, and shut the doors of the Civil Court against him when he seeks to set aside a sale on grounds which, he alleges, were not contemplated by, or not within the scope of, the Revenue Sale Law?

It is said that the cases contemplated by Section 26 are those where a valuable estate has been sold for a trifling balance, or where the party, whose estate had been sold, had money in the Collector's hands sufficient to meet the balance which that officer refused to credit to the estate—the former would be a case of hardship, the latter of injustice, and for such cases Section 26 provides, but not for cases when there was no arrear at all. It is further said that the sale, being that of the property of a surety, could not properly be made under Act XI. of 1859, and, even if the surety had agreed that his property should be sold under that law on default by his principal, yet his agreement only extended to the mode of sale, but did not deprive him of any civil right. He agreed that the property might be sold under the Revenue Sale Law, *i. e.*, that it might be sold without a suit in Court and after decree, but he did not thereby give up his right to bring an action in the Civil Court to recover the property if illegally sold; and it is added that, even if Section 26 provides for such a case as the present, neither it nor any other Section of the Act prohibits, in distinct terms, a suit to set aside a sale.

It is necessary to read Sections 25, 26, and 33 of Act XI. of 1859 together. These Sections are not new, but are a re-enactment of Sections 17, 18, and 24 of Act I. of 1845, with some additions to the latter Section. The object of the sale law is to give a title to the purchaser which shall not be open to challenge by any body: hence it fences about the auction-purchaser against any claims of the defaulter or others, and provides another remedy for them should any one have suffered injury by the sale. The only ground on which a revenue-sale can be set aside is, as we see from Section 25 of the Act, on the score of irregularity in conducting the sale, and then the Commissioner, on a petition of appeal presented to him within fifteen days of the sale, can set it aside. The terms of the petition, however, need not be limited to pointing out only irregularities. It may set forth any other cause for setting the sale aside; it may disclose a case of hardship or injustice where no irregularity in conducting the sale exists, for instance, that the sale has taken place where no arrear is actually due, and under such circumstances the Government, under the provisions

of Section 26, may set aside the sale. If the Commissioner will not interfere to set aside the sale, the party who considers himself aggrieved may bring an action in the Civil Court under Section 33 of the Act, and may ask to have it set aside on the score of irregularity, and the Court may set it aside on proof of the existence of such irregularity, and of substantial injury caused to the plaintiff by such irregularity. Such suit must be brought within one year from the date of the sale becoming final and conclusive as provided in Section 27 of the Act. If, therefore, no irregularity producing substantial injury is pleaded, a Civil Court cannot entertain an action to set aside a sale for arrears of revenue, or other demands realizable in the same manner as arrears of revenue; and the only course open to a party who considers himself to be injured by the sale of his property, should the Commissioner under Section 25 or the Government under Section 26 refuse to interfere, is by a suit for damages, as provided for in the latter part of Section 33.

Applying, then, the law as thus understood to plaintiff's case, we find that his estate was, under the terms of his own surety-bond, made subject to sale under the provision of Act XI. of 1859, and was sold under that Act. We find that an appeal was preferred to the Commissioner by the son of the surety who is now represented by the plaintiff, within the period prescribed by Section 25 of the Act; but plaintiff, instead of awaiting the result of that appeal, has been premature in bringing this suit. We find, further, that, as this suit is brought to set aside the sale, not on the grounds set forth in Section 33, *viz.*, irregularity in conducting the sale, the suit is not within the jurisdiction of the Civil Court, and cannot be entertained. We think, further, that, as the surety agreed that the property pledged by him should be sold under the provisions of Act XI., 1859, on default of his principal, he must, in the absence of any reservation, be bound by all the provisions of that law; he cannot now say that he intended the sale to take place in the mode prescribed by that law, and reserved to himself a right of action exclusive of that law.

Considering, then, that the plaintiff has no cause of action, we think the Lower Courts were right in dismissing his suit with costs, and we dismiss this special appeal with costs.

We think, however, that the special appeal No. 1233 must be decreed against the auction-purchaser, as his suit was quite unnecessary, and the Government have set aside the sale and restored the property to the representative of the original surety. We, therefore, give a decree in special appeal No. 1,233, and dismiss the plaintiff Isharee oollah's case with costs.

The 24th September 1867.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Limitation—Breach of contract—Clause 10, Section 1, Act XIV., 1859.

Case No. 738 of 1867.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 9th January 1867, affirming a decision passed by the Deputy Commissioner of Lohardugga, dated the 9th June 1866.

Pochooram Sahee (Plaintiff), *Appellant,*

versus

Choto Lall Mukoond Lall Sahee (Defendant), *Respondent.*

Baboo Sham Lall Mitter for Appellant.

Baboo Bhawanee Churn Dutt for Respondent.

An action for breach of contract on the repudiation of a lease, provided for by Clause 10, Section 1, Act XIV., 1859.

Bayley, J.—We think that the Lower Courts are right in this case in holding that Section 1, Clause 10, Act XIV., bars the plaintiff's suit. Defendant agreed to give him a lease, and did so; and when plaintiff went, in the same month in which the alleged lease purported to be given, to take possession, he could not get it, because a third party set up his possession under a lease from the same lessor defendant. Plaintiff states that he then went to the lessor defendant, and stated these circumstances, when the lessor defendant repudiated such a lease to plaintiff altogether.

Defendant's case was a denial of such a lease; but plaintiff's suit is admittedly brought three years after the repudiation of the alleged lease by defendant. That repudiation of the lease was undoubtedly the breach of contract, and that breach the cause of action. To that breach of contract Clause 10, Section 1, Act XIV. of 1859 applies.

Section 1, Clause 16, is for cases not provided for otherwise; but this case is, in our opinion, under the facts above stated, clearly one provided for by Section 1, Clause 10, Act XIV. of 1859.

In this view, we dismiss this special appeal with costs.

The 25th September 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Limitation—Suit for damages for malicious prosecution—Clause 2, Section 1, Act XIV. of 1859.

Case No. 474 of 1867.

Special Appeal from a decision passed by the Officiating Additional Principal Sudder Ameen of Chittagong, dated the 29th December 1866, reversing a decision passed by the Moonsiff of Puttia, dated the 29th March 1866.

Obedul Hossein (Plaintiff), *Appellant,*

versus

Goluck Chunder and others (Defendants), *Respondents.*

Baboo Nursing Chunder Mitter for Appellant.

Baboo Greeja Sunker Mojoomdar for Respondents.

The limitation of one year prescribed by Clause 2, Section 1, Act XIV., 1859, for bringing suit for damages for injury caused to reputation by a malicious prosecution in a Criminal Court runs from the date on which the plaintiff was discharged from custody, and not from the date on which the criminal charge was preferred.

Mitter, J.—This was a suit for damages for injury caused to the reputation of the plaintiff by a malicious prosecution instituted against him in the Criminal Court by the defendant Goluk Chunder. The Lower Appellate Court has dismissed the claim upon the ground that more than one year having elapsed from the date when the criminal charge was preferred, to the date of the institution of the present suit, it was barred by Clause 2, Section 1, Act XIV. of 1859.

In special appeal, it is contended before us that the period of one year prescribed by the aforesaid Clause ought to be computed from the date when the plaintiff obtained his final discharge from the Magistrate. I am of opinion that this contention is sound. The entire prosecution from its commencement down to its termination by the order of acquittal passed by the Criminal Court ought to be looked upon as one continuous act, which constitutes the plaintiff's cause of action in this case. The various acts done by the defendant during the course of the trial all go to constitute the prosecution, and limitation can hardly be said to have commenced to run against the plaintiff until the last of those acts was done, which was on the day the plaintiff obtained his discharge. The charge was the mere commencement of the prosecution; and I think that it would be unreasonable to hold that the plaintiff was bound to sue within one year from the date when the charge was preferred against him, without waiting for the result which was to follow upon it. It is laid down in page 733, Broom's Commentaries on the Common Law, 3rd Edition, that in an action for a malicious prosecution, "it is incumbent on the plaintiff to show "that the proceeding was determined in his "favor." Hence it follows that the plaintiff cannot be put to his action before the proceeding in the Criminal Court is actually determined. I would, therefore, reverse the judgment of the Lower Appellate Court so far as the defendant Goluk Chunder is concerned, and remand the case to that Court for a decision upon the merits.

Loch, J.—I concur.

The 25th September 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Limitation—Cause of action—Wrongful possession of land—Sale of putnee for arrears of rent—Proprietary and Putneedaree rights.

Case No. 544 of 1867.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 11th December 1866, reversing a decision passed by the Moonsiff of that District, dated the 21st July 1865.

Raj Narain Roy and others (Defendants), *Appellants,*

versus

Woomesh Chunder Goopto and another (Plaintiffs), *Respondents.*

Baboo Sreenath Doss for Appellants.

Baboo Anund Chunder Ghosal for Respondents.

A suit is brought to recover possession of a piece of ground. Plaintiff had granted a putnee of certain lands, including the piece in question, and the putnee was ultimately sold for arrears of rent, when it was bought in by plaintiff. On taking khas possession, plaintiff discovered that the plot in suit had been encroached upon and appropriated by defendant, who is admitted to have been in wrongful possession for more than 12 years before the institution of this suit. *Query*, Is plaintiff's suit barred by lapse of time or not: in other words, when did plaintiff's cause of action arise?

HELD per *Phear, J.*—That on the completion of the auction-sale the putnee merged in the superior title of the zemindar vendee, who thus became entitled, by virtue of his original rights as zemindar, to possession of the entire lands. The withholding possession constituted a new cause of action, independently of the fact of its being a persistence in that which was before a violation of the putneedar's right of possession. The decision of the Lower Appellate Court is right.

HELD per *Bayley, J.* (*Contra*, decreeing the appeal).—That the adverse possession by the third party is of the lands, the proprietary right of which remained with the zemindar, and was not affected by the intermediate putnee-right to collect rents, &c. On that proprietary right being interfered with, the cause of action arose, *i.e.*, whenever the adverse possession commenced. The zemindar could have sued whether there was a putnee or not; as he did not, limitation bars the suit.

Phear, J.—THE suit is brought to recover possession of a small piece of ground. It seems that the plaintiff had granted a putnee of certain land, including the land in suit to one Damoodur Chunder Roy, and ultimately this putnee was sold by auction for arrears of rent, when it was bought in by the plaintiff himself. This occurred on the 6th Srabun 1269. On proceeding to take khas possession of the lands of the putnee, the plaintiff discovered that the plot of land now sued for had been encroached upon and appropriated by the defendant, the owner of a neighbouring talook, during Damoodar Chunder's enjoyment of the putnee; and the plaintiff accordingly brings this suit to recover his lost property.

It is admitted that the defendant has been in wrongful possession of that land for more than 12 years before the institution of this suit. On this, arises the question whether the plaintiff's suit is barred by lapse of time, or not? In other words, when did the plaintiff's cause of action arise? The Lower Appellate Court has found that the plaintiff's cause of action first accrued when he obtained back his property by purchase at the auction-sale, because he could not have known earlier that the dispossession had taken place. Manifestly, the reason given for this decision is erroneous, inasmuch as the accruing of the cause of action could in no way depend upon whether the plaintiff was aware of its existence, or not. I am, however, inclined to think that the decision itself is right. It seems to me that, during the pendency of the putnee, the plaintiff was not entitled to the possession of the land subject to the putnee, even as against a trespasser; he was only entitled to such rents, profits, and privileges, as were reserved to him by the pottah, and the reversion of the property contingent on the event of the putnee in any way coming to end. If this view be correct, the occurrence of the encroachment did not give him any right to sue to recover possession, although it might have afforded him good cause to sue for vindication of his reversionary and other rights, and as long as the putnee continued in being, his position relative to the wrongdoer did not alter. Consequently, the cause of action upon which the plaintiff now sues did not accrue to *himself* during the time that the putnee lasted. Then, did it during that period accrue to the putneedar, and from him pass to the plaintiff by the auction-sale? I think there is no doubt upon the facts that the right to sue to eject the trespasser did accrue to the putneedar when the encroachment was first made, and, if the present plaintiff now sues only by reason of claiming through the putneedar

and on the foundation of his rights, then the present cause of action must date back to the time when it accrued to the putneedar, and the suit is clearly barred by the Limitation Act. But, passing by the question whether, under the rent-law, the purchaser at a sale of a tenure for arrears of rent takes with it such rights of action in regard to it, and no more, as the defaulting tenant possessed at the time of sale, I think that, in this particular case, on the completion of the auction-sale, the putnee entirely disappeared by merging in the superior title of the zemindar-vendee. The zemindar could not pay rent to himself, and there was nothing in the facts to keep the tenure alive for the benefit of any one else. On the putnee thus ceasing to exist, the plaintiff became entitled, not as claiming through the putneedar, but by virtue of his original rights as zemindar, to the possession of the lands in their entirety which had been originally granted in putnee. In this state of things, the withholding possession from him, which is attributed to the defendants, constitutes a new cause of action, and is not simply a continuance of that which had before accrued to some other person. The defendant's trespass is a violation of the plaintiff's right of possession, which he is entitled to maintain by action quite independently of the fact that the trespass in question is also only a persistence in that, which was before a violation of the putneedar's right of possession. The violation of right in the two instances is not one and the same thing, because the two rights of possession are themselves distinct. The zemindar does not acquire his right of possession from the putneedar, but he does so as a consequence of the putneedar's tenure and rights all falling to the ground.

I assume that, during the existence of the putnee until the sale for arrears of rent, the plaintiff was not in any way ousted of his zemindar's rights, for, had the putneedar disclaimed or paid his rent to another person, inasmuch as in either of these events the zemindar would have acquired immediate right of possession, his right of action against the trespasser would have accrued at the same time, and the period of limitation would have commenced to run accordingly.

On the whole, therefore, I think that the decision of the Lower Appellate Court is right, and that the appeal ought to be dismissed with costs.

Bayley, J.—I much regret that I cannot concur in this judgment, and differ from my learned brother Phear with much diffidence. But in this case, I think, the zemindar, though purchaser of the putnee, is barred, because the cause of action is, in my view, the act of dispossession which admittedly took place 12 years before suit. I pass over one plea addressed to us, *viz.*, that the cause of action is the date of the knowledge by the zemindar (*after his* purchase of the putnee) of the adverse possession of a third party. I do so, as we are agreed that such knowledge does not create the cause of action. The question we have to decide is, whether the other plea taken by the zemindar, *viz.*, that, as *purchaser*, he has a right to have the putnee in the state it was when originally created, and that no cause of action arises to him till the date of his purchase, is correct or not? He is, it is true, the purchaser; but it is also true that he remains, notwithstanding, just as much the zemindar as ever. It is not seriously contended before us that, if he were the zemindar *only*, and not the zemindar-purchaser combined, he would not be barred. Now, the adverse possession by the third party is of the lands, the proprietary right of which during the whole period of adverse possession remained with the same zemindar. The intermediate putnee-right to collect the rents and take the profits would not in any way affect the zemindar's proprietary right. On that right being interfered with by a third party having adversely held possession of the lands of the zemindar-*proprietor*, the cause of action arose, *i. e.*, whenever the adverse possession commenced.

It is said that the zemindar could not sue while the putneedar had the putnee. But, I think, this is not so. The zemindar could, in my view, have always sued, whether there was a putnee or not, for a declaration of his proprietary rights against the third party in adverse possession. His doing so would not affect the putneedar's lease, and then the zemindar might, indeed, if he got a decree, make over the land to the putneedar's possession. As the zemindar did not do what, in my opinion, the law allowed him to do, and what the act of dispossession by a third party called upon the zemindar as *proprietor* to do, limitation must, I hold, bar the suit.

I would, therefore, decree this appeal.

The 19th November 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Pre-emption—Nature of the right—Christians in Behar.

Case No. 483 of 1867.

Special Appeal from a decision passed by Baboo Nurottun Mullick, Principal Sudder Ameen of Bhaugulpore, dated the 19th December 1866, affirming a decision passed by Baboo Matadeen, Moonsiff of Kissengunge, dated the 28th August 1865.

Baboo Mohesh Lall (Plaintiff), *Appellant,*

versus

Mr. John Christian and Co. (Defendants), *Respondents.*

Mr. Montriou and *Baboo Mohesh Chunder Chowdhry* for Appellant.

Mr. R. V. Doyne and *Baboo Kissen Succa Mookerjee* for Respondents.

The right of pre-emption is not matter of title to property, but is rather a right to the benefit of a contract; and, when a claim is advanced on such a right, it must be shown that defendant is bound to concede the claim, either by law or by some custom to which the class of which he is a member is subject on grounds of justice, equity, and good conscience.

Phear, J.—THE plaintiff brings this suit against the vendor and the purchaser of a certain portion of land in the District of Bhaugulpore, seeking to obtain possession of the sold land on the ground of an alleged right of pre-emption. Both the plaintiff and the vendor-defendant are Hindoos, inhabitants of Behar, and, as such, members of a class which has adopted the custom of pre-emption: the purchaser-defendant is a Christian. The land in question is now in possession of this latter defendant, and therefore the cardial question in the case is, whether or not the plaintiff has a right to recover the land as against him, he being a Christian, inhabitant of Bhaugulpore. If the plaintiff has such a right, it must be because the Christian defendant, under the circumstances which are necessary to give foundation to a claim of right of pre-emption, is bound by law, or by custom having the force of law, to give up the land to the plaintiff at his request. Now, admittedly, there is no such general law, for the right of pre-emption is not matter of title to the property, but is rather a right to the benefit of a contract; therefore, if the Christian defendant is so bound, it must be by reason of some custom, to which a class only of the people including him as a member, and not all people are, on grounds of justice, equity, and good conscience, subject. No doubt, in reference to the obligation of a custom, the class subject to it may be defined either by local limits, or by family, social, or personal characteristics, and so on. Mr. Montriou's argument (throughout which I may remark he has treated this case entirely as if it were one of regular appeal) requires either that all inhabitants, or at least all Christian inhabitants, of the District of Bhaugulpore, dealing with Hindoos for the purchase of land within the same district, are bound by the Mahomedan rules with regard to pre-emption or some modification of them. This is entirely matter of evidence in which the point to be established is, that the persons of the necessary class have exhibited adherence to the custom alleged; and the Lower Court finds specifically on the evidence before it that Christians in Bhaugulpore are not shown to have adopted such a custom. It follows from this finding that all inhabitants of Bhaugulpore have not adopted it. Hence the requisites necessary to satisfy the exigencies of Mr. Montriou's argument are not satisfied, and he must fail in the contention which he makes on behalf of his client. It appears to me, therefore, that, supposing we were in a position to deal with this case, as a case of regular appeal, the application of the plaintiff ought to be dismissed.

But, in truth, this is a special appeal, complaining that the Lower Appellate Court has erred in carrying out the order of remand formerly made by this Court. As to this, I need now only say that I think the objection has not been sustained by the argument. I am of opinion that the Lower Appellate Court substantially tried and determined the issues which were referred to it by remand-order of this Court.

This special appeal must, therefore, be dismissed with costs.

Bayley, J.—I entirely concur; the current of decisions having been to the effect that, where it is shown that the Hindoos of any district or province had adopted as a custom the system of pre-emption recognized by the Mahomedan Law, that custom should be binding on such Hindoos. Acting on analogy to the principle laid down in those decisions, the remand-order of this Court (of which this so-called special appeal is, in fact, an application for review) required the Lower Courts to find if the Christians

of Behar (as well as the Hindoos) had adopted the custom in question. It was on special appellant to prove this, and the Lower Appellate Court has found, as a fact, that he utterly failed to do so.

Under this state of facts, I think this special appeal should be rejected with costs.

The 19th November 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Mesne-profits (Assessment of).

Case No. 753 of 1867.

Special Appeal from a decision passed by Mr. A. E. Russell, Officiating Additional Judge of Hooghly, dated the 25th January 1867, affirming a decision passed by Moulvie Nuzeeroodden Khan, Principal Sudder Ameen of that District, dated the 3rd November 1865.

Mr. Charles Swinton Hogg (Plaintiff), *Appellant,*

versus

Dinonath Sreemanee (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboo Bhowane Churn Dutt* for Appellant.

Baboo Khetturnath Mookerjee for Respondent.

The sum to be recovered in any case of a suit for mesne-profits is of the nature of damages to be assessed by a proper exercise of the judicial discretion of the Court which is charged in the trial of the case on its merits; and it is impossible to lay down a rigid rule according to which those damages should always be calculated.

Phear, J.—In this case, the plaintiff had sued for mesne-profits, and obtained judgment for a sum amounting to the aggregate of the yearly sums of money received by the defendant by way of rent while in possession of the land. The plaintiff now appeals specially, complaining that the Lower Appellate Court has not also awarded him interest on the defendants' money-receipts for the time during which he was wrongfully kept out of his land, in addition to giving him the amount of those receipts.

We need hardly remark that the sum to be recovered in any case of a suit for mesne-profits is of the nature of damages to be assessed by a proper exercise of the judicial discretion of the Court which is charged with the trial of the case on its merits. It is impossible to lay down any rigid rule according to which those damages should always be calculated. The amount must, in each case, depend upon all the circumstances of the case. The Court of first instance refused to give the interest now asked for, saying in so many words that, in its opinion, the sum of the annual profits made by the defendant was, under all the circumstances of the case, a sufficient measure of the damages sustained by the plaintiff. On appeal, the Lower Appellate Court said that it was not usual to deviate from this measure of damages unless special cause were shown, and it went on to find that in this case no such cause existed. Consequently, it affirmed the decision of the Lower Court.

It is pressed upon us that the Lower Appellate Court laid down for itself, and held its discretion limited, a rule which does not obtain in law, and, therefore, that the case ought at least to be returned to it for re-consideration. We have carefully considered the arguments placed before us, and on the whole are not able to say that the Lower Appellate Court has not exercised its full judicial discretion in the matter. In this view, there being substantially no other objection on the part of the plaintiff to the legality of the decision of the Lower Appellate Court, we dismiss the special appeal with costs.

The defendant before us orally objected (which he did not below, although he had the opportunity) that the Lower Courts had gone beyond their jurisdiction in awarding the amount of interest which was actually decreed, and he based his argument on Section 11 of Act XXIII. of 1861; but we are of opinion that this Section is not applicable to the case, and, consequently, that his grounds of appeal are untenable, and his application must be dismissed.

The 21st November 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Commission—Witness—Procedure.

Case No. 93 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 8th January 1867.

Mulluk Ali Shah and others (Defendants), *Appellants,*

versus

Mussamut Meher Banoo (Plaintiff), *Respondent.*

Messrs. R. V. Doyne and *C. Gregory* for Appellants.

Baboos Unnoda Pershad Banerjee and *Onookool Chunder Mookerjee* for Respondent.

Where the application of a party to a suit to have the evidence of witnesses, residing beyond the British territories, taken under a commission, failed owing to circumstances beyond his control, a subsequent application to have other witnesses examined within the British territories ought to have been complied with.

Kemp, J.—This case must be remanded. The merits have not been entered into in the argument before us. It has been contended by Mr. Doyne for the defendant, appellant, that the Lower Court did not give his client a fair opportunity of producing all the available evidence in support of his plea, and we think that this contention is clearly made out.

The defendant first applied to have certain important witnesses residing beyond the British territories examined by commission through the Commissioner at Peshawur. These parties reside at Candahar and Herat, and are attached to the Court of Share Ali. The return to the commission was to the effect that, owing to the disturbed state of the kingdom of Affghanistan, the commission could not be executed—a result that might well be expected. The defendant failed in obtaining the best evidence procurable, that of the attesting witnesses to the deeds filed in support of his defence, proceeded to Peshawur, and, finding that some important witnesses resided there, applied to have them examined by commission, as also to have certain witnesses including the son of the plaintiff, residing in the Patna and Bhaugulpore districts, examined.

These applications were refused by the Principal Sudder Ameen on very insufficient grounds.

The defendant, it is true, in the first application, did not name these witnesses, as he relied upon the evidence of the principal witnesses who reside in the foreign territory to prove his case. When these witnesses failed him owing to circumstances entirely beyond his control, he applied to the Court to permit him to adduce further evidence, and this application, being a reasonable one, ought to have been complied with. As it is, the defendant, without any neglect or laches on his part, has not been permitted to prove his case, and there has been a failure of justice.

The case is remanded. The Principal Sudder Ameen will examine the witnesses residing at Peshawur by commission, and summon and examine the local witnesses cited by the defendant, and then pass a fresh decision upon the merits. Costs to follow the result.

The 21st November 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Admission.

Case No. 3034 of 1866.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 16th August 1866, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 17th January 1866.

Seetanath Shaha (Plaintiff), *Appellant,*

versus

Keshub Chunder Acharj Chowdhry and others (Defendants), *Respondents.*

Baboo Kishen Dyal Roy for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

A decree was given in favor of *A* in a suit by *A* against *B* on a kistbundee in which *B* admitted his share of a debt contracted by him (*B*) and *C*. Held that *A* is not entitled to recover in a subsequent suit brought by him against both *B* and *C* for the balance of the same debt, B not having made any admission in this second suit, and there being no evidence to support the claim against *C*.

Loch, J.—We think the judgment of the Lower Appellate Court must be upheld. The defendants in this case are two brothers, and the claim is for the value of goods sold to them. It appears that the plaintiff brought another suit against the elder brother Ishan, on a kistbundee in which he had admitted

himself to be liable for half the debt. That case was decreed. In the present suit, plaintiff made both brothers defendants, and the first Court, disposing of it *ex parte*, gave a decree against the second brother Keshub, and released Ishan as not liable, he having given a kistbundee for his share of the debt. On the case being admitted for re-trial under Section 119, the first Court dismissed the suit, there being no sufficient proof to support the claim, and this judgment was affirmed by the Judge.

In special appeal, it is urged that, as Ishan had admitted the debt, the suit should not have been dismissed, and, even if the claim were not proved against Keshub, a decree should have been given against Ishan. We do not find that Ishan made any admission in this suit, for he did not appear; and we cannot concur in the reason pressed upon us that, as a decree was given against him in another suit upon a kistbundee executed by him, he must necessarily be liable for the balance of the debt. On the contrary, we think that plaintiff, having settled with him for his share of the debt, cannot now come down upon him for the other moiety; and in this case there is no sufficient proof that either brother is liable, for both the Lower Courts hold that the evidence adduced by plaintiff is insufficient to support his claim. The appeal is dismissed with costs.

The 22nd November 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Payments made into Court in execution of decree (Suit for)—Section 206, Act VIII. of 1859.

Case No. 912 of 1867.

Special Appeal from a decision passed by the Judge of Dacca, dated the 11th February 1867, reversing a decision passed by the Principal Sudder Ameen of Furreedpore, dated the 12th July 1866.

Mohima Chunder Ghose (Defendant), *Appellant,*

versus

Nobin Chunder Adhikaree (Plaintiff), *Respondent.*

Baboo Kalee Mohun Doss for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondent.

Section 206, Act VIII. of 1859, does not bar a suit brought to recover money paid into the Collectorate as Government revenue, although the person on whose behalf the money was paid had an Act X. decree against the person paying the money, as the entire amount of the decree was eventually recovered by taking out execution of the whole decree.

Glover, J.—This was a suit to recover certain moneys paid into the Collectorate on the special respondent's account. It appears that the respondent held an Act X. decree against the special appellant, and the money paid into the Collectorate to the credit of the special respondent was to go against the decree. Ultimately, however, the special respondent took out execution of his decree in full, and recovered the entire amount, and the plaintiff now seeks to recover what he paid into the Collectorate on behalf of the special respondent.

In reply, it is contended that the suit cannot lie with regard to the provisions of Section 206, Act VIII. of 1859.

We are of opinion that the suit was properly brought. No doubt, the objection that the special respondent, when he paid the money, supposed that he was to get credit for it in the decree against him, and that therefore the money so paid was money paid under a decree, is ingenious; but it cannot fairly be contended that what the special respondent paid to the Collector was money "payable" under a decree, and that it was not held by the special appellant to be money paid under the decree is clear from the fact of his taking out execution in full.

Special respondent paid the money as Government revenue due by the special appellant, and not as part of a decree; and, in a case like this, where it has been found, as a fact, by the Judge that the special respondent did pay this money, and, notwithstanding that, had to pay the full amount of the special appellant's decree against him, he is most fully entitled to the most liberal construction we can put upon the law.

We hold that Section 206 does not apply to the case, and that there is, therefore, no ground of special appeal.

The application is, therefore, rejected with costs.

The 22nd November 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mesne-profits—Wrongful possession.

Case No. 84 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Purneah, dated the 7th July 1867.

Hera Lall Thakoor (Plaintiff), *Appellant,*

versus

Gridharee Lall and others (Defendants), *Respondents.*

Baboo Khetturnath Bose for Appellant.

Baboos Tarucknath Sein, Roopnath Banerjee, and *Tara Prosunno Mookerjee* for Respondents.

A party in wrongful possession of land is liable for mesne-profits from the date he withheld possession from the rightful owner.

Kemp, J.—This was a suit for possession of 127 beegahs of land which the plaintiff alleges he inherited from one Eshuk Lall Thakoor.

The land was sold in satisfaction of a decree against Eshuk Lall Thakoor, and the plaintiff's right to recover possession has been lost to him. This much is admitted. But the question of mesne-profits up to date of sale has not been decided by the Lower Court.

If the possession of the defendant was a wrongful one, the plaintiff is entitled to mesne-profits from the date possession was withheld to date of sale in execution. The pleaders for the respondents admit this.

The case must go back to the Lower Court to ascertain the amount of mesne-profits due to the appellant.

The decision with reference to costs is upheld. The defence of the defendants was not altogether a common one, and some of them were most unnecessarily dragged into Court.

The decision of the Principal Sudder Ameen is, therefore, amended to the extent mentioned above.

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The 22nd November 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Possession (Joint or separate).

Case No. 79 of 1867.

Regular Appeal from a decision passed by the Judge of Sylhet, dated the 25th January 1867.

Rajbullub Shammee and others (Plaintiffs), *Appellants,*

versus

Waris Mahomed and others (Defendants), *Respondents.*

Baboo Greesh Chunder Ghose for Appellants.

Baboos Kishen Kishore Ghose and *Debendro Narain Bose* for Respondents.

In a suit to recover possession, it was proved that plaintiffs had purchased shares in a joint property, and had held possession. The Lower Appellate Court, thinking that they had done so separately without being at the time aware of their ijmalee rights, held that it could not decree to them the joint-possession sought for.

Held that it matters not what position plaintiffs considered themselves to have occupied originally whilst in possession. If they can establish their right, they are entitled to recover possession, whether that possession were originally joint or separate.

Glover, J.—This was a suit against a large number of defendants to recover joint possession of certain lands situate in three mouzahs.

Plaintiff claimed by purchase from the proprietors, and the defendants are also purchasers from parties who bought from the plaintiff's vendors. In short, both parties to this suit derive their title from the same source.

The plaintiff's allegation is that the defendants contrived to get the portions of land in which he claims to have a joint interest demarcated at the time of the survey as their separate estate, and so dispossessed him of his share in the land. From other lands he alleges himself to have been forcibly ousted.

The majority of the defendants claim to hold their several plots of land in separate ownership under different deeds of sale. Some of them, however, admitted the plaintiff's right, and compromised the case brought against them.

The Judge has found on the evidence that the estate of which plaintiff bought a

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portion is a joint undivided one, and that, therefore, the plaintiff is entitled to his share ijmalee with the other shareholders; but he decides against the plaintiff, on the ground that he had not been able to prove that he had ever been dispossessed after getting possession. He would have given him a declaration of his title, had the plaint not set forth possession and dispossession, and, that not being proved, the Judge held that he could not decree to the plaintiff the joint-possession sought for.

Several objections are taken in appeal; but it will be unnecessary to notice more than the first, as we are of opinion that, on the facts found by the Judge, and not disputed by the other side in cross-appeal, the plaintiff was entitled to a decree declaring him a joint-sharer with the defendants.

It is admitted by the Lower Court that the plaintiffs purchased shares in a joint-property, and that they held possession of those lands, although the Judge thinks that they did so separately, not being at the time aware of their ijmalee rights. If this be so, then, as they are not in joint-possession now, it follows from the Judge's own showing that they must have been dispossessed. It matters not what position they considered themselves to have occupied originally whilst in possession. It is held to be proved that they were in possession, and therefore they are entitled, if they can establish their right, to recover possession; whether that possession were originally joint or separate does not affect the question, and their right to the former kind of possession has been now judicially determined, and not denied by their opponents.

We think, therefore, that, taking the case as the Judge has himself put it, the appellant is entitled to a decree affirming his possession joint with the other shareholders, and we amend the Lower Court's decision accordingly.

Baboo Kishen Kishore Ghose has appeared on the part of Government for costs, on the ground that Government had long ago withdrawn its claim, and had compromised with the plaintiff, and had been unnecessarily made a respondent in this appeal.

The plaintiff's vakeel admits that this was the case, and costs will accordingly be allowed to Government.

The 22nd November 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Limitation—Onus—Lakheraj—Resumption.

Case No. 1087 of 1867.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 16th February 1867, affirming a decision passed by the Officiating Additional Principal Sudder Ameen of that District, dated the 25th June 1866.

Beharee Lall Roy (Defendant), *Appellant,*

versus

Kalee Doss Chunder (Plaintiff), *Respondent.*

Baboo Romanath Bose for Appellant.

Baboos Onookool Chunder Mookerjee and *Otool Chunder Mookerjee* for Respondent.

The Lower Appellate Court was not bound to take up the plea of limitation which was raised before it for the first time on remand and after the litigation had been proceeding for a protracted period, when it did not appear from the pleadings that limitation arose in the case.

The onus in a case in which the plaintiff is an ordinary zemindar, suing to assess lands which he asserts to have been illegally usurped or alienated by a defendant lakherajdar subsequent to the Permanent Settlement, rests on the plaintiff.

Seton-Karr, J.—Two points are taken in this special appeal. The first is that the Judge was bound to dispose of the plea of limitation, and the second is that the onus of proof has been misplaced.

On the first point, it is to be noticed that the plea of limitation was raised for the first time before the Judge, after the case had been remanded, and when the litigation had been proceeding for nearly five years.

The special appellant is unable to show that the point of limitation did at all arise on the pleadings, or on anything on the papers, and, therefore, we think that, in this case, the Judge was not bound to take up what appears to be a mere effort, at the last moment, to put the plaintiff out of Court.

On the first point, the special appeal is untenable.

But, on the second point, namely, that the *onus* has been misplaced, we think that the Lower Courts have not correctly applied or interpreted the decision on which they rely (Nubo Kishen Mookerjee *versus* Promothonath Ghose and others), decided on the 13th of March 1866, and reported in V. Weekly Reporter, page 148, Civil Rulings.

In that case, a lakherajdar, being ousted by the zemindar, sued for recovery; and the learned Judges held that, as the lakherajdar had been a putneedar of the village in which the lakheraj lands were situated, he had peculiar opportunities of showing that they were rent-free, and was bound accordingly to start his case.

But, in the instance before us, the plaintiff is an ordinary zemindar, suing to assess lands which he asserts to have been illegally usurped or alienated by the defendant subsequent to the Permanent Settlement. There is nothing, therefore, that we can see, to take the case out of the broad rule laid down in the case of Khelat Chunder Ghose *versus* Poorno Chunder Roy and others (Weekly Reporter, Volume II., page 258, Civil Rulings), and repeatedly acted on in scores of other cases. In this view, the Judge has decreed the case on a misplacement of the *onus*, and the case must be sent back to him, in order that he may first call on the plaintiff, special respondent, to show that the lands had at any time paid rent since the Decennial Settlement; and, if the plaintiff succeeds in starting a case in this respect, he will, as in all other cases, then be at liberty to go into the points raised by the defence.

Macpherson, J.—There is nothing on the record to show that this suit is barred by limitation, and, therefore, I would decide the first point taken in special appeal against the appellant.

I concur in thinking that the *onus* has been wrongly laid on the defendant, and that the case ought to be remanded in consequence.

The 22nd November 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Jurisdiction—Clause 4, Section 23, Act X., 1859 — Suit for arrears of rent against surety — Remission by Naib — Sanction by zemindar.

Case No. 1174 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 27th February 1867, modifying a decision passed by the Deputy Collector of that District, dated the 31st August 1866.

Bhoobun Mohun *alias* Prolad Sandyal (one of the Defendants), *Appellant,*

versus

Bhubo Soonduree Debia Chowdhrain (Plaintiff) and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Otool Chunder Mookerjee* for Appellant.

Baboos Annoda Pershad Banerjee and *Chunder Madhub Ghose* for Respondents.

A suit for arrears of rent under Clause 4, Section 23, Act X., 1859, may be entertained by the Collector both against the lessee who was made originally liable and against the surety who would be liable on the default of the lessee.

A remission of rent by a Naib, who is shortly afterwards dismissed from office, requires the sanction of the zemindar.

Seton-Karr, J.—This appeal is preferred against a decision for a considerable amount of rent, not by the lessee who was one of the defendants, but by the surety.

The first point taken is that the action will not lie against the surety in this case, and that any suit against him ought to be instituted in the Civil Court, and not in that of the Collector. But we think this objection untenable. The suit to all intents and purposes may be termed a suit under Clause 4, Section 23 of Act X. of 1859, being one for arrears due on account of rent, and, as such, it may fairly be entertained both against the lessee who was made originally liable, and against the surety who would be liable on the default of the lessee.

This is the view taken by a Bench of three Judges of the late Sudder Court in a case decided on the 28th of June 1862 (Sudder

Decisions, page 297) in the case of Kumarroonissa Begum, which is on all fours with the present; and we see no reason for not following the rule therein laid down.

The next objection taken is that the Judge was wrong in not allowing the defendant remission for some lands which had diluviated. But we see nothing legally erroneous in the decision of the Judge, who held that a remission by a Naib, who was shortly afterwards dismissed from his office, required the sanction of the zemindar, which sanction was not given.

The third and last objection taken is that the defendant should have had credit for a sum of Rupees 137, deposited when he took the lease, and for Rupees 14 spent on account of zemindaree dâk. There is, however, nothing to show that these points, on which the first Court held that no proof had been adduced, were really pressed on the notice of the Judge.

The Judge first recounts the points on which issues were taken, and then proceeds, on an appeal before him by both parties, to decide them *seriatim*.

We affirm his decision, and dismiss this appeal with costs and interest.

The 25th November 1867.

Present:

The Hon'ble H. V. Bayley and
J. B. Phear, *Judges.*

Evidence—Onus probandi—Plea of minority.

Case No. 878 of 1867.

Special Appeal from a decision passed by Mr. S. DaCosta, Principal Sudder Ameen of Maunbhoom, dated the 28th January 1867, affirming a decision passed by Moulvie Abdoollah, Moonsiff of that District, dated the 20th February 1866.

Radha Kisto Singh Deo (Defendant), *Appellant,*

versus

Gudadhur Banerjee and others (Plaintiffs), *Respondents.*

Baboos Bama Churn Banerjee and *Umbika Churn Banerjee* for Appellant.

Baboo Sham Lall Mitter for Respondents

In a suit to recover possession of land claimed by virtue of a sunnud from a Rajah, in which plaintiff gave *primâ-facie* evidence of the authenticity of the sunnudr and subpœnaed the Rajah to prove it; it was

HELD that the Lower Court did very right in considering plaintiff's testimony to be strengthened by defendant's (Rajah's) refusal to come into Court with his own story; and that the onus lay on the Rajah to rebut the plaintiff's evidence or to prove minority or other personal disqualification.

Phear, J.—THE plaintiff in this suit sought to recover possession of certain land, to which he claimed to be entitled by virtue of a sunnud from the Rajah defendant, and from which he alleged he had been ousted by the second defendant acting in collusion with the Rajah. The plaintiff himself gave *primâ-facie* evidence of the authenticity of the sunnud, and he also subpœnaed the Rajah himself as a witness to prove it. The Rajah did not appear, and gave no valid excuse for not doing so. Both the Lower Courts decreed in favor of the plaintiff.

It appears that one of the objections raised by the pleadings of the defendants was that, if the Rajah ever executed the sunnud, he was a minor at the time of doing so.

The Rajah alone appeals specially to this Court, and he puts forward two grounds:—

1st.—He says that the Lower Appellate Court threw the burden of proving minority on the defendant, and thereby committed an error in law.

2nd.—That the plaintiff ought to have come into Court prepared to prove the genuineness of the sunnud on which he relied, and that the Court ought not to have given him any advantage by exercising in his favor the discretion given to it by Section 170 of Act VIII. of 1859.

Taking the *second* objection first, it seems to us that the plaintiff in this case did all that could be reasonably expected of him, and that the Lower Court was very right in considering his testimony to be strengthened by the refusal of the defendant to come into Court with his own story. The existence of some evidence in support of the plaintiff's claim entirely distinguishes this case from that reported in Marshall 568.

As to the *first* objection, we think that, after the plaintiff had given (as he, in fact, gave) *primâ-facie* evidence of the document in question having been executed by the defendant, it did lie upon the latter to show some reason why it should not be binding on him, *i. e.*, the *onus* lay on him to rebut the plaintiff's evidence, or to prove minority or some other personal disqualification.

We, therefore, overrule both objections to the decree of the Court below, and dismiss the appeal with costs.

The 25th November 1867.

Present :

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Lakheraj—Onus probandi.

Case No. 789 of 1867.

Special Appeal from a decision passed by Mr. S. DaCosta, Principal Sudder Ameen of Maunbhoom, dated the 22nd January 1867, reversing a decision passed by Baboo Nund Coomar Sircar, Moonsiff of Chatna, dated the 28th February 1866.

Ram Soondur Chuckerbutty and others (Defendants), *Appellants,*

versus

Ramessur Acharjee and others (Plaintiffs), *Respondents.*

Baboo Issur Chunder Chuckerbutty for Appellants.

Baboo Kalee Prosunno Dutt for Respondents.

The Full Bench decision ruling that, before a plaintiff can resume lakheraj lands, he must first prove he has collected mâl rents, and defendant need not first prove his lakheraj title, not applicable to the present case, in which it was proved that plaintiff collected mâl rents from the time the land was capable of bearing any.

Bayley, J.—We think this special appeal must be dismissed.

The main grounds taken are these :—

(1.) The onus of proving his lakheraj title has been wrongly put on defendant.

(2.) That the plaintiff was specially restricted by the terms of his lease from interfering with lakheraj lands.

(3.) That the remand-order by the Lower Appellate Court to try the power of the plaintiff to resume and the possession of defendant was improper.

The *first* ground is not tenable. A Full Bench decision certainly rules that, before a plaintiff can resume lakheraj lands which he alleges to be mâl, he must first prove he has collected mâl rents, and defendant need not first prove his lakheraj title. But in this case it is most clearly found as a fact below, that plaintiff's witnesses established that plaintiff collected mâl rents from the time the land was capable of bearing any. There is a clumsy reference to defendant's being required to prove his title, and that defendant's sunnud was shown (but by plaintiff's witnesses) to be false; but the decision is really based on proof being given by plaintiff which was requisite for him to give.

On the *second* plea, we observe that the lease only restricts plaintiff from interfering with *valid* and *recognized* lakheraj grants, and does not stipulate that *all alleged* lakheraj is to be rent-free in the estate.

The remand-order discloses, in our opinion, no illegality in itself, nor are we shown that it was illegal.

On the whole, then, we dismiss this special appeal with costs.

The 25th November 1867.

Present:

The Hon'ble G. Loch, L. S. Jackson, and C. P. Hobhouse, *Judges.*

Procedure—Opinion ultra vires—Will of a Hindoo—Mitakshara Law—Right of son to ancestral property.

Case No. 552 of 1866.

*Application for review of judgment passed by the Hon'ble Justices C. B. Trevor, C. Steer, and E. Jackson, on the 26th September 1866, in Regular Appeal No. 249 of 1864.**

Sudanund Mohapattur (Plaintiff), Appellant, *Petitioner,*

versus

Soorjoo Monee Debee, widow of Bonomalee Mohapattur (Defendant), Respondent, *Opposite Party.*

Mr. R. V. Doyne and *Baboos Onookool Chunder Mookerjee, Mohendro Lall Shome,* and *Tarucknath Sein* for Petitioner.

Mr. J. Cochrane and *Baboos Unnoda Pershad Banerjee, Chunder Madhub Ghose,* and *Mohesh Chunder Chowdhry* for Opposite Party.

Notwithstanding that a Division Bench of the High Court, on appeal, in 1863, gave its opinion on certain points in a previous suit between the same parties, the High Court, on the present appeal, held that the parties were entitled to the Court's opinion on the same points, as they pointed out that these points did not arise in the previous suit (which was brought for an object different to that for which the present suit was instituted), and the opinion of the Court in 1863 was, therefore, *ultra vires,* and did not conclude the parties.

In this country, there are no formalities to be gone through in order to the constitution of a valid will, and all that is required is, that the intention of the testator should be ascertained in whatever way it may be ascertained, whether by word of mouth or in writing, clearly and unmistakably.

A son under the Mitakshara law is entitled jointly with his father from the moment of his birth, or, in this case, of his adoption, to ancestral estate, and also to the profits accruing after his birth.

Hobhouse, J.—THE material facts of this case are as follows:—

One Chucker Dhur Doss, the sole owner of a large family-property governed by the Mitakshara doctrines, adopted two sons, *first* (in 1823), the plaintiff-appellant, Sudanund, and, *secondly,* in 1825, one Bonomalee, now deceased, the husband of the principal defendant-respondent, Soorjo Monee.

Then, on the 5th of April 1849, Chucker Dhur made a will to this effect, *viz.*, he gave 9 annas of his ancestral and self-acquired immoveable property to Sudanund, and 7 annas to Bonomalee, and he divided his moveable property into equal shares between the two.

And the will went on to declare that the testator's property was, the will notwithstanding, to remain at his absolute disposal during his lifetime, and that, if either of the sons disputed or did anything contrary to it, then that son was to forfeit his share of the property devised, and the other son was to take the whole of it.

On the 7th May 1857, Sudanund left his father's house, and, on the 22nd May 1857, he prayed the authorities for protection against his father's violence; and thereafter, on the 27th July 1857, Chucker Dhur filed a petition in the Judge's Court, and another in the office of the Magistrate and Collector of the District, setting forth the will; alleging that Sudanund had forfeited the status of a son; declaring that, under the terms of the will, he had repudiated and disinherited Sudanund, and that Bonomalee was entitled to the whole property, moveable and immoveable; and praying the Court to take notice of the fact of such repudiation, and of Sudanund having no right to the estates covered by the will; and winding up by saying that he retained the power to dispose absolutely of all properties covered by the will and of whatever properties he had acquired or might hereafter acquire (sewaee) "besides or in addition to" the properties covered by the will.

Sudanund filed an answer to this petition denying Chucker Dhur's right to deprive him of the status of a son, and thereupon Chucker Dhur rejoined, 17th January 1858, and, after reciting his right to repudiate Sudanund, declared that he had done so, and had, under the terms of the will, constituted Bonomalee malik of the 16 annas.

Chucker Dhur presented this petition in person, and requested that it and the previous petition of July 1857 might be filed in Court *with the will.*

On the 14th January 1859, Sudanund filed a suit against Chucker Dhur and

* *See* 6 Weekly Reporter, Civil Rulings, p. 256.

Bonomalee. In this he recited the family-history and disputes up to the time of the petition of 17th January 1858; he contested the right of Chucker Dhur to adopt the second son Bonomalee during his (Chucker Dhur's) lifetime; he alleged himself to be the sole heir of Chucker Dhur by right of adoption, and he prayed :—

1st. That the will and what he called the false and fraudulent petitions might be set aside.

2nd. That Chucker Dhur's repudiation of himself and adoption of Bonomalee might be annulled; and

3rdly. That maintenance from the 23rd May 1857, the date of his dismissal from Chucker Dhur's mansion, to the date of Chucker Dhur's death, whenever that might occur, might be awarded to him.

On the 13th March 1869, Chucker Dhur and Bonomalee replied, alleging the facts of the repudiation of Sudanund and of the adoption of Bonomalee and of the notification thereof to the Courts, and pleading justification for the same, and adding that the so-called self-acquired zemindaries were not acquired out of the profits of Chucker Dhur's ancestral estates, but were acquired by private means of Chucker Dhur of a nature specified.

Sudanund rejoined to this that Chucker Dhur had acquired no estates out of private funds, or otherwise than out of the profits of ancestral estates, but that he did not sue to recover any estates, but only to be declared the legal heir of Chucker Dhur, and to obtain maintenance.

The issues material to this case that were laid down were these :—

1st. Could Chucker Dhur repudiate Sudanund?

2nd. Was the will admitted by plaintiff?

3rd. Could Chucker Dhur, and did he, adopt Bonomalee, and could two sons be adopted?

4th. Was Sudanund entitled to maintenance?

The Court of first instance held on the first issue that Chucker Dhur's repudiation of Sudanund was valid in law; on the second issue, that the will was consented to and was just and proper; and on the 3rd issue that Chucker Dhur had power to adopt two sons, and the Court then, on the 6th of March 1860, dismissed Sudanund's suit.

An appeal was made to the High Court, and pending the hearing of this, *viz.*, on the 17th August 1861, Chucker Dhur died, and the appeal proceeded between Sudanund and Bonomalee.

In appeal, Chucker Dhur having died in the interim, the question of maintenance was dropped, and on the 28th February 1863 a Division Bench of this Court decided the appeal as follows :—

Justices Campbell and Pundit, page 317, Marshall.

They held, on the questions material to this appeal, *first*, that the adoption of Bonomalee was void; *secondly*, that Sudanund was entitled to the status of a son, "the declarations published by the father "whereby he cast off the son and professed "to deprive him of that status being illegal;" *thirdly*, that the will and the petitions were inofficious and inoperative so far as they professed to deprive Sudanund of his right to succeed to "the whole ancestral immoveable property held" by Chucker Dhur, but not "as regards all other property;" and, *lastly*, that by "ancestral immoveable property" was meant "only that "actually inherited from ancestors, and not "that which had been acquired or recovered "even though it might have been acquired "from the income of ancestral property."

On the 23rd November 1863, Sudanund brought the suit now in regular appeal before us.

In the plaint, Sudanund sets forth certain moveable and immoveable properties; alleges that these are all his by ancestral right; that his title to possession thereof accrued on the death of his father Chucker Dhur in August 1861; and that Bonomalee, up to the time when he died in October 1863, had been, and Bonomalee's widow, the defendant, was still keeping him out of possession, and so that, in right of inheritance, he claimed possession of the immoveable properties with mesne-profits and of the immoveable properties or their value.

On comparing this plaint with Sudanund's written statement, it is clear that he intended to claim and did claim as heir-at-law to Chucker Dhur the whole of the properties left by Chucker Dhur, except the 7 annas of the self-acquired immoveable property (whether that property was acquired out of the profits of ancestral property or otherwise) and the 8 annas of the moveable property specified in the will.

The defendant filed a schedule of the ancestral immoveable property to which she admitted that Sudanund was entitled, but claimed the whole of the rest of the property in suit as having been conveyed to her late husband Bonomalee under the will of Chucker Dhur, as interpreted, she maintained, by the High Court in its decision of 1863.

The issues, material to this appeal, laid down by the Court below were :—

First.—Of the properties in dispute, which are the ancestral, and which the self-acquired properties of Chucker Dhur? and

Secondly.—Whether or not the plaintiff is entitled to the properties, real and personal, acquired by Chucker Dhur?

On these issues, the Court below seems to have held, partly on the strength of the High Court's decision of 1863 and partly on its own view of the evidence on record, that Bonomalee was entitled, under devise from Chucker Dhur, to the whole of the self-acquired immoveable property and to the whole of the moveable property of Chucker Dhur, and then the Court went on to determine what was the self-acquired and what was the ancestral immoveable property of Chucker Dhur, and decreed possession of this latter property only to Sudanund, appellant before this Court.

There is no appeal before this Court in the matter of the moveable property; but, in the matter of the immoveable property, it is contended that the appellant is entitled to the whole of it, less only the 7 annas of self-acquired immoveable property covered by the will of Chucker Dhur.

Mr. Cochrane for respondent contends that this point has already been determined adversely to appellant by the decision of the Division Bench of this Court of the 28th February 1863.

The words used by the Division Bench are these: "We declare that the will and the petitions sought to be set aside are inofficious and inoperative so far as they profess to deprive the plaintiff (Sudanund) of his right to succeed to the whole ancestral immoveable property held by Chucker Dass (Chucker Dhur). But, as regards all other property, seeing that Chucker Dass was entitled to do as he chose, and chose to disinherit his son, we cannot interfere, and in so far dismiss the prayer of the plaintiff."

There cannot, I think, be any doubt but that the effect of these words was to find that Sudanund was entitled to nothing more than "*the whole ancestral immoveable property*" held by Chucker Dhur, but Mr. Doyne for appellant contends that this finding was *ultra vires*, and that his client is entitled now to a decision of this Court on the effect of the will and the petitions.

I think that this contention is sound. I observe that the real object of the suit of 1859 was not to declare how far the will and the petitions were officious and operative, but only to declare that Sudanund had the status of an only son; that the will and the petitions setting up another son, Bonomalee, did not affect that status; and that Sudanund, having such status, was entitled to maintenance during his father's lifetime.

These were clearly the only points put in issue, and these, looking to the Court's remarks at page 319 of their judgment, were at one time so considered to be the only points in issue; and, when the Court went further, and determined how far the will and the petitions were officious and operative, and how far they were not, it determined a matter which was not legitimately before it; and on that matter, therefore, appellant is entitled, I think, to the judgment of this Court.

The questions, then, before us seem to be, *first*, whether the will stands alone, or is to be read by the light of the petitions and the acts of Chucker Dhur; and, *secondly*, whether, if the will be so read, the whole of Chucker Dhur's self-acquired property was or was not conveyed by him to Bonomalee?

In this country, there are no formalities to be gone through in order to the constitution of a valid will, and all that is required is that the intention of the testator should be ascertained in whatever way it may be ascertained, whether by word of mouth or in writing, clearly and unmistakeably.

And in this case there cannot, I think, be a doubt of the intention of the testator.

He begins by adopting Sudanund, and then he adopts Bonomalee. He believes that they are both legally his sons. He divides his property in very nearly equal proportions between them, giving a little more, as was natural, to the first adopted. But his whole anxiety is that what property he had to devise should remain unmistakeably and without contest with the person

or persons of his election. Therefore, to make assurance doubly sure, as he thinks, he distinctly declares that he retains sole disposal of the property during his lifetime; and that, if either of his sons should dispute this his particular distribution of it, then that son should forfeit his share, and the 16 annas of the estate should go to the other son.

Then exactly that contingency occurred which the testator had contemplated. Sudanund, the first adopted son, disputed his father's disposition of the property, and, this being so, the father, in July 1857, called upon the Courts to take notice that in the terms of his will (*i. e*, his intention) he had disinherited and disowned Sudanund, and that Sudanund had no title to his estate.

And again in January 1858, Chucker Dhur still more publicly notified the same intention, stating that Sudanund had forfeited his rights, and that he, Chucker Dhur, had confirmed Bonomalee; and that there might be no doubt of his intentions, Chucker Dhur himself appeared before the Court with this last petition in the most public and solemn manner, and prayed that it and the petition of July 1857 might be filed with his will, and with his will they were accordingly so filed.

And, finally, in his reply of the 13th March 1859, to the suit then instituted by Sudanund to set aside the will, Chucker Dhur distinctly talks of Bonomalee as the person who, after his decease, would be owner and heir of everything.

No doubt, in the petitions, Chucker Dhur did retain to himself the sole power of disposing of his estates during his lifetime, but so he did in the will; but this was evidently by way of precaution only (and Sudanund's conduct after the will would have made him, Chucker Dhur, doubly cautious); and at the most this expression of the retention of the power of disposing of his property was mere surplusage, for, as a matter of fact, Chucker Dhur could, of course, at any time of his life, have made a fresh disposition of such property as he had it in his power to dispose of.

Reading, then, Chucker Dhur's will, his petitions, his acts, and his pleadings in Court together, I have no doubt that he did sufficiently express his intention, in the words of the learned Judges in the case of 1863, to deprive Sudanund "of all right to the property" (I would add to any property he had) "so far as he could deprive him, and "to give it to Bonomalee."

I hold, then, that appellant is not entitled to any immoveable property of which Chucker Dhur could by will deprive him, *i. e.*, to any self-acquired immoveable property of Chucker Dhur, whether such was acquired before the execution of the will or after it.

Mr. Doyne then urges for the appellant that the principle upon which the Court below has determined what is self-acquired and what is ancestral immoveable property is erroneous, and contends that ancestral property is not alone that which is derived directly from ancestors, but also that which is acquired out of the proceeds of property derived from ancestors.

Mr. Cochrane, on the other hand, contends for the respondent that this point has been already determined by the Division Bench in 1863, at page 320 of their judgment.

No doubt this is so; but, for the reasons I have given above, I am of opinion that the judgment of 1863 was on this point also *ultra vires*, and that appellant is entitled to our judgment upon it.

The learned Judges, in 1863, laid it down that, "by the Mitakshara Law applica- "ble to the case, the son had a vested right "of inheritance in the ancestral immoveable "property, but that, as the income was the "property of the tenant for life, so ances- "tral property was only that actually in- "herited from ancestors, and not that "acquired or recovered from the income of "the ancestral property."

With great respect, I think that there is in this very thesis a position which shows the thesis to be untenable; for if, as I hold to be truly the case, the son under the Mitakshara doctrine has, from the moment of his birth, a vested right in ancestral property, it seems to me to follow that the father has not that dominion over the income of ancestral property which the learned Judges would assign to him.

The true position of the Mitakshara son is that which has been conclusively assigned to him by the Full Bench ruling of the 7th June 1867, page 15 *et seq.*, Weekly Reporter, Volume-VIII.

Under that ruling, it seems to me that the Mitakshara son is entitled equally with his father as well to the profits of

ancestral property as to the property itself from the moment (in this case) of his adoption; and so, in his case, that is equally ancestral property which has been acquired out of the proceeds of such property, with that actually inherited from ancestors.

It is on this principle that I would determine what is ancestral and what self-acquired property in this case; and inasmuch as the Court below has determined this point upon a different principle, and there is not on the record evidence sufficient to enable us to determine the point on what I think to be the right principle, I would remand, or rather, as my brother Jackson suggests, refer, the case for enquiry and determination on this point.

Loch, J.—I concur.

Jackson, J.—I concur in the view taken by my colleagues as to the effect to be given to the previous decision of this Court in Sudanund's case, reported in Marshall, page 317.

It is necessary to consider what the object and scope of the suit then before the Court were, and to hold the decision binding upon the parties as far as it gave or withheld any relief actually sought, and no further.

When that suit was commenced, the father of Sudanund was living: he alleged himself to have adopted a second son, to have repudiated Sudanund, and made the second son so adopted his heir and successor.

Sudanund consequently sued to set aside such alleged repudiation; to have the pretended adoption declared invalid; and to obtain the maintenance which his father withheld; the so-called will and petitions were impeached as claiming a right on the father's part to do the acts complained of; and the Court was asked to decide as to the existence of such right.

The plaint did not call for possession of any portion of the father's property, nor did the view then taken of the Mitakshara law by the Courts of these provinces encourage any such claim in the lifetime of the father.

Nor could it have served any useful purpose to seek from a Court of justice a consideration of the validity of testamentary dispositions which the testator might (as he emphatically declared) at any time defeat, by acts of alienation in his lifetime, and which he might also change by a fresh will.

All questions as to the devolution of property in the father's hands were necessarily and in fact postponed until the father's death.

The Court, in 1863, in the outset of the judgment proposed to itself for decision the issues really raised; and if, following the arguments of Counsel, the Judges afterwards went on to decide issues not regularly raised in the suit, it seems to me that the parties were not thereby concluded, and that the plaintiff is entitled to ask us now for a decision upon the points which now for the first time there is real occasion to determine.

In my opinion, the points which so arise are two:—

I. Did Chucker Dhur make any disposition of his property to take effect after his death; if so, how and when?

II. Whether, under such disposition, Bonomalee was entitled to retain possession of the whole of Chucker Dhur's self-acquired property.

It is clear to me that Chucker Dhur did, so far as he could, make such disposition of his property, and that his intentions are to be found in the so-called will which he deposited in the Judge's Court in 1849.

The petitions afterwards put in do not, in my view of them, carry any fresh bequest; they merely explain, confirm, and put in force those provisions of the "will" which were intended to take effect in the occurring of the contingency of either son acting in opposition to the wishes of the father.

The language of those petitions is not, as it seems to me, that of a man giving something beyond what he had already given, but rather that of one ratifying and emphasizing that gift.

It may be observed that Sudanund had not in the first instance brought himself within the express provisions of the will, which declared him subject to deprivation in case of contravention of the father's wishes. He at first was merely charged with vicious and disrespectful conduct, and it was not until the filing of his counter-petition setting the father's dispositions at nought, that he was declared to have brought himself within the deprivation-clauses as well as within the general rules of Hindoo Law applicable to the case of a son disavowing the authority of a father.

I read the two petitions, therefore, rather as throwing light on the construction of the will, and as indicating the intention of the

testator to act upon certain provisions of it, than as modifying its terms or conveying anything additional.

Now, as to the meaning of the will itself, there has been some discussion as to the inference to be drawn from the mention therein of certain properties by name.

The truth seems to me to be simply that Chucker Dhur, in making this "will," was not giving specified property to Bonomalee, and making Sudanund residuary legatee. He was simply dividing the property between the two, and for convenience sake he annexed a schedule of that property as it then stood.

Nothing in that will prevented either Bonomalee or Sudanund from taking shares in property subsequently acquired; and, in fact, it may be gathered from the language of the petition that, but for the renunciation of Sudanund, they would have been intended by the testator to take such property according to the shares defined.

From the will and petitions taken together, it may, I think, be collected that Chucker Dhur, having adopted, as he thought lawfully, two sons, assuming himself also to be in the position of a man having unrestricted control over his estate, first made a prospective division of that estate between the two supposed sons, accompanied by a declaration that either son, in case of disobedience, would forfeit the whole share assigned to him, and subsequently, under an authority which he arrogated to himself, renounced one of such sons, and also declared the forfeiture to have been incurred, and finally declared the other son to be heir to everything which he, the testator, possessed.

The testator died before any of those acts of his had undergone the definitive arbitrament of the Courts of law.

A grave doubt seems to me to arise whether Chucker Dhur would have made or maintained these dispositions, if he had known that his repudiation of one and his adoption of the other son were alike unlawful, and that Bonomalee would be thus declared incapable of rendering him those spiritual benefits of which the desire is present to the minds of every orthodox Hindoo, and so largely influences his conduct.

However this may be, the result arrived at after the death of Chucker Dhur was that, in the judgment of the High Court, Sudanund, as there was no sufficient ground for depriving him, had not lost the *status* of a son, and Bonomalee, having been unlawfully adopted, had never acquired it.

And the utmost effect of Chucker Dhur's will, which is now contended for, is that they give to Bonomalee such property of his as was under his absolute dominion.

And the efficacy of the will to this extent is not disputed by the appellant, and it may be said to be further agreed that whatever is ancestral property is without, and whatever is the independently-acquired property of the testator falls within, this category; and the question is, in fact, narrowed to this, namely, whether property acquired by the exertions of the testator from the profits of ancestral estate can be called independently acquired.

Mr. Cochrane maintains that this question has been already decided in the particular case by the Judges who gave the decree of 1863, and therefore denies our competency to entertain it now.

The Judges did, indeed, express an opinion which will be found at page 320* of Marshall's report of the case.

The obvious fallacy contained in the reasoning of this passage induces me to believe that the learned Judges who employed it could not have given the point that attentive consideration which they must have bestowed upon it if they had believed themselves to be determining finally the rights of the parties. In any case, for the reasons which I have already stated, I do not consider the parties bound by the opinion.

As to the question itself, I consider the law to have been settled by the Full Bench ruling referred to in the judgment of my brother Hobhouse. In this view of the law, a son under the Mitakshara is entitled jointly with his father, from the moment of his birth, or, in this case, of his adoption, to the ancestral estate, and also to the profits thereof accruing after his birth, and probably to any such profit accumulated and in hand at the time of his birth, though this latter point is not expressly decided.

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* "By the Mitakshara "law applicable to the "case, the son has a vest-"ed right of inheritance "in the ancestral immove-"able property, and as the "question was raised be-"fore us, we must declare "that the ancestral pro-"perty is only that actu-"ally inherited from ances-"tors, and not that which "has been acquired or re-"covered, even though it "may have been acquired "from the income of the "ancestral property; for "the income is the proper-"ty of the tenant for life "to do as he likes with it. "On the other hand, the "father has it in his power "to dispose as he likes of "all acquired and all per-"sonal property."

I am of opinion, therefore, that the defendant is not entitled to keep back from the heir any immoveable property which has not been acquired by Chucker Dhur otherwise than out of the profits of ancestral estate accruing since the adoption of Sudanund or in hand at the time of his adoption. This will leave the defendant in possession of lands which he can show to have been acquired previous to the adoption of Sudanund though out of profits of ancestral property.

It is for the defendant to show that such property was so exceptionally acquired, and I agree that he should now have the opportunity of doing so.

But, adverting to the existing rules of Procedure, I do not think there ought to be a remand, but the defendant should have a certain time allowed him to offer evidence on this point in the Court below, such evidence to be returned to this Court under directions to be given in accordance with Sections 356 and 357 of the Code.

A remand at this stage, besides being unauthorized by law, will, I am afraid, only lead to a new appeal and to an indefinite prolongation of the suit.

The 26th November 1867.

Present :

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Plaintiff must support his own case.

Case No. 908 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 1st March 1867, affirming a decision passed by the Deputy Collector of that District, dated the 29th August 1866.

Radha Jeebun Moostofee (Plaintiff), *Appellant,*

versus

Grees Chunder Roy and another (Defendants), *Respondents.*

Baboo Pooryo Chunder Shome for Appellant.

Baboo Anund Chunder Ghosal for Respondents.

A plaintiff, who does not care to be present to support *his own case* when he knows it is tried, cannot be allowed to urge the plea that he had no opportunity of rebutting the *defendant's* evidence.

Phear, J.—THE plaintiff in this suit, having had, as his pleader admits, full notice of the day and place of trial, chose to remain away. The defendant gave evidence serving to prove the groundlessness of the plaintiff's claim, and the Judge dismissed the suit. The plaintiff now appeals specially, saying that he had been summoned by the defendant to give evidence at the trial, but that the summons was not duly issued in consequence of the absence of certain preliminaries. Under these circumstances, he urges that he has not been allowed proper opportunity of rebutting the case set up by the defendant. The frivolousness of this objection is only to be equalled by the audacity which has led to its being brought forward. It is monstrous to say that a plaintiff, who did not care to be present to support his own case when he knew it was to be tried, was refused the opportunity of rebutting the evidence of his opponent. We may further remark that this objection was never thought of in the Court below.

We dismiss the appeal with costs.

The 26th November 1867.

Present :

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Joint suit by several Hindoo widows—Plaint—Multiplicity—Allegation of fraud—Evidence tendered by party whose case has been closed.

Case No. 31 of 1867.

Regular Appeal from a decision passed by Baboo Doorga Pershad Ghose, Principal Sudder Ameen of Nuddea, dated the 28th September 1866.

Hurro Monee Dossea and others (Plaintiffs) *Appellants,*

versus

Onookool Chunder Mookerjee and others (Defendants), *Respondents.*

Mr. C. Gregory for Appellants.

Messrs. R. V. Doyne and *Motee Lall Sandyal* for Respondents.

The plaintiffs are 3 ladies, widows of 3 out of 5 sons, and sue for their husbands' shares of property, on the allegation that the 5 sons possessed property left by their father at his decease; that the 3 widows had, since their husbands' deaths, been holding possession of their husbands' shares in co-parcenery with the other two surviving sons; and that the said co-parceners, in collusion with the other defendants, contracted debts, and allowed them to purchase the property at auction, whereby the plaintiffs have been dispossessed.

HELD that the finding that the husbands of two of the plaintiffs died before their father was fatal to the claim, not only of these two plaintiffs, but also of the 3rd plaintiff who chose to join the other two in a suit of this sort.

HELD, further, that the plaint in this suit was bad on the ground of multiplicity, and should not have been admitted, inasmuch as, the acts of the purchaser-defendants in taking possession being found to be separate acts, the suit was, in reality, 3 suits against so many different defendants. Even if the plaint was rectified, the Court at the hearing should have insisted on the plaintiffs' making an election of a cause of action and of a defendant upon which and against whom they would proceed.

Where a party to a suit chooses to clothe with fraud that conduct of the other side on which he bases his claim, he must understand that he risks his success with the charge which he makes.

It behoves all Courts of first instance to take care that a party to a suit whose case has been finished is not permitted, without good reason, to mend that case by fresh evidence after his adversary has succeeded in impeaching it; evidence given under such circumstances must always be in the highest degree untrustworthy.

Phear, J.—IN this case it appears that one Ram Surun had five sons, and that the plaintiffs are three ladies, widows of three of these. Two of the defendants, Iswar Chunder Pal and Indar Chunder Pal, are the remaining sons.

The plaint alleges that the five sons enjoyed possession of the properties left by Ram Surun at his decease, after performing the services of the ancestral idol. It then states that three of the sons died one after another, and that ever since their deaths the plaintiffs had been holding possession of the respective shares of their husbands in co-parcenery with the co-sharer-defendants by suffering the properties to remain under the management of Iswar Chunder Pal. Finally, it avers that the defendant Iswar Chunder Pal created debts in collusion with the other defendants, and that they, the other defendants, having in concert with him, Iswar, purchased at auction his rights and interests in the property in suit, dispossessed the plaintiffs of the shares of their husbands therein. On this state of facts, the plaintiffs sue jointly to recover possession of the said shares of their husbands.

The Principal Sudder Ameen has found that the husbands of the 1st and 3rd plaintiffs, respectively, both died before their father. It followed from this finding that these ladies never had any right in the property in question, and the Court accordingly held that, although the second plaintiff's, namely Kritharto Moyee's, right to a share appeared to have been made out, still, as she had chosen to sue jointly with the two other plaintiffs to obtain three-fifths of the property as of joint-right, she was not entitled in this suit to recover one-third on another, *viz.*, her own several right.

Against this decision the plaintiffs appeal to this Court.

We are of opinion, after full consideration of the evidence read to us, that the Principal Sudder Ameen's finding of fact is correct. It also appears to us (and indeed the Advocate of the plaintiffs admits as much) that the taking possession of the property by the purchaser-defendants, of which the plaintiffs complain, was not one act, but three distinct acts of the three purchaser-defendants respectively, without concert with each other. Each took possession of the particular estate which he bought at the auction, independently of the others. So that the suit is, in reality, three suits against so many different defendants. We observe, too, that the names of the defendants against whom the suit is brought are nowhere exhibited except in the heading of the plaint, and there, in the case of two out of the three purchasers intended to be sued, the agents who bid for them at the sale are mentioned with the statement that they were such agents, while the principals themselves are omitted. It thus happens, inasmuch as the plaint discloses no cause of action against the two Pal defendants, that there are at least four defendants as against whom the suit ought to have been dismissed for reasons apparent on the face of the plaintiffs' own pleadings. We feel ourselves bound to say that the Lower Court was greatly wrong in receiving a plaint so plainly erroneous as this is; and we also think that, had the plaint been rectified, that Court ought, at the trial, when the facts became apparent, to have sustained the defendants' objection to the suit on the ground of multiplicity, and to have insisted on the plaintiffs' making election of a cause of action, and of a defendant upon which and against whom they would proceed.

Coming now to the merits, we are very clear, not only that the Principal Sudder Ameen was right in his facts as above men-

tioned, but further that, whatever may be the case relative to the property bought, and taken possession of, by the purchaser first named in the plaint, regarding that in the hands of the second purchaser, even Kritato Moyee has failed to establish any claim to it, while, as respects the remainder of the property sued for, it is literally unaffected by any evidence at all. Consequently, not only do two of the plaintiffs sue without any title, but, if this suit be treated as if divided into the three separate actions, of which it is really constituted, and the other lady be considered as the sole plaintiff in each, a judgment must pass against her in two out of the three. Moreover, although the plaint charges that the ousting of the plaintiffs by the three purchaser-defendants was entirely fraudulent, and the crowning act of a scheme concocted between them and Iswar Chunder, yet it appears that not the slightest attempt was made at the trial to support this very grave accusation. We think there can be no doubt that it was really groundless, for the evidence actually given leads naturally to the conclusion that the conduct of the purchaser-defendants was honest and of good faith throughout the matter. The words of the plaint, in fact, constitute a gratuitous libel on the purchaser-defendants, put on paper solely with the intention to prejudice the Court against them, and without a thought of making the words good. The plaintiffs, with all other litigants, must learn that conduct of this kind cannot be indulged in with impunity. A Court of Justice will not tolerate that the pleadings before it should be made the vehicle of reckless defamation, and, if a party to a suit chooses to clothe with fraud that conduct of the other side on which he bases his claim, he must understand that he risks his success with the charge which he makes. In the present case, keeping in mind all the facts, as well those which bear on the frame of the suit as those which touch its merits, we are of opinion that the plaintiffs do not deserve that the Court should do anything to place them or either of them in a better position than that in which they have thought fit to place themselves, and, as they now stand on the record, we think that they are not entitled to recover against any one of the defendants.

The appellant's pleader has complained before us that the Lower Court refused to receive the evidence of some material witnesses tendered by his client at the trial. On reference to the record, it appears that this occurred after the defendants' case had been entered upon and their witnesses examined, and after the Court itself had called before it and examined the two Pal defendants. Then it was, that the plaintiffs for the first time tendered the witnesses in question, and they did so by way of reply. If these witnesses could really have spoken truthfully to the merits of the issue between the parties, there seems to have been no reason for their not having been duly tendered during the course of the plaintiffs' case, and no new matter was afterwards raised by the testimony of the witnesses who followed, such as to require being met by additional evidence on the part of the plaintiffs. Obviously it behoves all Courts of first instance to take care that a party to a suit, whose case has been finished, be not permitted, without good reason, to mend that case by fresh evidence after his adversary has succeeded in impeaching it, because evidence given under such circumstances must always be in the highest degree untrustworthy. Hence, so far as we can learn what actually took place in this case, we see no ground for concluding that the Court below exercised its discretion, in regard to the conduct of the trial and the reception of evidence, otherwise than properly.

We affirm the judgment of the Lower Court, and we dismiss the appeal. We also direct that the plaintiffs pay the costs of each defendant in both Courts.

The 26th November 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Pre-emption—Tulubi ishtishad.

Case No. 1362 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 23rd April 1867, reversing a decision passed by the Moonsiff of Raojan, dated the 18th September 1866.

Rajeeooddeen (one of the Defendants), *Appellant,*

versus

Zeenut Bibee (Plaintiff), *Respondent.*

Baboo Greeja Sunkur Mojoomdar for Appellant.

Moulvie Syud Murhumut Hossein for Respondent.

The "tulubi ishtishad" is a preliminary act as essential as the "tulubi mowasibat" to secure to the claimant the right of enforcing pre-emption. There should always, therefore, be a distinct finding as to whether it was properly made or not.

Loch, J.—We think this case must be remanded to the Lower Appellate Court for a distinct finding, whether the "tulubi ishtishad" was properly made or not. He has found that the tulubi mowasibat was made; but the tulubi ishtishad is a preliminary act as essential as the other to secure to the claimant the right of enforcing pre-emption. The case is remanded accordingly.

The 26th November 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Limitation — Proof of possession —Ameen's report.

Case No. 2379 of 1866.

Special Appeal from a decision passed by the Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen, at Chittagong, dated the 30th June 1866, reversing a decision passed by the Moonsiff of that District, dated the 6th July 1865.

Ameenooddeen Shaha (Plaintiff), *Appellant,*

versus

Asgur Ali and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Debendro Narain Bose for Respondents.

An Ameen's report is by itself insufficient to prove the possession of a plaintiff, on whom the *onus* of proving possession within 12 years of the date of suit has been cast by the defendant raising the plea of limitation.

Loch, J.—As the plea of limitation was raised by the defendant in this case, it was for plaintiff to prove that he had possession of the land in question within 12 years of the date of suit. This he failed to do, and, though the Ameen's report is evidence in the case, and is in favor of the plaintiff, special appellant, the Principal Sudder Ameen was justified, when weighing it, to hold that by itself it was insufficient to prove the plaintiff's possession. There was nothing contrary to law in such a finding. The special appeal is dismissed with costs.

The 27th November 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Arrears of rent—Onus probandi—Jumma-wassil-bakee papers—Evidence.

Case No. 1275 of 1867.

Special Appeal from a decision passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 14th March 1867, reversing a decision passed by Baboo Gopal Chunder Doss, Deputy Collector of that District, dated the 30th June 1866.

Shaikh Newazee and others (Defendants), *Appellants,*

versus

Mr. L. Lloyd (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellants.

Baboo Bhowanee Churn Dutt for Respondent.

In a suit for arrears of rent on account of a certain quantity of land, at a specified rate, plaintiff is bound to prove that defendant held the said land for which he was liable to pay at the rate sued for.

Jumma-wassil-bakee papers cannot be treated as independent evidence.

Mitter, J.—The merits of this case have not been properly investigated. The special appellant was sued for arrears of rent on account of 6 beegahs 16 cottahs of mâl or rent-paying land at a certain rate specified in the plaint. The quantity of land, as well as the rate of rent, being denied by him, it was for the respondent to prove them. The Lower Appellate Court observes that, inasmuch as the special appellant admitted that his ancestor held 6 beeghas of mâl land of which 2

beegahs only fell to his share on partition, and that, inasmuch as he did not raise any objection on the ground that his puteedars were not made parties to the suit, his plea regarding the quantity of land could not be entertained. As to the rate, the Lower Appellate Court is of opinion that it was for the special appellant to prove that it was what he asserted it to be, and not what was claimed by the respondent. We think, however, that the Lower Appellate Court is wrong on both these points. The respondent was clearly bound to prove that the special appellant held 6 beegahs 15 cottahs of land for which he was liable to pay at the rate sued for. It has been contended before us by the pleader for the respondent that the Lower Appellate Court has, in the last portion of its judgment, gone into the proofs filed by his client. It is true that the Lower Appellate Court has remarked that the respondent has filed his jumma-wassil-bakee papers duly attested, and that these papers not being rebutted were sufficient to prove his case. But jumma-wassil papers, like books of account, cannot be treated as independent evidence in support of a claim. The other passage pointed out by the respondent's pleader refers to the bhaolee lands, with which this special appeal has nothing to do.

We remand this case to the Lower Appellate Court, to re-try it with reference to the above remarks.

The 27th November 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Transfer of suit—Re-hearing of witnesses.

Case No. 1 of 1867.

Regular Appeal from a decision passed by Mr. H. K. Maddocks, Judge of Bhaugulpore, dated the 3rd October 1866.

Mussamut Unnopoorna (Plaintiff), *Appellant,*

versus

Hurbullub Sing and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Opendro Chunder Bose* for Appellant.

Mr. R. E. Twidale and *Baboo Anund Gopal Paleet* for Respondents.

Where a suit, which was filed originally before a Principal Sudder Ameen, who had fixed the issues and recorded the evidence of witnesses, is transferred by a Judge to his own file, the Judge, his Court being a Court of original jurisdiction, ought to have the witnesses before him, and take their evidence *de novo.*

Glover, J.—THIS was a suit for possession of Talook Phonsahee alleged to have been purchased from the owner Zalim Sing in the year 1853 by the plaintiff's husband, Ram Dyal Sing.

Beer Kishore Singh, the son of Zalim, whilst denying in one part of his answer that his father ever executed the deed of sale, in another part of it admits that the kobalah was executed, although no consideration passed. He admits the same thing in a petition which is on the record.

Hurbullub Sing denies the kobalah *in toto.*

And it is admitted by the plaintiff that, from the date of the kobalah up to the present time, neither her husband nor herself ever held possession of the talook, and that for nearly 12 years she has taken no steps to recover her rights.

The suit was filed originally before the Principal Sudder Ameen, who fixed the issues and recorded the evidence of the witnesses. Before, however, the case was decided, the Judge transferred it to his own file.

The Judge held that the kobalah was spurious, that there was no proof of its execution, none of payment of consideration, and none of possession under it.

He dismissed the plaintiff's suit accordingly.

It is urged in appeal before us that there is credible evidence in support of the kobalah, which evidence has been in no way rebutted by the respondent.

We have read this evidence; it consists of the depositions of five witnesses, who swear with more or less distinctness to the fact that Zalim Sing sold his estate for Rupees 3,995, and received the money. Amongst these witnesses are four of the parties who attested the kobalah, and one who was called in to see if the money were good (purucklena), and who received part of it afterwards

from Zalim Sing in payment of certain articles supplied from his shop.

Primâ facie there seems nothing improbable in this evidence. No doubt, there is the admitted fact that possession did not follow the purchase; that the kobalah was never registered, and has not been in any way brought forward for more than eleven years; but no particular questions were asked of the witnesses on these points, and, as the record stands, there is nothing to impeach their credibility. The Judge, as we observed before, did not examine the witnesses himself, but contented himself with the evidence as recorded by the Principal Sudder Ameen. We think that this mode of proceeding was objectionable, and that, as the Judge's Court was the Court of original jurisdiction, it ought to have had the witnesses before it, and have taken their evidence *de novo*. Many very important matters have been omitted from their examinations which a fresh questioning may supply, and without which we do not think the case can be satisfactorily disposed of. If we were to decide on the evidence in its present state, we should be inclined to say that the plaintiff had made out a *primâ-facie* case, the evidence in support of it not being displaced.

The case must go back, therefore, for a further and more searching enquiry. The witnesses should be strictly examined on the points above noted, and the mohajun Mohun Dass, witness No. 5, should be called upon to corroborate his statement that he received 900 rupees from Zalim Sing on the day of the sale, by the production of his books.

If, after re-taking the evidence, the Judge remains of the same opinion as before, he will dismiss plaintiff's suit; if, on the other hand, he considers the kobalah established, and the payment of consideration proved, he will find whether, at the time of the sale to Ram Dyal, Zalim had any interest left in the estate, or whether it had not been previously sold to a third party (*vide* the case of Beer Kishore, plaintiff, appellant, *versus* Hur Bullub Narain Sing, defendant, respondent, VII. Weekly Reporter 502). He will then, if necessary, proceed to consider the right of the vendor Zalim Sing to alienate the family-property without the consent of his son, Beer Kishore Sing; in other words, whether the sale was justified by any of those pressing necessities which the Hindoo Law allows of.

Costs will follow the result.

The 27th November 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Claim under Bond—Grammatical import of the terms—Evidence of intention.

Case No. 968 of 1867.

Special Appeal from a decision passed by the Judge of Gya, dated the 15th January 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 24th April 1866.

Doolee Chund (Plaintiff), *Appellant,*

versus

Joogul Singh and others (Defendants), *Respondents.*

Mr. R. T. Allan for Appellant.

Baboos Anoda Pershad Banerjee and *Kalee Mohun Doss* for Respondents.

Where a plaintiff claiming under a bond desires to show that something was intended by the parties beyond the grammatical import of the terms of the contract, he should prove this by other evidence; the Court cannot supply the defect.

Jackson, J.—It is unnecessary for us to decide in this case whether the Judge was right in refusing, "Act XXVIII. of 1855 notwithstanding," to allow the plaintiff's interest at the rate they claimed, because it is not made out, in our opinion, that the contract between the parties intended any such rate.

The bond commences by a recital that the defendants had borrowed 300 rupees at interest from the plaintiff, at the rate of 2 rupees per cent. per mensem. It goes on to stipulate that the amount of principal and interest is to be repaid in one sum at the full moon of the current month, and that, in case of failure to pay on the date appointed, the borrowers would pay the whole amount, principal and interest, mentioned in the bond, at the rate of 10 rupees per diem beginning from the 1st of Kartick, till realization of the whole.

These words, as they stand, simply mean that the amount, with interest as conditioned, namely, at 2 per cent. per mensem, if not re-paid at the full moon as appointed, is to be re-paid by daily instalments of 10 rupees, commencing on 1st Kartick, and going on till payment in full has been made.

They certainly do not, to our comprehension, at all amount to a contract to pay interest at 10 per cent. per diem.

It is possible that a payment of 10 rupees per diem as a penalty for delay may have been contemplated, but it is not expressed, and we cannot supply the defect, even if it would be reasonable that the defendants should pay it.

If the plaintiff desired to show that something was intended by the parties beyond what the ordinary grammatical construction of the contract imports, he should have proved this by his own evidence, and should have also called the defendant, and had him examined.

Being, therefore, of opinion that the judgment of the Court below is quite correct, we dismiss the special appeal with costs.

The 27th November 1867.

Present :

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Suit for restitution of conjugal rights.

Case No. 1206 of 1867.

Special Appeal from a decision passed by Mr. E. P. Lloyd, Deputy Commissioner of Nowgong in Assam, dated the 18th March 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 18th April 1866.

Koobur Khansama (Defendant), *Appellant,*

versus

Jan Khansama (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Bama Churn Banerjee for Respondent.

Follows a previous decision which ruled that a decree in a suit for restitution of conjugal rights should not decree possession of the *person* of the wife, but should declare the husband entitled to his conjugal rights, and order the wife to return to his protection.

Mitter, J.—The two following points have been urged before us in this special appeal :—

1st.—That the Lower Appellate Court is wrong in giving a decree to he respondent for the recovery of the *person* of his wife.

2nd.—That the Lower Appellate Court is wrong in not awarding to the special appellant costs in proportion to the amount for which the claim of the respondent was dismissed.

With reference to the first point, we think that the decree passed by the Lower Appellate Court ought to be modified in the manner laid down by a decision of this Court reported in page 105, VI. Weekly Reporter.

The modified decree will stand thus: "That the plaintiff, special respondent, is entitled to his conjugal rights, and that his lawful wife, Musst. Beersanee, be ordered to return to his protection."

With reference to the second point, we are of opinion that, under the circumstances of this case, each party ought to bear his own costs.

The 27th November 1867.

Present :

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Kubooleut (for a portion of the lands).

Cases Nos. 1294, 1327, and 1330 of 1867, under Act X. of 1859.

Special Appeals from a decision passed by Mr. R. V. Cockerell, Officiating Additional Judge of Chittagong, dated the 18th March 1867, reversing a decision passed by Mr. J. A. Craven, Deputy Collector of that District, dated the 11th January 1867.

Abdool Ali and others (Defendants), *Appellants,*

versus

Yar Ali Khan Chowdhry (Plaintiff), *Respondent.*

Baboos Bama Churn Banerjee and *Laleet Chunder Sein* for Appellants.

Baboos Greesh Chunder Ghose and *Obhoy Churn Bose* for Respondent.

A suit will not lie for a kubooleut for a portion of the lands included in one entire holding, for which entire holding a kubooleut and pottah have been already exchanged between the parties.

Mitter, J.—THE first point taken before us in these three appeals is, that a suit will not lie for a kubooleut for a portion of the lands included in one entire holding. We think this objection to be a valid one. Upon the respondent's own showing, it appears that the land in dispute in each of these three cases forms part of an under-tenure, for which a kubooleut and potta have been already exchanged between the parties. There can be no doubt, therefore, that the respondent had no right to sue for a separate kubooleut for this land. This view is fully supported by the decisions of this Court reported in page 219, Volume VIII., Weekly Reporter, and page 106, Volume VI., Weekly Reporter, Act X. Rulings.

These three appeals are accordingly decreed, but without costs, inasmuch as the objection has been taken rather at a late stage of the proceedings. The other grounds of special appeal need not be gone into.

The 27th November 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Admission—Onus probandi.

Case No. 996 of 1867.

Special Appeal from a decision passed by Mr. O. Toogood, Judge of Beerbhoom, dated the 6th October 1866, affirming a decision passed by Baboo Gobind Chunder Chowdhry, Principal Sudder Ameen of that District, dated the 11th September 1865.

Asmutoonissa Bebee (Plaintiff), *Appellant,*

versus

Alla Hafiz and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboos Anodapersaud Banerjee and *Tarucknath Sein* for Respondents.

In a suit by a daughter for property left by her father, in which the defendants relied upon certain admissions, said to have been made by plaintiff, relinquishing the share in the inheritance left by her father, and in which they also set up a will of the father conveying the property to others, the Lower Court should have enquired into the genuineness of the will, and required the defendants to prove that the admissions, which plaintiff impugned, emanated from her or from some one duly authorized by her to make them. The mere fact that the admissions were contained in statements filed in a Court of Justice in her *name* does not necessarily prove that they were made by her.

Mitter, J.—THIS was a suit instituted by the special appellant to recover a two-annas share of certain properties belonging to the estate of her father, one Mahomed Bheekun, deceased. The respondents are purchasers from the brothers of the special appellant, and their main defence to the action was, that her father had by his last will and testament bequeathed the whole of his estate to their vendors, leaving only a monthly stipend of Rupees 4 for her maintenance. Both the Lower Courts have dismissed the suit upon the ground of certain admissions alleged to have been made by the special appellant. It is now contended before us—

1st.—That the admissions in question have been accepted by the Lower Appellate Court without any proof that they were really made by the special appellant.

2nd.—That the Lower Appellate Court has omitted to enquire into the genuineness or otherwise of the will relied upon by the respondents, as also to take into its consideration certain important items of evidence produced by the special appellant.

With reference to the first point, we are of opinion that the onus of proof has been thrown upon the wrong party. The authenticity of the admissions in question being impugned by the special appellant, it was for the respondents, who relied upon them, to make out that they had really emanated from her, or from some body duly authorized by her to make them. The mere fact that they are contained in statements

filed in a Court of Justice in her *name*, does not necessarily prove that they were actually made by her. This view is fully supported by a decision of this Court, reported in page 132, V. Weekly Reporter. The most mischievous consequences would ensue if the principle laid down in this decision were departed from. So far as we can judge from the circumstances connected with the admissions in question, we think that they are open to very great suspicion. The special appellant is a *purdanusheen* native lady. There is nothing to show who authorized the pleaders by whom those admissions were made. Then again, it is to be borne in mind that the statements in which those admissions are contained purport to have been filed not only on her behalf, but jointly on behalf of herself and her brothers who were most interested in setting up the alleged will of her father, a will by which her interest in the inheritance was cut down to a paltry allowance of Rupees 4 per month. We do not wish to fetter the judgment of the Lower Appellate Court on a question of fact, but we have adverted to these circumstances, because we find that it has altogether failed to take them into its consideration.

With reference to the second point, we are of opinion that an enquiry into the genuineness or otherwise of the will relied upon by the respondents is of vital importance in this case. The Lower Appellate Court has declined to go into it, upon the ground that the admissions above referred to proved a relinquishment by the special appellant of her legitimate share in the inheritance left by her father. If those admissions were really made by her, they can only be treated as evidence in support of the will, and as nothing more. We also find that the special appellant produced decrees of Court, showing that those admissions were declared to be untrue in the very suits in which they purport to have been made. Other items of evidence were also produced by her bearing upon the same question, but the Lower Appellate Court has altogether failed to take them into consideration. This, we think, is a serious defect in the investigation of the case.

The case is, accordingly, remanded to the Lower Appellate Court to be re-tried with reference to the above remarks. Any other issue or issues fairly arising between the parties should also be enquired into.

The 27th November 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Rent payable for a share of a Talook, how determined.

Case No. 963 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 2nd March 1867, reversing a decision passed by the Deputy Collector of that District, dated the 12th November 1866.

Khema Moyee *alias* Khamessuree Debia (one of the Defendants), *Appellant,*

versus

Radha Pearee Debia Chowdhrain and others (Plaintiffs), *Respondents.*

Baboo Gopal Lall Mitter for Appellant.

Baboos Sreenath Doss and *Kishen Dyal Roy* for Respondents.

The purchaser of a specific share of a talook, which with other talooks was held by the same jotedar, can be held liable only for the rent due upon the share purchased; and there can be no difficulty in determining the rent payable if each tenure has a separate jumma, and each shareholder holds a specific share.

Loch, J.—The record of this case is so imperfect that we are unable to come to any decision on the special appeal before us. The Judge bases his decision on certain judgments quoted by him, but which have not been filed with the record, and we are therefore unable to say whether the view taken by the Judge of these proceedings is correct or not. The special appellant, who is the defendant in the case, states that she purchased a 10-annas 8-pie share in Talook Oottam, and that she has no interest in the other talooks of Ramnath and Joykishen which with Oottam were held by Promo Moyee, the widow of Rajah Tirto Narain Roy. The remaining 5 annas 4 pie of Oottam were subsequently sold for debts due by Promo Moyee, and the purchaser sought to intervene in this case, and offered to pay the balance of rent due on that talook from him. The special appellant contends that she cannot, under

any circumstances, be made liable for the rent of the three talooks, seeing that she purchased a specific share of only one; that even if the lands of the three talooks cannot be separately identified, yet the jumma of each is known, and she is liable only to the extent of her share of the jumma. The Judge, quoting certain proceedings of his own Court and of the Collector, says: "It was finally decided that the three talooks had lost their distinctness, and been incorporated into one by the Survey authorities of 1857. The three then were in the possession of one jotedar under the proprietor from whom he received his rents. Since then the jotedaree rights have changed hands by sale and purchase, but no butwarah has been made; the lands, therefore, which comprise what is now called Oottam, must be considered as held in joint occupancy by the present parties in possession until a butwarah shall have been effected, but until then the zemindar cannot be compelled to recognize the diverse interests of his under-tenants, especially when their names have not, in accordance with Section 27 of Act X., been entered in his books."

The Court are unable to concur in the correctness of the reasoning of the Judge. In the first place, the Court do not understand how the proceedings of the Survey authorities could destroy the identity of any tenure. The lands of two or three tenures might be mixed together, and there might, from lapse of time, be difficulty of determining the plots which appertained to each talook, so as to render it necessary for the Survey authorities to measure the whole land in one "nulkah" without specifying to which tenure each plot belonged; but, so long as each tenure had a separate jumma, there could be no difficulty in determining the amount of rent payable by each of the shareholders in each talook, provided they held specific shares, nor would the circumstance that the three talooks were held by the same jotedar increase the difficulty so long as the jummas remained distinct. Now, it is impossible for this Court to gather from the judgment of the Lower Appellate Court what is the exact state of the case. It appears to the Court that the petitioner can be held liable only for the rent due upon the share (10 annas 8 pie) of talook Oottam which she purchased, and, if the jummas remain distinct, there can be no difficulty in ascertaining the sum due from her. But it has been urged that similar joint-decrees against the petitioner and Promo Moyee for the rent of the three talooks as one have heretofore been passed, and the petitioner never objected thereto. In answer to this, it is sufficient to say that her past acquiescence is no bar to her taking the objection now; and, further, there was a reason, which no longer exists, why decrees jointly and severally were passed against the petitioner and Promo Moyee. So long as Promo Moyee retained an interest in Talook Oottam and held the two other talooks, a joint-decree, though objectionable, might have been legally passed; but, as Promo Moyee's interest in Oottam has entirely ceased, she having been sold out in execution of a decree, the petitioner cannot be made jointly liable with her for the rent of the other talooks for which the petitioner is not in any way responsible. We think, therefore, that the record should be returned to the Judge with instructions to make it complete by filing with it authenticated copies of the proceedings referred to by him, and disposing of the claim for rent in the manner indicated above.

The 27th November 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Limitation—Sections 19 and 20, Act XIV., 1859—High Court's relation to late Supreme and Sudder Courts.

Case No. 334 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Moorshedabad, dated the 27th April 1867.

Kishen Kinkur Ghose and others (Decree-holders), *Appellants,*

versus

Buroda Kant Roy and another (Judgment-debtors), *Respondents.*

Baboo Mohinee Mohun Roy for Appellants.

Mr. J. W. Montriou and *Baboos Anoda Pershad Banerjee, Obhoy Churn Bose,* and *Opendro Chunder Ghose* for Respondents.

A decree of the High Court, as a decree made by a Court established by Royal Charter, falls under the 19th Section of Act XIV. of 1859, and is subject to 12 years' limitation.

HELD by Jackson, J., that it is a fallacy to suppose that the High Court has two parts, one representing the late Supreme Court, the other the late Sudder. It is *one* amalgamated Court possessing and exercising "all jurisdiction and every power and authority whatever in any manner vested in any of the abolished Courts." (Section 9, High Court's Act.)

HELD by Hobhouse, J., that when the present High Court was intended to stand in the place of the Sudder Dewanny Adawlut on the one side, and of the Supreme Court on the other, it would only have been intended that the Laws of Limitation which applied to those Courts respectively before they were amalgamated should apply to the Court which took their place. But, though he cannot doubt that it was the intention of the Legislature that decrees of the High Court passed in appeal from Courts not established by Royal Charter should be subject to the limitation provided by Section 20, yet the terms of the law are in conflict with such supposed intention, Section 19 being declared to apply to Courts "established by Royal Charter." The High Court's decrees are therefore subject to a limitation of 12 years.

Jackson, J.—THE appellants in this case obtained their decree in the Zillah Court on the 25th March 1862.

That decree was affirmed in appeal by the High Court on the 8th June 1863, the appellant being ordered to pay the costs of the appeal.

The effect of that decision being, I apprehend, to leave the plaintiff at liberty to execute his original decree within three years from 8th June 1863, as provided by Section 20, Act XIV. of 1859, and also to give him a decree of the High Court which he might execute for costs of the appeal within the time limited by law for the execution of decrees of that Court.

The law in force on that subject is the Act above cited, Act XIV. of 1859, in which no particular Courts are specified; but the Courts of Judicature in British India are distinguished as Courts established by Royal Charter, and Courts not established by Royal Charter.

The 19th Section of the Act provides for execution of decrees of the Courts established by Royal Charter, and the 20th and 21st Sections provide for the like matter in respect of Courts not so established.

At the time of the passing of that Act, the chief appellate jurisdiction in this country over the Courts in the Mofussil was vested in the Sudder Dewanny Adawlut which was a Court not established by Royal Charter, and the decrees of that Court would unquestionably be executed under the provisions of Sections 20 and 21.

At that time, the only Court in Bengal established by Royal Charter was the late Supreme Court.

Both these Courts were, in accordance with 24th and 25th Vic., Chap. 104, Section 8, abolished on the establishment of the High Court, which is a Court established by Royal Charter, and which made the decree under consideration.

By the 11th Section of the Act cited "all "provisions then in force in India"—of any "Acts of the Legislature of India which at "that time" were applicable to the Supreme Court at Fort William became applicable to the High Court.

Apparently, therefore, a decree of the High Court as a decree made by a Court established by Royal Charter falls under the 19th Section of Act XIV. of 1859, and, if that Section be regarded as a provision applicable on the 1st July 1862 to the Supreme Court, it became on that day applicable to the High Court by reason of its establishment.

A doubt at one time occurred to my mind whether the provisions of Section 19, which, when it was passed, undoubtedly referred to decrees of original jurisdiction, should not be still restricted in its operation to such decrees. But I find nothing in the Act of Parliament which discriminates between the different jurisdictions of the Court so as to warrant any such restriction. Section 12 does not contain any such matter.

Nor, indeed, can I see any reason why the decrees of the High Court on its appellate side should have a less extended efficacy or vitality than those of the same Court on its original side, the proceedings in both being governed by the Code of Civil Procedure, to which the Law of Limitation is at least very nearly allied.

It is objected to as an anomaly that, while the High Court has merely inherited the powers of the late Sudder Court in respect of appeals from the Mofussil Courts, and while the Sudder Court was included in the three years' rule, the High Court, which has succeeded to the functions of the late Supreme Court merely for the purpose of original jurisdiction, should use for the purposes of what may be called its Sudder jurisdiction, a provision applicable to the Supreme Court's decrees in original suits.

But this observation seems to me to rest upon a fallacy. Those who make it assume that the High Court has two parts, of which one represents the late Supreme Court and exercises its powers, the other representing the late Sudder Court with the jurisdiction and authority of that Court; whereas, in

fact, the High Court is *one* amalgamated Court possessing and exercising "all jurisdiction "and every power and authority whatsoever "in any manner vested in any of the abolished "Courts." (Sec. 9, High Court's Act.) And I am of opinion that, when any power vested in the late Supreme Court can be usefully brought to the aid of the Court acting in its appellate jurisdiction, it would be our duty to exercise such power.

Otherwise the 11th Section of the Act of Parliament would have been quite differently worded, and it would have been enacted that provisions applicable respectively to the Supreme and Sudder Courts should apply according as the Court was exercising original or appellate jurisdiction.

I cannot, therefore, but hold that the plaintiff was entitled to execute his decree for costs of the High Court within 12 years as declared by the 19th Section.

This, however, does not extend to the decree below which was affirmed by the High Court, and it remains only to consider whether execution of that decree was barred, as the Judge deemed, by the terms of Section 20.

The only proceeding to which the plaintiff could refer us as having been taken by him within three years next preceding the application to execute was the filing of a petition during the proceedings of an appeal to Her Majesty in Council which was commenced by the defendant, but not prosecuted. The petition set forth that the parties intended to compromise and asked for a delay which was granted, and the appeal was afterwards struck off the file, on the appellant failing to proceed.

The filing of this petition, it appears to me, cannot be looked upon as a proceeding to enforce the judgment, or to keep it in force, and consequently execution of that decree was properly refused.

The Judge's decision must be modified in accordance with our opinion. We give no costs.

Hobhouse, J.—I agree in the order which my brother Jackson would give in the case. The facts are these:—

The petitioners, Kishen Kinkur Ghose and others, were plaintiffs in the Zillah Court, and, on the 25th March 1862, obtained a decree against the judgment-debtors, respondents.

The judgment-debtors appealed to the High Court, but that Court, on the 8th June 1863, affirmed the decree of the Zillah Court with costs.

The judgment-debtors then commenced proceedings with a view to an appeal to Her Majesty in Council, but these proceedings were not effectually prosecuted before the High Court, and were, therefore, on the 9th May 1866, struck off on default.

On the 8th April 1867, the decree-holders, petitioners, applied to execute the decree of the High Court of date 8th June 1863, but the Court below has rejected the application on the ground that execution of this decree is barred by the application of the Statute of Limitation, Section 20, Act XIV., 1859.

The point taken in special appeal is that the decree, execution of which was applied for, was, if not altogether, at least as to costs a decree of the High Court; that the High Court is a Court established by Royal Charter; and that the period of limitation which is applicable is not the period of three years under Section 20, but the period of 12 years under Section 19 of the Act.

I entertain no doubt but that the decree of 1862 and that of 1863 are two distinct and separate decrees of different Courts. The decree of the High Court of 1863 affirmed that of the Court below, and, therefore, the decree of this latter Court remained in its integrity.

But the decree of the High Court went further; it did that which the decree of the Lower Court could not have done; it directed that the costs incurred in proceedings before itself should be paid by the appellant.

It is very true, as contended by the learned Counsel, Mr. Montriou, that, when an appeal is dismissed by the High Court, or any Appellate Court, costs almost as a matter of course follow, but the decree for such costs is not the less, in fact, a decree of the Appellate Court, and the mere circumstance that, under the rules of the Code of Civil Procedure, the decree has to be put in execution in another Court (Section 362), does not alter the character of the decree; it is still a decree of the Appellate Court.

I hold, then, that the decree of the High Court of 1863 is on the one hand a distinct decree, but that, on the other hand, it is a decree for costs of that Court only; and the next question is whether Section 19 or whether Section 20, Act XIV. of 1859, contains the law applicable to execution.

The words of Section 19 are as follows: "No proceeding shall be taken to enforce any "judgment, decree, or order of any Court "*established by Royal Charter*, but within "twelve years next after a present right to "enforce the same shall have accrued," &c.

And again, the words of Section 20 are these: "No process of execution shall "issue from any Court *not established by Royal* "*Charter* to enforce any judgment, decree, "or order of such Court unless some proceeding shall have been taken within three "years," &c.

The decree in this instance is a decree of the High Court on its appellate side, and the High Court is a Court established by Royal Charter; and it follows within the unmistakeable meaning of words, that the limitation prescribed in Section 19, *i. e.*, of 12 years, is the limitation applicable to the decree before us.

But Mr. Montriou contends that the High Court on its appellate side in this particular case is merely exercising the power which the Sudder Dewanny Adawlut would have exercised; that, when the Act of 1859 was passed, the provisions of Section 19 applied as clearly only to the Supreme Court as the provisions of Section 20 did to the Sudder Dewanny Adawlut; that it follows that the provisions of this latter Section apply now to the case before us, and that to hold otherwise would be to hold that one law applied to one part of what is substantially one and the same decree, and another law to another part.

There can, I think, be no doubt but that, up to the 1st July 1862, when the present High Court was established, decrees of the Sudder Dewanny Adawlut were governed by the limitation of Section 20, and decrees of the Supreme Court by that of Section 19, and it would seem to follow that, when the present High Court was intended to stand in the place of the Sudder Dewanny Adawlut on the one side, and of the Supreme Court on the other, it would only have been intended that the Laws of Limitation which applied to the Sudder Dewanny Adawlut and to the Supreme Court respectively before they were amalgamated should apply to the Court which took their places after they were amalgamated.

And to my mind there is a manifest absurdity in the idea that a decree, which, if it had been given by the Sudder Dewanny Adawlut on the 30th June 1862, would have been privileged to but three years' limitation, should, because it was given by a Court under a different name, but which still represented the same Sudder Dewanny Adawlut on the 1st of July 1862, be privileged to twelve years' limitation.

I cannot, therefore, doubt but that it was the intention of the Legislature that decrees of the High Court passed in appeal from Courts not established by Royal Charter should be subject to the limitation prescribed by Section 20 of the Act.

But, I think, it would be quite unjustifiable in us, sitting as interpreters of the law, to follow what we believed to be the intention of the Legislature, when the terms of the law are directly in conflict with such supposed intention.

And here, it seems to me, the terms are quite plain. Section 20 is declared distinctly to apply to decrees of Courts "not established by Royal Charter," Section 19 to Courts "established by Royal Charter." The High Court is a Court established by Royal Charter. The decree before us is a decree of the High Court for costs of that Court.

I hold, therefore, that, inasmuch as the decree of date June 1863 is a decree of a Court established by Royal Charter, and inasmuch as appellants have proceeded to execute it within twelve years, they are in time; and I would set aside so much of the judgment of the Court below as refused appellant's permission to execute it.

The 28th November 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Suit for a kubooleut.

Case No. 1008 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 18th February 1867, affirming a decision passed by the Assistant Collector of that District, dated the 3rd October 1866.

Modhoo Soodun Chowdhry and another (Plaintiffs), *Appellants,*

versus

Ram Mohun Ghur (Defendant), *Respondent.*

Baboo Mohinee Mohun Roy for Appellants.

Baboos Kishen Succa Mookerjee and *Gopeenath Mookerjee* for Respondent.

The tender of a pottah is not necessary before a suit for a kubooleut can be laid.

Where the tenure of a defendant is declared liable to assessment in a suit passed between him and the plaintiff's vendor, the plaintiff can sue for a kubooleut as he is thereby only carrying out the provisions of the decree obtained in that suit.

Kemp, J.—THIS was a suit for a kubooleut.

The Judge held that a tender of a pottah was absolutely necessary before a suit for a kubooleut could be laid.

and.—That the plaintiff had not proved that the defendant had any right of occupancy, and that, therefore, the suit for a kubooleut would not lie.

On the *first* ground the Judge is wrong. He is referred to decisions of this Court published at page 282, Volume VII., Weekly Reporter; page 88, Volume V.; page 23, Volume IV.; page 49, Volume I.

On the *second* ground, the decision quoted by the Judge is not in point. In that case, the defendant was a tenant-at-will, a mere trespasser, and it was held that the plaintiff could eject, but was not entitled to sue for a kubooleut. In this case, the tenure of the defendant has been declared liable to assessment in a decree passed between him and the plaintiff's vendor. The plaintiff, in suing for a kubooleut, is only carrying out the provisions of that decree.

The real point in the case has not been decided. The defendant urges that, after the resumption-suit, he obtained a mokurruree pottah from the plaintiff's vendor which bars enhancement. It is also said that the plaintiff's vendor has admitted this pottah. Now, it is essential to determine whether this pottah is *bond fide*, and whether it protects the defendant's tenure from enhancement. The admission of the plaintiff's vendor after this suit was instituted would, of course, not be binding on the plaintiff.

The suit is remanded for a fresh decision with reference to the above remarks.

The 28th November 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Suit for enhancement of rent—Relation of landlord and tenant.

Case No. 984 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by Mr. W. T. Tucker, Judge of West Burdwan, dated the 4th February 1867, reversing a decision passed by the Deputy Collector of that District, dated the 31st August 1866.

Beharee Lall Mookerjee (Plaintiff), *Appellant,*

versus

Modhoo Soodun Chowdry and others (Defendants), *Respondents.*

Baboos Kishen Succa Mookerjee and *Nil Madhub Sein* for Appellant.

Baboo Mohinee Mohun Roy and *Kalee Kishen Sein* for Respondents.

The admission by a defendant in a suit for enhancement of rent that he is paying (and has for many years paid) a sum of money to the holders of the putnee in plaintiff's possesion, without being able to show that it was paid as anything else than rent, is sufficient to raise the presumption that the parties stand to each other in the relation of landlord and tenant.

Glover, J.—THIS was a suit by the special appellant, calling himself putneedar of Lot Soojapore, Mehal Arazee, Mouzah Chenadehee, for enhancement of rent after notice.

The defendants pleaded, *first*, that no notice had been served upon them; and, *second*, that the land was their ancestral talook, and not liable to pay rent to the plaintiff.

The Court of first instance decreed the plaintiff's claim; but the Judge on appeal held that the plaintiff had not proved the relationship of landlord and tenant between himself and the defendant, and, therefore, dismissed his suit.

We think that this decision cannot be sustained. The special respondent admits that he pays, and has paid, for many years the sum of Rupees 34 to the holders of the putnee now in special appellant's possession; and he is not able to show that it was paid as anything else than rent. The Judge refers to this payment, but styles it an assignment. Why, we cannot determine, for there is no evidence whatever on the record to show that any assignment was made; nor can the special respondent's pleader explain how or why this payment was made by a person calling himself an independent talookdar.

We find, moreover, from the record that, in the year 1861, the predecessors of the special respondents sued certain ryots for enhanced rent. In that suit, the predecessors of the present special appellant intervened, claiming a 6-annas share of the property, and their claim was successful. Afterwards, the special respondents purchased their ryot's tenure, and so apparently became liable to the special appellants in respect of their 6-annas share.

The Judge has taken no notice of this very important piece of evidence; nor has he given any reasons for supposing that the payment of Rupees 34, which special respondents admit to have been paid for many years to the special appellant's predecessor, is an assignment or anything else than rent. His decision is incomplete and unsatisfactory.

The case will go back to him for a clear finding on the question. If the special respondents are not able to show that the 34 rupees are paid on some other account than rent, the presumption (especially when the Civil Court decree above noticed is taken into consideration) will be that the parties stand in the relation of landlord and tenant.

If this point be found in special appellant's favor, the claim to enhancement of rent will be gone into in the usual way. Costs will follow the result.

The 28th November 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Sale of tenure under Section 105, Act X., 1859 —Howlahdar.

Case No. 981 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 5th February 1867, affirming a decision passed by the Deputy Collector of that District, dated the 3rd December 1866.

Doorga Soonduree Debia (Plaintiff),

Appellant,

versus

Dinobundhoo Kyburto Doss and others (Defendants), *Respondents.*

Baboo Shushee Bhoosun Bose for Appellant.

Baboos Nubo Kishen Mookerjee and *Bama Churn Banerjee* for Respondents.

Full Bench decision cited, ruling that a sale for arrears of rent under Section 105, Act X., 1859, is not free of incumbrances created by the defaulter before the sale, unless the right of selling has been finally reserved, does not apply to a case where the tenure itself was not sold.

A plaintiff, who sues for a kubooleut against a kursa ryot, who is found to hold the tenure as a howlah, an intermediate and higher grade of tenure, must fail unless he can get rid of the encumbrance created by his predecessor.

Kemp, J.—The Courts below have correctly found that the tenure itself did not pass by the sale, but simply the rights and interests of the judgment-debtor in the said tenure which was held in joint-tenancy. This is clear from the bill of sale which we have carefully inspected. The special appellant was, therefore, not entitled to the tenure free of all incumbrances, nor would he have been so entitled had the tenure itself passed, unless it were shown that the tenure was one in which the right to sell was specially reserved by the engagements interchanged on the creation of the tenure.

It is unnecessary to apply the principles enunciated in the Full Bench decision, published in Volume VII., Weekly Reporter, pages 260-266, to this case, inasmuch as the tenure itself was not sold.

The plaintiff sued for a kubooleut from the defendant treating him as a kursa or cultivating ryot, whereas the defendant is entitled to hold the tenure as a howlah, which is an intermediate and higher grade of tenure. The suit was, therefore, properly dismissed, as plaintiff must first get rid of the encumbrance created by his predecessor before he can claim a kubooleut from the defendant treating him as a kursadur.

Appeal dismissed with costs and interest.

The 28th November 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Damages—Plaintiff making exaggerated statements.

Case No. 947 of 1867.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 11th February 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 13th January 1866.

Thakoor Luleet Narain Deo (Plaintiff), *Appellant,*

versus

Juggurnath Misser and another (Defendants), *Respondents.*

Baboo Chunder Madhub Ghose for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

A plaintiff, who comes into Court with a monstrously exaggerated statement of injury sustained, is only rightly served if the Court dismisses his claim *in toto*, although *some* injury was found to have been sustained by him.

Glover, J.—THIS was a suit to recover the value of certain fish said to have been caught by the defendants in the plaintiff's tanks.

Both Lower Courts dismissed the plaintiff's suit. They did not, as it appears to us, refuse to credit the allegation that fish were caught in the plaintiff's waters, but declined to give him any relief in the shape of damages on account of the grossly exaggerated nature of his claim.

It is contended in special appeal that, as some injury was found to have been suffered by the plaintiff, some relief in the shape of damages should have been granted.

We do not think it necessary to interfere in this case. If a plaintiff comes into Court with a monstrously exaggerated statement of injury sustained, a statement disproved to be by evidence and by the circumstances of the case, he is only rightly served if the Court dismisses his claim *in toto*. In this case, it has been found by both Lower Courts that, save in the one point that some fish were caught in special appellant's water, everything else in the plaint is a tissue of falsehoods.

We, therefore, dismiss this appeal, but, under the circumstances, without costs.

The 28th November 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Foreclosure—Redemption—Limitation.

Cases Nos. 1274 and 1365 of 1867.

Special Appeals from a decision passed by the Judge of Gya, dated the 12th March 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 28th June 1866.

Lotf Hossein and another (two of the Defendants), *Appellants,*

versus

Abdool Ali and others (Plaintiffs), and others (Defendants), *Respondents.*

Mr. S. Vertannes and *Baboo Dwarkanath Sein* for Appellant.

Mr. R. E. Twidale for Respondents.

The lapse of more than 12 years from the year of grace bars the right of redemption.

Mitter, J.—THERE is no ground for special appeal in these two cases. The Lower Appellate Court has correctly found, upon full

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legal proof, that the conditional sale relied upon by the respondent was duly foreclosed. More than 12 years having elapsed from the date of the expiration of the year of grace, the special appellant has lost his right of redemption. Both these cases are accordingly dismissed with costs.

The 28th November 1867.

Present:

Case No. 1194 of 1867.

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Application under Section 230, Act VIII., 1859.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 28th February 1867, reversing a decision passed by the Officiating Principal Sudder Ameen of that District, dated the 27th March 1866.

Ajoo Khan (Plaintiff), *Appellant,*

versus

Kisto Pershad Lahoory (Defendant), *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

An application, under Section 230, Act VIII., 1859, when once registered, is to be dealt with as an ordinary civil suit, and the question of title may be gone into, although there has been no ejectment by the decree-holder.

Mitter, J.—The only point taken in this case is that, the Lower Appellate Court having found it as a fact that the special appellant was not ejected by the decree-holder, respondent, his suit, under Section 230 of Act VIII. of 1859, ought to have been thrown out at once without any adjudication upon the question of title. We are of opinion that this objection is not tenable. Section 230 distinctly says that, when the application made under it is once registered, it is to be dealt with as an ordinary civil suit. The question of title, therefore, has been properly gone into. The precedent cited by the pleader for the special appellant is not in point. This appeal is rejected with costs.

The 28th November 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Suit for confirmation of title and possession—Plea of previous transfer.

Case No. 514 of 1867.

Special Appeal from a decision passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 24th December 1866, reversing a decision passed by Moulvie Sukhaoodeen Mahomed, Moonsiff of Durbhangah, dated the 30th June 1865.

Mussamut Bhugobutty (Plaintiff), *Appellant,*

versus

Bikramajeet Singh and others (Defendants), *Respondents.*

Mr. J. S. Rochfort for Appellant.

Baboos Mohesh Chunder Chowdhry, Debendro Narain Bose, Anund Gopal Palit, and *Bama Churn Banerjee* for Respondents.

Where a purchaser sues for confirmation of title and possession, and the plea set up by the defence is that the rights and interests in question were previously transferred by sale to another party who had sold it to defendant's vendor, the Court is bound to inquire into the alleged transfer which is the foundation of defendant's plea whether it was genuine, and, if so, whether it was a real or only a colorable transaction.

Mitter, J.—The special appellant in this case is the purchaser of the rights and interests of one Baboo Nauth in Mouzah Mahomedpore. He instituted this action for the confirmation of his title and possession in a certain fractional share of that village, and for setting aside certain conveyances under which the defendants, now respondents before us, claimed to hold it. The respondents pleaded that Baboo Nauth had transferred his interests in the property in suit to one Bheem Dutt, who again had sold it to their vendor Fuqueer Chand. The Lower Appellate Court has dismissed the suit upon the ground that the conveyances executed by Fuqueer Chand in favor of the respondents were genuine documents, and that the respondents were in possession since the respective dates of their purchase. The following grounds are now urged before us in special appeal :—

1st.—That the alleged transfer by Baboo Nauth to Bheem Dutt has been already set aside by a final decree of Court.

2nd.—That this transfer was the foundation of the title relied upon by the respondents, and the Lower Appellate Court having made no enquiry into it, there has been an error in law in the investigation of the case.

With reference to the first point, we are clearly of opinion that it is not tenable. On looking to the decree referred to, we find that it related to a quite different property; nor was there any adjudication made by it upon Bheem Dutt's purchase.

The second ground, however, is a good one. The title of the respondents depends entirely upon the alleged purchase by Bheem Dutt. If the conveyance alleged to have been executed in favor of Bheem Dutt is a false document, the special appellant is at once entitled to succeed. If, on the other hand, it is found to be genuine, it will still be necessary to enquire as to whether any real transfer of Baboo Nauth's interests was effected thereby, or whether the transaction was merely a colorable one. If the transaction is found to be fraudulent and collusive, notwithstanding the creation of a mere paper title, it will be further necessary to see whether the respondents had any notice, actual or constructive, of the fraud. If they had such notice, their title must fail. If, on the other hand, they had no such notice, or that they had, but their vendor Roghoonath had not, at the time of *his* purchase, the appellant's claim against them must be dismissed.

The case is accordingly remanded to the Lower Appellate Court to be tried with reference to the foregoing remarks.

The 28th November 1867.

Present:

The Hon'ble W. S. Seton-Karr, L. S. Jackson, and A. G. Macpherson, *Judges.*

Purchaser—Act X. of 1859, Section 105—Khas possession.

Cases Nos. 1281 and 1282 of 1867.

Special Appeals from a decision passed by the Additional Principal Sudder Ameen of East Burdwan, dated the 6th March 1867, modifying a decision passed by the Moonsiff of Selimabad, dated the 28th December 1865.

Teelottuma Debee and another (Plaintiffs), *Appellants,*

versus

Brojo Lall Shamunt and others (Defendants), *Respondents.*

Baboo Otool Chunder Mookerjee for Appellants.

No one for Respondents.

A ryot's tenure having been sold for arrears of rent under an Act X. decree, the purchaser is entitled to be put in *khas* possession of the *entire* tenure as it originally stood, notwithstanding that the sons of the ryot have been occupying huts on the land for more than 20 years. The circumstance that the purchaser happens to be the superior landlord does not diminish his right.

Macpherson, J.—I AM of opinion that the appellant in these cases is entitled to *khas* possession of this land. He certainly was entitled to *khas* possession of it as against the defaulter who was her judgment-debtor, and whose tenure she sold. The respondents are the sons of the defaulter; and, although they may have been in possession for twenty years, they have been so merely as members of the family of the defaulter, and not as having any independent tenure or right of their own.

I think that the decree of the Lower Court should be reversed with costs, and that decree should be made, declaring the plaintiff entitled to possession of the land, as prayed for by him.

Jackson, J.—I agree with my brother Macpherson in thinking that the judgment of the Court below is erroneous.

It appears to me that the plaintiff, having purchased the rights of the out-going tenant, is entitled to be put in possession of the entire tenure as it stood. That tenure consisted, probably, of lands of various descriptions—*bastoo*, *ood-bastoo*, and other descriptions of land.

It seems to me quite clear that the out-going tenant, whose rights are sold, is not entitled to retain a *portion* of the tenure while giving up the rest.

The circumstance that the purchaser happened to be also the superior landlord is, in my opinion, a circumstance that in no way affects his rights; and he is entitled to possession of the entire tenure, as any other person would be who had purchased and wished to hold the land under the zemindar. It seems to me that this accidental circumstance is one which has influenced the consideration of the Lower

Courts, and they have looked upon the plaintiff rather as the zemindar than as a purchaser.

Seton-Karr, J.—I had such grave doubts as to the course to be pursued in this case, that I requested that it should be re-heard with the assistance of a third Judge; and accordingly we, who first heard this case argued, have now had the benefit of our brother Jackson's opinion and experience.

It is unfortunate that in such a case, which is somewhat novel in its character, and in regard to which no precedents have been quoted, the respondent has not thought fit to appear and support the judgment in his favor.

It is also to be noticed that in this case no less than three Judges have found in favor of the defendants, and have denied the purchaser the right which he claims to exercise, *viz.*, that of entering on *khas* possession, and thus, in all probability, destroying the houses of the defendants. Further, it is remarkable that out of the whole tenure, which amounts to 84 beegahs, the special appellant admits that he has obtained *khas* possession of all but a beegah or two on which the houses stand.

After much consideration, and not without considerable doubts on the subject, I have come round to the opinion that, as a matter of pure and dry *law*, the special appellant, purchaser of the tenure, is entitled to that which he claims. As I have before stated, no case in point has been quoted, and, as far as my recollection serves me, it is not the practice of persons purchasing *khood-khast* tenures or other tenures to knock down or destroy the homesteads of ryots actually residing therein.

What the consequences of any such general practice would be, what the feelings of resident cultivators, and what the general effect of legislation if thus practically carried out, I forbear now to discuss or inquire. But, feeling that in this case, as presented to us, and on the finding of the Court, the purchaser has a strict *legal right* to carry out his decree to the full, and that the Courts are bound to assist him in his endeavours to carry out that right, I shall not now dissent from the views which have been expressed by my learned brothers, whatever I may think of the hardship of the case of the defendants before us, or of the inevitable hardship to other parties similarly situated, if this practice become general.

The decree of the Lower Courts will be reversed, and this appeal will be decreed with costs and interest.

The 29th November 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mesne-profits—Bona-fide holder without knowledge of defect in title.

Case No. 1014 of 1867.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 14th February 1867, modifying a decision passed by the Sudder Ameen of that District, dated the 23rd November 1866.

Mugun Chunder Chuttoraj (Defendant), *Appellant,*

versus

Surbessur Chuckerbutty and others (Plaintiffs), *Respondents.*

Baboo Kalee Kishen Sen for Appellant.

Baboos Gopal Lall Mitter and *Kalee Prosunno Dutt* for Respondents.

Held, dissenting from a ruling of the late Sudder Court, that mesne-profits is always recoverable from a person who has enjoyed them, even though he has been in *bonâ-fide* possession without knowledge of the defect in his title. He would, if he bought with sufficient enquiry, have a remedy against his vendor.

Glover, J.—This was a suit to recover mesne-profits on certain lands decreed to the plaintiff, for the years during which he had been kept out of possession by the defendant, the vendee of the person, who had originally ousted the plaintiff.

The defendant pleaded non-liability, on the ground that he had been an innocent purchaser for value, and had held a *bonâ-fide* possession not knowing of the plaintiff's rights.

Both Lower Courts held the defendant to be liable; but the Judge awarded mesne-profits for a period of three years and seven months only, holding the claim for the remainder of the period allowed by the Sudder Ameen to be barred by limitation.

It is now urged before us in special appeal—

(1.) That, under the circumstances, special appellant was not liable for any mesne-profits at all.

(2.) That, if he was liable, it was only for three years, the remainder of the claim being barred.

(3.) That, with regard to certain plots of land, the Judge has decreed more than was claimed in the original plaint of the suit for possession; and

(4.) That the Judge has miscalculated the costs.

In support of the first objection, we have been referred to a decision of the late Sudder Dewanny Adawlut (No. 412 of 1854, Sudder Dewanny Adawlut Reports, 1858, page 513) in the case of Ranee Surno Moyee, Plaintiff, Appellant, *versus* Pertap Chunder Burooah, Defendant, Respondent, in which it is laid down generally that a party in *bonâ-fide* possession of land, in possession that is without knowledge of the defect in his title, is not liable to the legitimate owner for mesne-profits.

We have been unable to find, and the special appellant's pleader has not referred us to, any later cases in which the same doctrine is enunciated; and, although we have great respect for the opinion of the learned Judges who passed that decision, we are not in any way bound to follow it as a precedent.

On the contrary, we are of opinion that, from the very nature of the case, "mesne-profits" must always be recoverable from the person who has enjoyed them, no matter how ignorant he may have been of the badness of his title. No injury is done to him; he suffers no loss, but is merely required to return what he had no right to keep. He would still have his remedy (supposing him to have been the victim of a fraud) against his vendor, and unless he had bought negligently and without sufficient enquiry, in which case the maxim of "caveat emptor" would apply, would be able to replace himself in the same position as he was in before his purchase.

If mere *bonâ-fide* possession were to excuse a party from payment of mesne-profits, the anomaly might very easily arise of the vendee after ouster by the legitimate owner, recouping himself as regards purchase-money from his fraudulent vendor, and still retaining all the mesne-profits he had collected during his wrongful possession, whilst the real owner would be without remedy.

We think that the special appellant was properly made liable for wassilat, and that this objection should be overruled.

Then as to the time for which mesne-profits should be given. The plaintiff brought his suit on the 5th May 1865, or Bysack 1272 B. S.; his claim for wassilat would therefore extend for six years upwards, *viz.*, up to Bysack 1266 B. S. Now, in his plaint he only claims for three years of this period, *viz.*, for the years 1266, 1267, and 1268 B. S., and cannot, therefore, be awarded any portion of the mesne-profits collected during the year 1269 B. S. The Judge has given him wassilat for 7 months of that year, and this amount must, we consider, be struck out of the accounts.

This objection is, therefore, allowed, and the Judge's order modified accordingly.

With regard to the third objection, we do not think the special appellant's contention established.

In the original suit for possession, the calculation was made avowedly by guesswork at ten times the annual produce for the purposes of valuation; and such calculation in a suit which was not for wassilat, but only for possession, cannot fairly be held to bind the plaintiff in this case. In his plaint in this suit, he demanded considerably more than the Ameen's enquiry found to be due.

As to costs, we think that the proper course for the special appellant to pursue is to apply to the Judge below to amend what is stated to be a mere error in calculation, and which can be much more efficiently done by the Lower Court (which is in possession of all the facts) than by this, which is hearing the suit on points of law only.

With the exception, therefore, of the modification above noted, this special appeal will be dismissed. Each party will get costs in proportion to the amounts decreed and dismissed respectively.

The 29th November 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Suit for accounts under Act X. of 1859—Heir of an agent.

Cases Nos. 1431 and 1509 of 1867 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Dinagepore, dated the 25th March 1867, reversing a decision of the Deputy Collector of that District, dated the 31st December 1866.

Gowhur Hossein and another (Plaintiffs), *Appellants,*

versus

Ram Coomar Chowdry and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Debendro Narain Bose* for Appellants.

Mr. J. S. Rochfort and *Baboo Chunder Madhub Ghose* for Respondents.

Semble.—A suit for the delivery of accounts under Act X. of 1859 will lie against the heir of an agent, the Act being intended to facilitate the recovery of accounts by zemindars, and to make the heir of an agent equally responsible with the agent.

Seton-Karr, J.—In these two cases a preliminary objection was taken by Mr. Rochfort, who appeared for the defendants, special respondents, to the effect that a summary suit like this under Act X. would not lie against the heirs of an agent, and that the plaintiff's remedy was a suit in the Civil Court.

We have heard the arguments of both parties on this point, and, if it were necessary to decide it, we should probably be prepared to hold that suits of this nature would lie against the heirs of the agent, and that the Act intended to facilitate the recovery of accounts by zemindars, and to make the heir of the agent equally responsible with the agents themselves.

This plea, however, was not raised in the Lower Courts, and, on examining the Judge's decision and their own written statement, I find that the defendants broadly denied that they ever had the custody of the accounts, and asserted them to be in the power of the plaintiff. And the Judge, as it appears to me, comes to a finding, not only that there is no proof that the defendants had the accounts and could produce them, but that it had also been shown that the plaintiffs resided at the Sudder Cutcherry, and had the means of obtaining every thing for which they now come into Court.

There does not appear to be any misplacement of *onus* of proof or failure of investigation, and I would, therefore, dismiss the appeals with costs and interest.

Macpherson, J.—I think, on the facts as found by the Judge, that no case has been made out against the defendants, and that there has been nothing wrong in the manner in which the case has been treated by the Lower Court. The appeals must be dismissed with costs.

The 29th November 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Judgment.

Case No. 1406 of 1867.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 8th April 1867, reversing a decision passed by the Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of that District, dated the 4th October 1866.

Shurno Moyee Dossia (Plaintiff), *Appellant,*

versus

Joy Narain Bose (Defendant), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboos Doorga Doss Dutt and *Sreenarain Doss* for Respondent.

There must be a distinct finding one way or other on all the material issues in a case.

Macpherson, J.—It is matter of regret to us that it is, in our opinion, necessary to remand this case.

The most material issue in the suit is, whether or not the endowment under which the plaintiff claims as *shebait* was a *bond-fide* transaction—whether it was not merely a fictitious and colorable conveyance executed by the judgment-debtor with a view to secure the property to herself or to those who, she knew, would hold it for her benefit.

The Judge, in the course of his judgment, gives various indications of his views on the question, but he has unfortunately not expressed this view so distinctly as to enable us to say that he has decided the point one way or other.

The case is remanded for a decision on this one point, and the Judge will take it up at once out of its order, and pass his decision with the least possible delay.

The 29th November 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Sale—Liability only of real vendor.

Case No. 1023 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Furreedpore, dated the 12th February 1867, reversing a decision passed by the Moonsiff of Bhanga, dated the 16th March 1866.

Kalee Doss Mojoomdar (one of the Defendants), *Appellant,*

versus

Meheroonissa Khatoon and others (Plaintiffs), *Respondents.*

Baboo Nuleet Chunder Sein for Appellant.

Baboo Hem Chunder Banerjee for Respon dents.

Where a plaintiff sued for recovery of possession of property which he said he purchased from two defendants, and it was found, as a fact, that one of the defendants did not sell, but that the other used fraud in effecting the sale, it was held that the decision below, which gave plaintiff a decree for the entire property against the defendant who acted fraudulently, was erroneous, and that the decree should have absolved from liability the share of the defendant who did not join in or know anything of the sale.

Glover, J.—This was a suit to recover possession of a three-annas share of a certain talook said to have been purchased by the plaintiff from Raj Chunder and Chunder Monee under a kabalah, dated the 14th Falgoon 1251 B. S.

Plaintiff alleges that he retained possession of his purchased share until dispossessed by the action of a decree under Act X. of 1859.

The defendants Chunder Monee and Kalee Dass, son of Raj Chunder, denied execution of the kabalah and the plaintiff's possession. They pleaded also limitation.

The first Court overruled the plea in bar, and, on the merits, found that Raj Chunder was the only person who sold to the plaintiff, and that he only sold the half of what the deed purported to convey, *i, e.*, a one-anna ten-gundahs share; that Chunder Monee knew nothing of the deed, and never agreed to it.

The Principal Sudder Ameen admitted this state of facts, but, holding Raj Chunder to have been guilty of fraud, made him liable to the plaintiff for the entire three annas mentioned in the kabalah.

We are of opinion that this decision cannot stand. The plaintiff's case was that both Raj Chunder and Chunder Monee sold him the 3-annas share; and when it was found, as a fact, that Chunder Monee's name had been fraudulently used, and that she knew nothing of the alleged conveyance, it followed that her share must have been deducted from the land conveyed to the plaintiff, and that the case should stop there. It might have been perfectly just to take the balance of 1½ annas out of the share of the fraudulent Raj Chunder; but, as the plaintiff brought his case, this description of remedy was not asked for, and the Principal Sudder Ameen could not, therefore, legally give it.

We think that, on the facts found, the judgment of the first Court was the only one that could legally be passed, and we accordingly restore that judgment, modifying the decision of the Principal Sudder Ameen. The costs of the appeal will be assessed in proportion.

The 30th November 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Deed of sale comprising several properties—Risk of purchaser.

Case No. 1422 of 1867.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Chittagong, dated the 3rd April 1867, affirming a decision passed by the Moonsiff of Raojan, dated the 27th August 1866.

Rai Sona Bibee (Plaintiff), *Appellant,*

versus

Kunee Meah and others (Defendants), *Respondents.*

Baboo Nursingh Chunder Mitter for Appellant.

Mr. R. E. Twidale for Respondents.

Where several properties are comprised in one deed of sale, the purchaser runs the risk of having his title in all the properties shaken, should the purchase as to one of them be called in question in a regular suit.

Loch, J.—We think the judgment of the Lower Appellate Court to be perfectly right. The plaintiff claimed certain surplus proceeds of sale in the hands of the Collector, which had been attached by a party who held a decree against the plaintiff's vendor, and who denied the genuineness of the plaintiff's purchase. Plaintiff's deed of sale comprised two plots purchased from two different parties. To establish her right and the money she claimed, the plaintiff had to prove the genuineness of her deed of sale, which the Principal Sudder Ameen on the evidence declared to be not proved.

Plaintiff, in special appeal, urges that the Principal Sudder Ameen should have left that part of the deed which related to the other property alone, and that the effect of his finding is to invalidate her purchase thereof. We think the Principal Sudder Ameen did what was right. He pronounced an opinion upon the genuineness of the deed, which he was bound to do. If people are so unwise as to include purchases of different properties from different owners in one deed of sale, they run the risk of having their title in all the properties comprised therein shaken, should the genuineness of their purchase as to one of those properties be called in question in a regular suit. We dismiss the appeal with costs.

The 30th November 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Reviews under Regulation XXVI., 1814—Permission of superior Court—Reviews under Code of Civil Procedure—Further appeals under the old law—Limitation—Act XIV., 1859—Section 377, Act VIII., 1859.

Case No. 1050 of 1867.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 15th February 1867, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 22nd December 1866.

Joogul Kishore Singh and others (Defendants), *Appellants,*

versus

Oogur Narain Singh and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Baboos Romesh Chunder Mitter* and *Tarucknath Sein* for Appellants.

Baboos Unnoda Pershad Banerjee, Mohinee Mohun Roy, and *Mohesh Chunder Chowdhry* for Respondents.

Whereas, by the law in force previous to the Code of Civil Procedure, the subordinate Courts could not review their judgments without the permission of a superior Court, the Code removed that inability, and the removal extended to suits past and pending as well as future.

A party petitioning, after the Code of Civil Procedure came into force, for the review of a judgment in appeal passed in 1849, is entitled to be governed by the terms of the old law (Regulation XXVI. of 1814), which allows a review in respect to a decree from which "no further appeal may have been admitted by a superior Court;" and a "further appeal" included both a second or special appeal and a summary appeal.

Act XIV. of 1859 is silent on the subject, and Section 377, Code of Civil Procedure, assigns no limit to the time, after the expiration of 90 days, at which the application for review may be filed, provided that the applicant can satisfy the Court that there was just and reasonable cause for the delay.

Jackson, J.—THE sole question with which we are concerned in this case is whether the Court below, in admitting to review the judgment in appeal passed by a former Judge in 1848, was wrong in law.

The circumstances are very fully stated by the Officiating Judge, Mr. A. J. Elliot, who, I am bound to say, appears to me to have dealt with the case more carefully, more accurately, and more in accordance with justice, than his predecessor, Mr. Birch, who rejected the application for review.

The Judge's competency to admit the review is denied;—

1st.—Because the previous permission of the High Court had not been obtained in accordance with the law before 1859.

2nd.—Because, a special appeal having been admitted in this case, review is barred.

3rd.—Because, more than 12 years having elapsed during which time the defendants have been in quiet possession, all further proceedings are absolutely barred.

Upon the first of these objections, it was contended that the case was one to which Regulation XXVI. of 1814, Section 4, applied, and that, as provided in the 2nd Clause of that Section, the Judge, before making any order, was bound to report the matter for the orders of the High Court, and that the order of review, made without the previous sanction of that Court, was a nullity.

It was argued that, although Regulation XXVI. of 1814 has been repealed, yet, under the principle of Section 387, Code of Civil Procedure, the present case must be dealt with as a suit pending at the time when the Code came into operation, and, therefore, governed by the law previously in force. And the case of Joy Kishen Mookerjee *vs.* Sib Chunder Bannerjee and others was referred to.

Sudder Dewanny Adawlut, 1859, page 1521.

The object of Section 387 was that no party to a pending suit should have his remedies narrowed or taken away by a change in the law occurring while the litigation was yet unfinished, and in the case cited the late Sudder Court put a wide interpretation on the word pending, in order to let in a review which would have been shut out by applying to the case the strict provisions, as to time, of the new Code. The appellants in the present case, reversing this process, seek to exclude an application for review made under the new Code, by applying to the case a law long since repealed, though it was applicable to the suit in its earlier stage, contending, in fact, that the applicant, as an old litigant, is not entitled to benefit by the more liberal provisions of the Code now in force.

It seems to me, however, that Section 387 has no bearing on the question. I speak, of course, of the proviso contained in the latter part of it. That proviso merely maintains the rights of parties to pending suits in reference to the procedure of the suits, and does not, in my opinion, affect the enlarged powers given to certain Courts, or the restraints removed by the Code. Whereas, by the law previously in force, the subordinate Courts could not review their judgments without the permission of a superior Court, the Code removed that inability, and the removal, in my opinion, extended to suits past and pending as well as future.

It was also contended for the respondent that the order made by the Division Bench, dated 30th January 1866, was a sufficient sanction to satisfy the requirements of the old law.

I am of opinion that, if such previous permission had been requisite in this case, the order in question could not have been considered in that light. It was not an order based on any report from the Zillah Judge, and it conveyed no direction at all, certainly not leave to review the judgment.

It merely drew attention to some errors into which Mr. Birch had fallen, and left his successor free to act upon his own view of the law and of the requirements of the case.

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The next matter to be decided is whether this review was barred by the previous admission of a special appeal.

In the Section of the Code which relates to the right to make applications for review (Section 376), the words "special appeal shall have been admitted" refer doubtless to the admission of a special appeal under the Code itself. It is manifest that in this case no special appeal could have been admitted under Act VIII. of 1859, and here I incline to think the petitioner was entitled to be governed rather by the terms of the old law, XXVI. of 1814, *viz.*, "from which decree no "further appeal may have been admitted by "a superior Court."

I understand that in this case no further appeal was ever admitted by the late Sudder Court, but that the application for special appeal was rejected on the ground that the Court was not competent to entertain a special appeal upon the facts.

It is material also, in order to apply this restriction fairly, to consider the real meaning of the words.

A "further appeal," as spoken of in Regulation XXVI. of 1814, Section 4, Clause 2, included both a special or second appeal described in Section 2, Clauses 1 and 2, of the same Regulation, and also a summary appeal mentioned in Clause 3, Section 3; and by the joint-operation of these Clauses the door for a further appeal was made wider open than under the later laws upon the subject.

And the view of this restriction taken by the late Sudder Court was apparently this. And it certainly seems a reasonable view that, when a decision had been confirmed by a superior Court, it had the effect of a decision of that Court, and was liable to be reviewed by it alone, *see* Construction, Sudder Dewanny Adawlut, No. 1057; and the case of Bhugwan Dutt Sing, Carrau's Summary Cases, page 42, and Syud Kesmunt Apia's case, *ib.*, page 137; *see* also Macpherson's Civil Procedure, 3rd Edition (1856), page 539.

Now, the special appeal in this case, even if admitted, must have been preferred under Act III. of 1843, which was the special appeal law in force down to 1853, when it was repealed by Act XVI. of that year. It must have, therefore, proceeded on the ground that the decision was "inconsistent with some "law, or usage having the force of law, "or some practise of the Courts," or that "it involved some question of the law, usage, "or practice—in which there was reasonable "doubt."

The admission or decision of a special appeal upon such grounds would not involve a decision of the Sudder upon the merits, and still less could it be conclusive as to the admission of new evidence not discovered till long after.

I am, therefore, of opinion that nothing in the proceedings in special appeal in this case barred the application for review.

A more formidable difficulty remains—in the lapse of time since the original decree of the Judge's Court in the first appeal, the interval between that decree and the application for review being about 15½ years.

At the hearing, Baboo Romesh Chunder Mitter referred us to the case of Kashee Nath Banerjee and others, Appellants, decided by the late Sudder Court in 1840. This case, first reported by Mr. Sevestre (1 Sevestre's Cases, page 49), is also to be found in Carrau's Summary Cases, page 23; it was there held that the expiration of twelve years barred the admission of an application for review; and the case is noted by Mr. Morley, I. Digest, page 528, as being the only one in which it had been so ruled.

There is, however, a *dictum* of Sir Robert Barlow to the same effect in the case of Jeeb Lal Mahton decided in 1852 (Colebrooke's Summary Cases, Sudder Dewanny and Nizamut Adawlut, page 177; also Sudder Dewanny Adawlut, 1852, page 1033).

In the case of Kashee Nath Banerjee, the petitioner applied, after the lapse of seventeen years, for review of a judgment passed by two former Judges of the Court, who had themselves rejected a similar application by orders of various dates shortly after the decision. It is not stated on what grounds the new application proceeded, though it seems to have been accompanied by certain documents.

According to the ancient Sudder practice, this petition first came before a single Judge, Mr. Bradden, who "doubted the genuineness of the documents," and also considered that the "transcripts exhibited by the respondents were not good and sufficient evidence for the admission of the review;" for these reasons, he proposed to reject the prayer, but sent the matter before a second Judge, because it arose out of a previous order of two Judges.

It then came before Mr. Tucker, who called upon the *serishtadar* to report whether, in any case, a review of judgment had been admitted after the expiration of twelve years.

The officer reported in the negative, and thereupon Mr. Tucker, with the concurrence of two other Judges, held that the undisturbed and quiet possession of the property by the appellants for upwards of twelve years was "a good and sufficient ground to bar the review," and that consequently the Court could not take cognizance of the petition.

This decision is not based on any positive enactment, nor do the Judges give the reason for their conclusion; but it may be assumed that they applied the Rule of Limitation laid down in Section 14, Regulation III. of 1799, to protect persons in quiet possession for twelve years, and held, to use the words of Baboo Romesh Chunder Mitter in the argument before us, that what bars the suit also bars the review.

And, in the case before them, probably the decision was quite reasonable; but, if the case had arisen, I presume the Judges of the Sudder Court would also have applied the provision contained in Regulation II. of 1805, Section 3, which declared that the twelve years' limitation should not be applicable to any private claims of right to immoveable property where the persons in possession should have acquired it by violence, fraud, or any unjust or dishonest means whatsoever.

Now, in this case, as will be observed in reference to the judgment of this Court in the case of another co-sharer, which was heard before our lamented colleague Shumboo Nauth Pundit, J., and myself on the 9th March 1863, there was a distinct allegation of fraud, the plaintiff's case being that one Rajcoomar, being jointly entitled to the estate with two brothers, had procured it to be sold as his sole property, had purchased it *benamee* through one Pertab Sing, and got it re-conveyed to his own grandchildren. The plaintiffs in the first suit to regain a third share were the heirs of one brother, and the second and successful suit was brought by the other, a third brother.

11 Hay's Reports, page 311.

The plaintiffs, who sued first, were unable to lay their hands on any evidence of the joint-ownership as Rajcoomar had managed the property, and so lost their suit. The other brother was more fortunate and discovered, among the judicial records of the district, distinct admissions in Court by Rajcoomar himself that the property was joint.

In this instance, therefore, clearly there was no quiet possession in good faith by the defendants so as to bar the suit by limitation.

This appears to me to distinguish the present case from that first cited.

In the other case cited, we have merely, as I have said, a *dictum* of Sir R. Barlow. The other Judges (W. B. Jackson and Mytton) proceeded on the ground that the petition must be presented in the Court where the first decision was passed, which it was sought to review, and for that reason refused to take cognizance of the application.

These cases, however, were decided upon the law as it stood previous to 1859, and with a new Procedure and a new Limitation Law it seems to me the question is *res integra*.

The Limitation Act, XIV. of 1859, is wholly silent on the subject; and Section 377, Code of Civil Procedure, assigns no limit to the time, after the expiration of 90 days, at which the application for review may be filed on the stamp-paper prescribed for plaints, provided that the applicant can satisfy the Court that there was just and reasonable cause for the delay.

In the present instance, cause was shown for the delay; the Judge took evidence as to its truth, and, after full consideration, decided that the cause had been made out.

He, therefore, granted the review, and his order on that point is final. We cannot disturb the order made or the subsequent proceedings unless they are shown to be contrary to law, or usage having the force of law. Can we say that there is any law or usage of equal force which declares that an application for review must be made within 12 years?

I know of none; and I do not conceive it to be the duty of the Courts to impose limits in such matters which have not been set by the Legislature.

This, it is true, is a case in which the right has been stretched very far; but the responsibility does not lie upon us, and the case is not likely to happen frequently.

For these reasons, after the best consideration which I can give the matter, I am of opinion that the decision of the Lower Appellate Court must be affirmed, and the special appeal dismissed, but, under the circumstances, I think, without costs.

Hobhouse, J.—I am of the same opinion.

The 30th November 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Collector's judgment—Estoppel—Jurisdiction of Civil Court.

Case No. 1270 of 1867.

Special Appeal from a decision passed by the Officiating Judge of Chittagong, dated the 23rd February 1867, reversing a decision passed by the Officiating Additional Principal Sudder Ameen of that District, dated the 27th March 1866.

Aradhun Dey and others (Defendants), *Appellants,*

versus

Golam Hossein and another (Plaintiffs), *Respondents.*

Baboo Sreenath Banerjee for Appellants.

Mr. R. T. Allan for Respondents.

A Collector's judgment as to the genuineness of a pottah cannot be pleaded as an estoppel in the Civil Court in an action for ejectment on account of trespass.

Loch, J.—THE plea urged in special appeal before us in this case is that the pottah pleaded by the special appellant had already been the subject of a suit in the Collector's Court under Act X. of 1859, between the special appellant and the plaintiff-respondent, and had been pronounced a valid document; and that judgment, being passed by a Court of competent jurisdiction, is final, and cannot now be questioned in another suit between the same parties in the Civil Court; and the Judge was wrong in holding that the case was not barred under the provisions of Section 3, Act VIII., 1867.

We think this plea is sufficiently met by the recent judgment in VIII. Weekly Reporter, pages 177-178, Civil Rulings, in which we concur. The judgment of the Collector in the matter of the genuineness of the pottah is the judgment of a Court competent to determine that question in order to the determination of the further question of rent or of ejectment; but, as it is not the judgment of a Court of concurrent jurisdiction with the Civil Courts, it cannot be pleaded as an estoppel in the Civil Court in an action for the ejectment of the defendant as a trespasser. Under this view of the case, we dismiss the special appeal with costs.

The 30th November 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Uniform rent for more than 40 years—Presumption under Section 4, Act X., 1859—Onus probandi.

Case No. 1256 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 27th February 1867, affirming a decision passed by the Deputy Collector of that District, dated the 7th May 1866.

Soodishtee Lall Chowdhry and others (Defendants), *Appellants,*

versus

Nuthoo Lall Chowdhry and others (Plaintiffs), *Respondents.*

Baboo Bama Churn Banerjee for Appellants.

Mr. R. E. Twidale for Respondents.

The presumption allowed by Section 4, Act X., 1859, of holding certain orchard-land at a uniform rent since the Permanent Settlement, was held not to be removed by defendant's statement that the orchard was planted more than 40 years ago; and it was for plaintiffs to prove it to have been made since the Permanent Settlement.

Loch, J.—THIS case must be remanded to the first Court for the trial of the proper issues. The plaintiff sued for a kubooleut at an enhanced rate, stating that defendant held some orchard-land at 4 rupees per

beegah; that lands of the same kind in the neighbourhood were paying Rupees 20 the beegah; that he had served notice of enhancement on the defendant, and now claimed a kubooleut at the rate so assessed.

The defendant stated that he purchased from the person who planted the orchard more than 40 years back; that he, as well as the party from whom he purchased, had never paid more than 4 rupees per beegah; and that this rate of rent, dating so far back, could not be enhanced.

The Deputy Collector says that he went to the spot, made a map, examined the holders of orchards in the neighbourhood, who gave the rates of orchard-land from Rupees 5-12 to 10 rupees the beegah, and that he thought Rupees 6 per beegah was a proper rate.

Both parties appealed to the Judge, plaintiff urging the correctness of the rate he sought to impose, while the defendant pleaded that he was entitled to the presumption of having held from the Decennial Settlement at a uniform rate. The Judge held that the presumption pleaded by the defendant did not arise in the case, as he himself gives the date of the planting of the orchard, *viz.*, more than 40 years, which could not, under any circumstances, reach back to the Permanent Settlement; and he gave a decree for the plaintiff at the rate he claimed.

The defendant filed a special appeal, urging that the plea of having held the land at a fixed rate for upwards of 40 years before his purchase is not inconsistent with the presumption of holding from the time of the Permanent Settlement; and his pleader quotes the decisions of this Court reported at VII. Weekly Reporter, page 472; III. Weekly Reporter, Act X. Rulings, page 133; V. Weekly Reporter, page 86, Act X. Rulings; IV. Weekly Reporter, page 25, Act X. Rulings, to show that it is not necessary to plead uniform payment of rent from the Decennial Settlement to raise the presumption mentioned in Section 4, Act X. of 1859, the words of which are: "Whenever, in any suit under this "Act, it shall be proved that the rent at "which land is held by a ryot in the said "provinces has not been changed for a "period of twenty years before the com-"mencement of the suit, it shall be presumed "that the land has been held at that rent from "the time of the Permanent Settlement, un-"less the contrary be shown, or unless it be "proved that such rent was fixed at some "later period." Now, in this case, the defendant's plea of uniform payment for more than 20 years does not appear to be questioned by the plaintiffs, and the presumption allowed by the law is not removed by the defendant's statement that the orchard was planted more than 40 years ago, for the terms are general, and it was for the plaintiffs to rebut the presumption thus raised by proving the orchard to have been made since the Permanent Settlement. The case will be remanded to be disposed of with reference to the above remarks.

The 2nd December 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Dakhilahs—Section 4, Act X., 1859—Copies of pottahs and jumma-wassil-bakee papers.

Case No. 864 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 21st February 1867, affirming a decision passed by the Deputy Collector of that District, dated the 27th September 1866.

Ramjadoo Gangoly (Plaintiff), *Appellant,*

versus

Luckhee Narain Mundul (Defendant), *Respondent.*

Baboos Onookool Chunder Mookerjee and *Anund Chunder Ghosal* for Appellant.

Baboos Sreenath Doss and *Mohinee Mohun Roy* for Respondent.

Dakhilahs relied upon by a defendant in a suit for arrears of rent at enhanced rates, to obtain the benefit of the presumption arising under Section 4, Act X. of 1859, must be proved even if not positively denied. If a variation in the dakhilahs is found to exist, there must be a distinct finding as to whether the short payments of one year were made up the next year, the variation *primâ facie* being evidence that the rent was *not* uniform.

Copies of pottahs and jumma-wassil-bakee papers ought not to be accepted on the mere fact of their being attested or authenticated copies, but should be proved by the best and most distinct evidence available.

Bayley, J.—In this case, plaintiff sued defendant for arrears of rent at enhanced rates on a specified area and jumma.

Defendant denied his liability for enhanced rates or for the tenure specified by plaintiff. Defendant averred that he held one jumma of Rupees 27-7, another of Rupees 13-12-17-2, or a total of Rupees 41-3-17-2, and had uniformly paid at those rates.

The first Court held that plaintiff had not proved his case by his jumma-wassil-bakee papers; that defendant had filed dakhilahs for twenty years, to which no special objection was taken; and that, from these and the defendant's oral evidence, it was shown that defendant had paid at fixed rates, so as to exempt him from liability to enhancement. The first Court accordingly dismissed plaintiff's suit.

On appeal, the Lower Appellate Court also decided in favor of defendant. The Lower Appellate Court remarked on the dakhilahs that it "did not find that they "by themselves absolutely proved that the "rent has not varied during the last 20 "years," still the *aggregate* amount approached to nearly the sum stated by the defendant, and "it would seem likely that "the difference *may* arise from short payment, "one year being made up the next, and so "on."

The Lower Appellate Court held, too, that inability by a defendant to prove the precise amount of rent did not vitiate the presumption that the rent had not changed; and that evidence, direct or indirect, would suffice to prove that the rent had been uniform. Kattyani Debea's case,* February 11th, 1865, was cited by the Lower Appellate Court to support the former proposition, and Radhanath Sircar's case,† 2nd August 1865, to support the latter.

The Lower Appellate Court also relied on an attested copy of a pottah of 1166 and an attested copy of a jumma-wassil-bakee of plaintiff's of 1266, and added "the defendants have also witnesses."

On the whole, the Lower Appellate Court considered that defendants had proved uniform payments, and that plaintiff had not proved a variation or even defendants' tenure to be as stated by plaintiff, and that, therefore, defendants were exempt from liability to plaintiff's claim to enhance.

On this, plaintiff appeals specially, urging that the dakhilahs relied on are not shown to contain that evidence of the rent being uniform which is required by law to give defendant the benefit of the presumption referred to in Section 4, Act X. of 1859, and that they are not proved by any legal evidence at all; that the copy of the pottah of 1166 and of the jumma-wassil-bakee of 1266, without further proof, should not have been relied on by the Lower Appellate Court; and that the Lower Appellate Court was further in error in law in stating that plaintiff had failed to prove defendant's tenures under plaintiff when defendant himself admitted two jummas to be so held.

After hearing Counsel on both sides and a reference to the record, we think that the case must be remanded to the Judge to find clearly whether the dakhilahs are proved to have been given to defendants by plaintiffs, and, if so, whether they show by themselves any legal evidence in support of them that the rent has been uniform. It is quite insufficient for the Judge, while admitting a variation in these dakhilahs, to state that it may arise from short payments in one year being made up by full payments in another, without that specific fact being fully proved. The variation *primâ facie* is evidence of the rent not being uniform. But it may be shown by defendants that this is not so. Further, the Lower Appellate Court seems to have adopted the erroneous view of the first Court, that dakhilahs, if not positively denied, need not be proved. They, like other documents propounded by parties, must be shown to be what they purport to be. The most recent decision of a Full Bench, 2nd August 1867 (subsequent to the Judge's decision of 21st February 1867), clearly lays this down. Nor do we think that the copies of a pottah of 1166 and of a jumma-wassil-bakee of 1266 can be accepted on the mere fact of their being attested (or rather authenticated) copies. They must be proved by the best and most distinct evidence available.

In this view, we remand this case for re-trial, with reference to the above remarks.

Order.—Remand accordingly.

* *See* 2 Weekly Reporter, Act X. Rulings, p. 60.
† *See* 3 Weekly Reporter, Act X. Rulings, p. 151.

The 2nd December 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Limitation—Possessory suit—Clause 7, Section 1, Act XIV., 1859—Clause 2, Section 1, Act XIV., 1838—Act IV., 1840—Section 318, Code of Criminal Procedure.

Special Appeals from a decision passed by the Judge of Dacca, dated the 23rd February 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 7th July 1866.

Case No. 914 of 1867.

Gobind Chunder Shaha (Defendant), *Appellant,*

versus

Ashruf Ali Meah and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Kalee Mohun Doss* for Appellant.

Baboos Romesh Chunder Mitter and *Otool Chunder Mookerjee* for Respondents.

Case No. 922 of 1867.

Huree Kishore Roy and others (Defendants), *Appellants,*

versus

Ashruf Ali Meah and others (Plaintiffs), *Respondents.*

Baboo Anund Chunder Ghosal for Appellants.

Baboo Otool Chunder Mookerjee for Respondents.

Case No. 923 of 1867.

Huree Kishore Roy and others (Plaintiffs), *Appellants,*

versus

Gour Doss Shaha and others (Defendants), *Respondents.*

Baboos Anund Chunder Ghosal and *Romesh Chunder Mitter* for Appellants.

Baboo Kalee Mohun Doss for Respondents.

Case No. 931 of 1867.

Mr. Gasper Gregory (Plaintiff), *Appellant,*

versus

Gour Doss Shaha and others (Defendants), *Respondents.*

Mr. C. Gregory for Appellant.

Baboo Kalee Mohun Doss for Respondent.

The limitation prescribed by Clause 7, Section 1, Act XIV. of 1859, applies to orders respecting possession of property made under Clause 2, Section 1, Act XIV. of 1838, or Act IV. of 1840 (now repealed), and not to those made under Section 318 of the Code of Criminal Procedure, the provisions of the last-mentioned Section differing from those of Act IV. of 1840 in many important respects. No period of limitation is prescribed in Section 318, C. C. P., within which a suit must be brought to set aside the Magistrate's award made under that Section, and a suit for that purpose may be brought within 12 years from the time the cause of action arose.

Kemp, J.—These four appeals were heard together, and one decision will govern the four appeals.

The subject of contention between the parties is a chur which, on inspection of the map, appears to be surrounded on all sides by rivers and doons, none of which are fordable at any season of the year.

The party in possession, when the suit connected with these appeals commenced, was the Shaha party, who are the appellants in No. 914, and the respondents in Nos. 923 and 931. The possession of the Shahas was apparently obtained under an award according to the provisions of Section 318 of the Code of Criminal Procedure.

The land in dispute was claimed by the Meah party, respondents in appeals Nos. 914 and 922, as forming an accretion to Chur Chanda, a khas mehal in Zillah Dacca, a settlement of which has been made with them.

The Roy party claimed it as appertaining to Chur Komoria.

The appellants in No. 931 base their claim on the same footing as the Roy party.

The result of the litigation below was that a decree was passed in favor of the Meah party, the land in dispute being de-

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cleared to appertain to Chur Chanda, Zillah Dacca.

The points taken by the Shaha appellants in special appeal No. 914 are—

1st.—That the plea of limitation taken by them has been improperly decided by the Lower Appellate Court.

2nd.—That the Lower Appellate Court has wholly misunderstood the maps filed in the case, inasmuch as those maps do not show that the lands in dispute are in any way an accretion to Chur Chanda.

On the limitation-plea, the Judge observes that it is a "technical plea which "can only hold good if it were found that "the lands in dispute lie within the jurisdiction of the Magistrate of Zillah Tipperah, but that this was clearly not the "case." The Judge held that, as the suit of the Meahs was brought within three years from the date of the order of the Assistant Magistrate at Moonsheegunge under Section 318 of Act XXV., it was in time.

The Shaha appellants in appeal No. 914 contend that they were put into possession of the disputed lands by the order of the Magistrate of Tipperah under Section 318, on the 6th September 1862, and that, the suit not having been brought within three years from the above date, it is beyond time. Clause 7, Section 1, Act XIV. of 1859, is quoted in support of this argument.

The Clause quoted refers to orders respecting the possession of property made under Clause 2, Section 1, Act XIV. of 1838, or Act IV. of 1840. The possessory award in this case, whether we take the order of the Magistrate of Tipperah or that of the Assistant Magistrate at Moonsheegunge as the starting point, was not made under Clause 2, Section 1, Act XIV. of 1838, or Act IV. of 1840, but, under the provisions of Section 318 of the Code of Criminal Procedure. Clause 7, Section 1 of Act XIV. of 1859, is therefore wholly inapplicable.

The provisions of Section 318 of the Code referred to differ from those of Act IV. of 1840 in many important respects. Under Section 318, the Magistrate must be satisfied that a dispute likely to induce a breach of the peace exists, and he must record a proceeding, stating the grounds of his being so satisfied. The Magistrate initiates the case by proceeding under the above Section. Under Act IV. of 1840, which has been repealed by Act XVII. of 1862, a party who has been forcibly dispossessed of any land could complain to a Magistrate under Section 4 of that Act, and obtain summary redress. This remedy is re-enacted in a somewhat different form in Section 15, Act XIV. of 1859. In Section 318 of the Code of Criminal Procedure, no period of limitation is prescribed within which a suit must be brought to set aside the award made under that Section. The limited period of three years prescribed by Clause 7, Section 1 of Act XIV. of 1859, is therefore inapplicable, and the suit may be brought within the period of twelve years from the time the cause of action arose.

On the second ground, we observe that the map of the Ameen shows that the disputed lands are surrounded, on all sides, by rivers, and are not accretions, but form an island. But the Judge in his decision states that the disputed lands are attached to the older lands of Chur Chanda on the west side of the river Megna, which river is the boundary between the two Zillahs of Dacca and Tipperah, and that, consequently, the claim of the Shaha appellants cannot be held to be good. The Judge has clearly misunderstood the map. Further, the boundaries as per survey-map do not correspond in every respect with the boundaries as laid down in the Ameen's map, and, to add to the difficulties of coming to a proper decision on the materials before us, the boundaries, as stated in the plaint of the Meahs, do not correspond with either the survey-map or the Ameen's sketch.

The decision of the Judge is so very unsatisfactory, and he has so evidently proceeded on a misconception of the maps, that we have no hesitation in remanding the case to which appeal No. 914 refers for a clearer decision of the rights of the respective parties under the Law of Alluvion. The Judge will do well to remember that the Shaha defendants, appellants before us, are in admitted possession of the disputed lands, and that they are entitled to retain that possession until another party can prove a better title.

With reference to appeal No. 922, in which the Roy defendants are appellants, we observe that the points taken are, that the Judge has entirely overlooked the decree dated the 28th June 1861, obtained by the Roy party, and that the Judge is under error in supposing that the land claimed by the Meah party is identical

with the land claimed by the Roy party as forming a portion of Chur Komorea decreed to them in the presence of Government in 1861.

This contention is good. The boundaries of the disputed land, as laid down in the Ameen's map with reference to certain important landmarks, do not differ materially from the boundaries laid down in the map according to which the Roy party obtained their decree; and, without going to the length of saying that the lands are identical, the decree is clearly an important piece of evidence. It may not be binding upon any but the parties to it, but it is unquestionably a piece of evidence which ought to have been fully considered, and not passed over altogether without comment.

The decision of the Court below is so vague and unsatisfactory that we remand the whole of these cases for a clear and full decision, again remarking that, as the Shaha party are in possession, the onus of displacing that possession by proving a better title is upon the Meah and the Roy party who were plaintiffs below.

The appeal No. 931 is also remanded, as it is admitted that the appellants in that case will stand or fall with the Roy party.

Costs to follow the result.

The 4th December 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Evidence—Reliance by plaintiff on judgment subsequently reversed.

Cases Nos. 693 to 696 of 1867 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Backergunge, dated the 8th January 1867, affirming a decision passed by the Deputy Collector of that District, dated the 23rd November 1863.

Mr. D. Panioty and others (Plaintiffs), *Appellants,*

versus

Parbutty Chowdhrain (Defendant), *Respondent.*

Baboos Kishen Succa Mookerjee and *Gopal Lall Mitter* for Appellants.

Baboo Romesh Chunder Mitter for Respondent.

Where the plaintiffs in these suits appealed in both the Lower Courts to the judicial determination of a previous suit as evidence in their favor, and embodied it in their plaints as being a material particular of the cause of action which they proposed to establish, they were not allowed in appeal to the High Court to object to the reception by the Lower Appellate Court of the judgment in question as evidence in the present cause, on the ground that they were not parties to that case, although the Judge, on review, reversed the judgment he had already passed in favor of these plaintiffs, on the strength of the decision of the High Court which reversed the judgment in the previous suit on which the plaintiffs had relied.

Phear, J.—The material facts surrounding these four cases are as follows:—

A three-anna sharer in certain property brought a suit for enhancement, and succeeded in the Lower Court. This suit may be conveniently termed suit No. 1.

After the termination of this suit in the Lower Court, the other co-sharers in the same property brought two like suits for enhancement, four of them joining as plaintiffs in one suit, and one suing alone, all basing their rights on the judicial determination in their co-sharer's suit No. 1, namely, that the tenure was liable to enhancement. In these suits, calling them Nos. 2 and 3 respectively, the plaintiffs were successful.

Suit No. 1 was carried by appeal to the High Court, and, while it was pending, the plaintiff in No. 3, in three successive years, brought as many suits each for a year's arrears of rent on the footing of the enhancement for which she had obtained a decree. These are suits Nos. 4, 5, and 6. The plaintiff was successful in all three.

After this, the decision of the High Court was given in suit No. 1, declaring that the tenure was not liable to enhancement, and then the defendants in suits Nos. 2, 3, 4, 5, and 6 asked for and obtained reviews in their several suits. These reviews constitute the four cases now brought before us. At the hearing of the reviews, the Lower Appellate Court received the judgment of the High Court in suit No. 1 as evidence against the plaintiffs, and upon the strength of it, together with the other evidence already given, reversed his former decisions, and dismissed the 4 suits under consideration.

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The plaintiffs now appeal specially, each urging that the judgment of the High Court, given as it was in a suit to which they were not parties, was not admissible as evidence against them, and that the Lower Appellate Court was, therefore, wrong in attributing any weight to it.

We think that it is not now open to these parties to make this objection. In the Court of first instance, and in the Lower Appellate Court before review, they not only appealed to the judicial determination of the suit No. 1 as evidence in their favor, but even embodied it in their respective plaints, as being a material particular of the cause of action which they proposed to establish. They expressly invited the Court to consider that determination, and desired it to be influenced thereby. We are of opinion that the Lower Appellate Court committed no error of which the special appellants can justly complain, when it complied with their request, and allowed itself to be guided by the determination to which its attention had been thus invoked. It makes no difference that the final decision of the Lower Appellate Court was come to on review, because the proceeding in review, when once allowed, is but a re-opening of the first hearing. And, clearly, the circumstance that the judicial determination of suit No. 1 had been corrected by the decision of a higher Court, during the interval between the first hearing and the review, could not have the effect of withdrawing from the record those words of the plaintiffs which had, in effect, asked that that decision should be treated as an authority in regard to their claim against the defendants.

The special appellants in Nos. 693 and 695 further objected before us that, inasmuch as the suits in these cases were, as they alleged, decided *ex parte* in the Court of first instance, because the defendants did not appear, therefore no appeal lay from these decisions, and consequently the hearing of the cases by the Lower Appellate Court was held without jurisdiction. On reference to the record, we find that this objection is made upon a misimpression of facts; for we find that, in each of these cases, the defendants filed written statements, and their pleaders were examined by the Court.

Neither ground of the special appellant's objections is, therefore, made out, and we, accordingly, dismiss the four special appeals with costs.

The 4th December 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Intervention under Section 77, Act X., 1859—Bona fides—Admission of signature—Plea of fraud—Onus probandi—Appeal.

Case No. 358 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by Mr. H. C. Richardson, Judge of Tipperah, dated the 11th December 1866, reversing a decision passed by the Deputy Collector of that District, dated the 19th March 1866.

Bhyrub Chunder Chund (Plaintiff), *Appellant,*

versus

Shaikh Khuleel and others (Defendants), *Respondents.*

Baboos Kalee Mohun Dass and *Otool Chunder Mookerjee* for Appellant.

Baboos Onookool Chunder Mookerjee and *Romesh Chunder Mitter* for Respondents.

An intervenor under Section 77, Act X., 1859, is bound to prove, not only actual receipt of rent, but receipt in *good faith*: where he admits his signature to a farming lease purporting to have been granted by him, but pleads that, in granting it, he was deceived, he is bound to prove this special plea of fraud.

HELD *by Phear, J.*—Whether the appeal from a Deputy Collector's decision should lie to the Collector or to the Judge depends on the decision determining a question of law or a question of fact; but, if the former, it must be such a question as is properly incidental to the suit, and not any which the Deputy Collector may by caprice or error introduce into his judgment.

Bayley, J.—PLAINTIFF in this case, as farmer on the part of one Doya Moyee, sues defendant, a ryot, for arrears of rent.

Defendant pleads that he does not pay rent to plaintiff, but half to one Shama Soonduree, and the other half to Fazzul Kureem.

Shama Soonduree intervenes and supports this statement, and pleads that Doya Moyee is not a real but a nominal proprietor only, her interests having gone half to Shama Soonduree, the widow of Ram Kishore, son of Doya Moyee, and half to Joogul Kurnee, another son of Doya Moyee.

The first Court (the Deputy Collector) held that it was established that there was no *title* in Shama Soonduree, as she and Joogul Kurnee "duly recorded their consent to the arrangement made under the deed of lease, and as this fact was also otherwise proved."

The Deputy Collector further held that, under the peculiar circumstances of this case, no special enquiry was necessary as to actual receipt of rent, as Doya Moyee's receipt of rent was tantamount to the same by plaintiff, the farmer.

The Deputy Collector gave plaintiff a decree, but not for the total amount he claimed, because plaintiff was not able to prove that sum, but for the amount admitted by *defendant*.

An appeal was laid before the Collector, but it was held, on special appeal to the High Court, that the decree of the Deputy Collector being on title, and *not* on actual receipt of rent, the appeal could lie only to the Judge.

The Judge has now tried the appeal. He held that, under the circumstances of this case, the questions of *title* as well as of *actual* receipt of rent were to be tried; and, to use the Judge's own words, he was "of opinion that on both questions the decision must be against plaintiff, respondent."

The Judge held, *first*, as to *right*, that certain Civil Court decrees and other evidence clearly showed that, although Doya Moyee's name still was used in connection with the estate left by her husband, still she, in fact, was proved to have parted with her interest in it to the husband of Shama Soonduree and to Joogul Kurnee, and to have no interest left.

The Judge further found on the evidence that Shama Soonduree was not proved to be really a consenting party to plaintiff's pottah as alleged by plaintiff. As to the receipt of rent, the Judge held it to be proved as a fact by the evidence that Shama Soonduree's husband, and his brother Joogul Kishore, collected the rents together during the husband's life, and that Shama Soonduree collected her share after his death.

Plaintiff appeals specially, urging:—

That the question of actual receipt of rent does not so much arise as the point whether Shama Soonduree, having admitted her signature to the pottah, has proved (as it was in such a case upon her to prove) that she received rents in *good faith* as laid down in Section 77, the only Section which could apply.

It is clear from its terms that Section 77 does require proof, not only of actual receipt of rent, but of the same *in good faith*. Here is a pottah purporting to be genuine, authentic, and in good faith, and so *prima facie* good evidence. But Shama Soonduree's statement is "the amlah, with deceptive concealment of the real state of facts, caused my signature to be affixed" (to the pottah). That statement is, in fact, that Shama Soonduree gave the pottah, but, in giving it, was deceived. She has, therefore, by the rules of evidence, to prove this special plea of fraud. But no such evidence is given by her, so she can have no decree. The case must, however, go back to be tried between the plaintiff and defendant-ryots.

Remand accordingly.

Phear, J.—I consider with Mr. Justice Bayley that the judgment of the Lower Appellate Court is obnoxious to the objection made to it on special appeal. As the case is attended by somewhat special circumstances, I desire to give the grounds on which my opinion rests.

It seems to me that the questions which it was incumbent upon the Judge below to decide were none other than those relevant to the matter in dispute between the parties as they stood in the Court of *first instance*: and there, undoubtedly, the only issue between the plaintiff and the intervenor was one of fact, namely, whether the latter had actually and in good faith received the rents before and up to the commencement of the suit. No other issue than this could arise between these two parties, and by the nature of the case the determination of the intervenor's claim hanging on this issue was preliminary to any consideration of the suit between the original parties. It is true that the statute, under the interpretation which it has received, makes the Court of Appeal to which resort must be had from the decision of the Deputy Collector, vary according as that decision determines a question of law between the parties, or not. Were the matter *res integra*, it might, I think, be reasonably argued that the questions of law contemplated by the Legislature in this enactment were only such as are properly incidental to the suit, and did not extend to any which the Deputy Collector might by caprice or error introduce into his judgment. This would seem to be the force of the word *determine*, and indeed one would be prepared *à priori* to find that the Legislature had made the jurisdiction of the Appeal Court depend rather upon the matters properly put in issue by the written pleadings of the parties than upon other elements

to be furnished by the judgment of the Court of first instance; and, if this view were correct, it would follow that, inasmuch as nothing but a question of fact can arise between the plaintiff and the intervenor, therefore, no view which the Deputy Collector should form, and express as to the *rights* of these parties relative to each other, would effect a shifting of the Court of Appeal. However, I believe, that this Court has ruled otherwise, and accordingly in this case, a Division Bench, having come to the conclusion that the Deputy Collector determined a matter of title (which, of course, was not properly in issue before him) between the farmer and Shama Soonduree, declared, on an interlocutory application, that the Judge's Court, and not the Collector's, was the proper Court to which the plaintiff should carry his appeal. To the Judge's Court, therefore, the appellant went. The Judge, on the case coming before him in this manner, seems to have thought that the wrongful assumption by the Deputy Collector of jurisdiction to try a matter of title between the plaintiff and intervenor had the effect, under the statute, of giving him (the Judge) on appeal a real jurisdiction to try and determine the same. In my opinion, this is an error; as I have already said, the occurrence of the matter of title only shifted the Court of appeal; it did not change the character of the subject litigated between the several parties. Therefore, the Judge ought to have set himself in the first place to consider and determine the issue of fact between the plaintiff and the intervenor without allowing himself to be influenced by any reference to the title of plaintiff even as against the intervenor. This issue involved the inquiry, not only as to whether Shama Soonduree had actually received rent, but also whether she had received it in good faith. The Judge appears to have contented himself with pursuing the first branch to an affirmative finding. He did not enter upon the other. Now, it is admitted by Shama Soonduree herself, in her written statement, that her name was put to the plaintiff's farming lease by an agent possessing authority from her, although at the same time, in order to do away with the effect of the signature as against herself, she asserted that the authority had been obtained from her by the fraud of some one, whom she did not name. Her admission of the signature, notwithstanding the qualification with which it is accompanied, furnishes *primâ-facie* evidence in favor of the plaintiff. Assuming then, that she has, in fact, collected the rent, it is incumbent upon her to show by evidence how she could have done so in *good faith*, after she had signed a lease granting to the plaintiff the right to the same rent. This burden she might discharge by making out fraud on the part of the plaintiff in regard to the lease, or ignorance on her side of the true character of the document of which she had authorized the signature. It appears from an examination of the record that no evidence tending in either of these directions was ever adduced by the intervenor, and, in the absence thereof, I think the Lower Appellate Court was bound to give effect to the *primâ-facie* case of the plaintiff, *viz.*, to find the issue as to the good faith against Shama Soonduree. I would, therefore, reverse the decision of the Lower Appellate Court, and affirm that of the first Court so far as concerns the issue between the plaintiff and the intervenor. In this view, inasmuch as the Lower Appellate Court has not given a decision upon the merits of the issue between the plaintiff and the ryot-defendants, it becomes necessary to remand the case for this purpose, and I would remand it accordingly.

The 4th December 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Plaint (drawn up in Persian).

Case No. 1167 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Patna, dated the 28th of February 1867, affirming a decision passed by the Officiating Deputy Collector of that District, dated the 1st November 1866.

Mirza Ameer Koolee Khan (Plaintiff), *Appellant,*

versus

Russick Lall Singh and others (Defendants), *Respondents.*

Messrs. R. T. Allan and *R. E. Twidale* and *Moonshee Ameer Ali* for Appellant.

Baboo Onookool Chunder Mookerjee and *Chunder Madhub Ghose* for Respondents.

A plaint drawn up in what is, practically, Persian ought not to be admitted on the file, but should be rejected or returned for amendment and presentation in Urdu, the ordinary language of intercourse and business in use in the district (Patna).

Seton-Karr, J.—It appears to me that on the facts found, and on the plaintiff's own showing, he has been very properly put out of Court. He was unable to prove that any arrears were due in 1273, and it is now admitted before us that the arrears for 1272, for which the plaintiff obtained a decree, are deposited in the Collectorate, and he has only got to take them thence.

The cases cited in support of the appellant (Sudder Decisions for 1860, page 382; Hay's Reports for April 1863, page 525; and *idem* for December 1862, page 573) do not in my opinion apply.

The case of Baijnath Sohay and another *versus* Amroa Singh, special appeal 1257 of 1867, decided by this Bench on the 5th of September 1867, appears to me to be on all fours with the present. That case refers to another case, reported at page 138 of Volume VIII. of the Weekly Reporter.

I think, therefore, we should follow the principles laid down in those cases, and dismiss this special appeal with costs and interest.

Ihave to observe, with dissatisfaction, that the plaint filed in this case, with the exception of very few words—such being Urdu verbs—is couched in pure and unadulterated Persian. That language is not the language either of the Court or of the district; and, if the official presiding in the first Court had known his duty, he would at once have rejected or returned the plaint for amendment and presentation in the ordinary language of intercourse and business in use amongst men; and I notice this prominently, because of late there have been flagrant instances brought to our notice of abuse in this respect from this very district, and of obstinate disregard of the repeated orders of this Court on the subject.

Macpherson, J.—I consider the present case is governed by that of the 5th of September 1867, and, therefore, that this appeal ought to be dismissed with costs.

I concur in the opinion that the plaint, on account of the language in which it is expressed, ought not to have been admitted on the file; and it is beyond doubt that very many such papers filed in the Courts of Zillah Patna, and which have recently come under my notice, are open to a similar objection.

The 5th December 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Suit for enhancement—Notice to dependant talookdar—Sections 13 and 17, Act X., 1859—Section 51, Regulation VIII., 1793.

Case No. 1036 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 12th February 1867, affirming a decision passed by the Deputy Collector of that District, dated the 26th September 1866.

Brojo Soondur Mitter Mojoomdar (Plaintiff), *Appellant,*

versus

Kalee Kishore Chowdhry and others (Defendants), *Respondents.*

Baboos Kalee Mohun Doss, Kishen Dyal Ray, and *Bama Churn Banerjee* for Appellant.

Baboo Greesh Chunder Ghose for Respondents.

In a suit for enhancement on one of the grounds set forth in Section 17, Act X., 1859, the notice, under Section 13, can be served on a *ryot with rights of occupancy;* but, in a case of a *dependant talookdar,* the plaintiff must proceed under Section 51, Regulation VIII., 1793, and not on the grounds laid down in Section 17, Act X. The defendant's talook in this case being a shikmee one, the suit, under Section 17, was informal, and was accordingly dismissed.

Kemp, J.—This was a suit for enhancement, after service of notice, on one of the grounds laid down in Section 17, Act X. of 1859.

The Court of first instance found that the suit of the plaintiff was an informal one, as he ought to have proceeded under the provisions of Section 51, Regulation VIII. of 1793. The suit was dismissed.

The Judge finds that the talook of the defendant was protected from enhancement, inasmuch as it existed before the Permanent Settlement.

The plaintiff, special appellant, appeals, urging that the Judge ought to have found, not whether the talook existed from the time of the Permanent Settlement, but whether the rent has not been changed from the time of that settlement.

The defendant takes a cross-appeal, objecting to the form of the plaintiff's suit, and urging that it ought to have been dismissed altogether.

Both Courts have found the talook of the defendants to be a shikmee or a dependant talook. The plaint even states that the defendants claim it as a shikmee talook. The notice was under Section 13, Act X., on one of the grounds laid down in Section 17 of the same Act. Such a notice could be served on a ryot with rights of occupancy, and the ground or grounds of enhancement would be those laid down in Section 17. But, in the case of a dependant talookdar, the plaintiff must proceed under Section 51, Regulation VIII. of 1793; and upon the grounds laid down in that Section, and not on the grounds laid down in Section 17, he would be entitled to succeed.

As the grounds upon which enhancement has been demanded in this suit are not those on which alone enhancement can be obtained, the suit is informal, and ought to have been dismissed. *See* Weekly Reporter, Volume III., pages 26-27, Act X. Rulings.

The appeal of the special appellant is dismissed with costs and interest, and the cross-appeal of the defendant decreed, the result being that the suit of the plaintiff is dismissed with costs of all the Courts, including this Court, with interest.

The 5th December 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Intervention under Section 77, Act X.—Assignment of rents—Advance taken by landlord does not make a lease a mortgage.

Case No. 161 of 1867 under Act X. of 1859.

Regular Appeal from a decision passed by Mr. E. Stewart, Deputy Collector of Bhaugulpore, dated the 22nd March 1867.

Baboo Gridharee Singh (Plaintiff), *Appellant,*

versus

Mrs. M. Collis (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboos Unnoda Pershad Banerjee* and *Hem Chunder Banerjee* for Appellant.

Baboo Umernath Bose for Respondent.

Section 77, Act X., 1859, provides for intervention only by one who claims the right to receive the rent, not by one who merely contends that they had been assigned to him under a special agreement.

A sum taken by a landlord as an advance to be credited to his lessee in his accounts as rent may be considered as security for the payment of the rent, but does not change the lease into a mortgage.

Glover, J.—THIS was a suit under Act X. of 1859 by the proprietor of Mouzah Rampore Bhatkoora to cancel a theeka pottah granted to the defendant Collis on two grounds, *first*, that there had been a default of three kists or instalments of rent; and, *secondly*, that the theekadar had given a sublease to the Tulsia Factory, both proceedings being contrary to stipulations in the pottah, and rendering the same voidable.

The defendant denied that any rent was due, inasmuch as it had been paid to the plaintiff under decrees of Court obtained by

him. She admitted the sub-lease to Tulsia Factory, but argued that a subsequent arrangement entered into by her husband Collis and by her father Christian with the zemindar had altered the simple lease into a zur-i-peshgee mortgage, and that the terms of the lease were not, therefore, binding.

Mr. Christian was not made a party to the suit by the plaintiff; but the Deputy Collector, considering that his interests were largely involved, inasmuch as he had lent Rupees 45,000 to the plaintiff on the security of the rents of the mouzah leased to Collis, allowed him to be made a defendant.

On the whole case, he found that the lease to Collis as well as the agreement with Christian were both of the nature of mortgages, and the suit was not, therefore, triable under Act X. of 1859. He referred the zemindar to a regular suit.

After hearing the pleaders on both sides, we are clearly of opinion that the Deputy Collector was wrong.

And, first, as to his allowing Christian to be made a party to the suit.

Section 77, the only Section of Act X. of 1859 which provides for intervention, expressly states that the intervenor must be one who claims the right to receive the rent to be the landlord in fact, but Christian did not do anything of the kind. His objection was that Collis's pottah could not be cancelled, because he had a lien on the rents. He admitted the zemindar's title to receive the rents under ordinary circumstances, and merely contended that they had been assigned to him under a special agreement.

Now, Act X. does not provide for an intervention of this kind, and we think that the Deputy Collector did wrong in making Christian a party to the suit.

The case of Jogendur Chunder Ghose, Plaintiff, Appellant, VIII. Weekly Reporter 78, takes a similar view of the law.

Then, as to Collis's agreementwith the plaintiff, it is admitted that the pottah itself is a simple theeka-lease with nothing in it that can support the defendant's contention that the arrangement between him and the zemindar was really a mortgage.

But it is contended that an ikrar given by Collis and another given by Christian, which were filed by the plaintiff, when read together, show that, whatever the arrangement might have been under the pottah, it was altogether altered by the ikrars. From these documents, it appears that Collis advanced 3,000 rupees, which he was to get credit for in the rent of the last year of his lease, and that Christian lent to the plaintiff Rupees 45,000, which, with interest, was to be paid off by the rents of the theeka-lease.

We do not see how these ikrars in any way alter the original lease. As to Collis's advance, it is the commonest thing possible in the Behar provinces for a landlord on giving a lease to demand an advance of moneys which are to be credited to the lessee in his accounts as rent. The sums so taken are considered as security for the payment of the rent, and the fact that the money is always credited by the last year's rent shows the meaning of the custom, which is that, in case of a tenant's absconding during the term of his lease, the landlord may have this sum at least to fall back upon. We have met with many cases of this description, but never one in which it was contended that such an advance changed the lease into a mortgage.

Then, as to Christian's ikrar, the respondent's pleader laid much stress on the word "bhurnanamah," which was found at the end of it. But, on reading the entire document, it seems perfectly clear that what was done was to assign the rents of the theeka-lease in payment of the loan, so long as that loan remained unpaid. The zemindar had the right to pay off the debt at any moment, and had neither possession of the mouzah nor anything to do with collecting its rents. The money which ordinarily would have gone to the proprietor he received from the tenant, and there his connection with the lease ended.

There is no presumption even in favor of the transaction with Christian being a mortgage. There is no suggestion that it was a benamee affair by Collis for Christian. And, so far as the documents go, they show a distinct and separate interest held by each of these persons.

Moreover, supposing Collis to have died or to have become bankrupt, or in some other way to have defaulted, could it be contended that, under the terms of the ikrar-namah, Christian could have entered on the property? And, if he could not have done that, where was his security in Collis's lease?

And, supposing that the plaintiff had paid off Christian's bond, say in the fourth or fifth year of its existence, could he have taken the lease away from Collis?

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From all these circumstances, it appears to us quite clear that the transactions between Collis and Christian were quite separate and distinct, and that there is nothing in the ikrarnamahs to change Collis's lease into a mortgage.

We think, therefore, that the case was triable under Clause 5, Section 20, Act X. of 1859, and that the Deputy Collector should have so tried it. The case is, therefore, remanded for trial.

We go no further into the case than this, and express no opinion regarding Christian's arrangement with the plaintiff further than to say that it did not, in our judgment, amount to a mortgage on the lands.

This decision governs regular appeal No. 162.

The 26th November 1867.*

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Evidence recorded in an ex-parte case not admissible in a new trial — Lower Appellate Court's duty under Section 52, Act II. of 1857.

Cases Nos. 1394 and 1395 of 1867.

Special Appeals from a decision passed by the Principal Sudder Ameen of Gya, dated the 20th March 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 8th September 1866.

Rosul Singh and another (Defendants), *Appellants,*

versus

Kishoree Lall (Plaintiff), *Respondent.*

Baboo Roopnath Banerjee for Appellants.

Baboo Hem Chunder Banerjee for Respondent.

Where a Court of first instance sets aside its own *ex-parte* judgment, and after a new trial, in which it takes fresh evidence as well as admits that originally recorded, again gives plaintiffs a decree, it is the duty of the Lower Appellate Court to inquire, under Section 57 of Act II., 1857, whether, independently of the evidence originally recorded, there was sufficient to justify the decree.

Jackson, J.—This case has come up owing to a defect in the decision of the Lower Court. The defendants did not appear at the first examination of witnesses, and the Sudder Ameen gave a decree *ex parte* against both of them after hearing evidence. They subsequently came into Court, and represented that no notice had been given them. Thereupon the Sudder Ameen, with, I presume, sufficient reason, set aside the judgment he had passed, and ordered a new trial. On this occasion, the witnesses who had been first examined were not summoned and examined *de novo*, but seven others were called and examined in the presence of the defendants. Their evidence, together with that recorded on the first occasion, was taken into consideration by the Sudder Ameen, who gave a fresh decree for the plaintiffs. The defendants separately appeal, and in the petition of one of them it is objected that the Lower Appellate Court had been in error in using the evidence which had been taken on the first trial behind his back. It was the duty of the Lower Appellate Court to enquire, under Section 57 of Act II. of 1857, whether, independently of the evidence which was originally recorded on the first trial, and irregularly admitted on the second, there was enough to justify the issue of the decree. The Sudder Ameen apparently thought that the evidence subsequently obtained was sufficient; but the Lower Appellate Court has not noticed the point, but has considered the case as the Court of first instance had done, and taken the whole of the evidence obtained on the first and second examinations together. It is impossible for us to say, as the Lower Appellate Court should have done, whether the evidence taken on the second examination was sufficient. It is, therefore, necessary that the case should go back to the Lower Appellate Court, in order that it may take up this point. In my opinion, if the evidence taken on the second examination is not sufficient, it should direct a recall and re-examination of the plaintiff's first witnesses. The evidence of those taken on the second examination, no doubt, goes to show that the defence set up was not an honest one, but *that*, of course, is not sufficient to show that this particular claim is a just one. The case must go back to the Lower Appellate Court.

Mitter, J.—I entirely concur.

* This case and the three following cases could not be obtained in time to be inserted in their proper place.

The 26th November 1867.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Hindoo widow—Cession of her rights to her husband's heir.

Case No. 1331 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 26th March 1867, modifying a decision passed by the Moonsiff of Raojan, dated the 23rd August 1866.

Shama Soonduree and another (Defendants), *Appellants,*

versus

Shurut Chunder Dutt and others (Plaintiffs), *Respondents.*

Baboos Motee Lall Mookerjee and *Greeja Sunkur Mojoomdar* for Appellants.

Baboo Nuleet Chunder Sein for Respondents.

The cession of her right by a Hindoo widow, during enjoyment, to the heir of her husband is valid; the recipient becoming absolutely entitled to the property which passes on his death to his heirs.

Jackson, J.—THE decision of the Lower Court in this case is erroneous. That Court has held that, although Shurut Chunder, during the lifetime of Huro Soonduree, who was a Hindoo widow in life-enjoyment of the estate, obtained a decree as heir, on the strength of a deed of gift, of the estate, still this decree and gift can only stand good during the lifetime of the childless widow, Huro Soonduree. And the decision goes on to say that no gift or sale by a childless widow can remain valid subsequent to her decease, and that, though Shurut Chunder was the heir of Huro Soonduree's husband, still, as he died during the lifetime of that lady, his heirs can only hold and enjoy the disputed property under the above deed of gift and decree, so long as she lives, but that, after her death, they can have no right to it. Now, it appears that Shurut Chunder was, in fact, undisputably the heir of Huro Soonduree's husband, and, therefore, the reversioner. It has been repeatedly held by the late Sudder and by this Court that the cession of her right by a Hindoo widow, during enjoyment, to the heir of her husband, is valid. Among the latest cases upon this point is that given at page 241 of Marshall's Reports, the case of Rojoneekant Mitter. That being so, and Shurut Chunder having received a surrender of the rights of the widow, entered into possession as heir of the husband, and became absolutely entitled to the property, the interests of the widow being thereby extinguished. On his death, his heirs took the property, and the heirs of Huro Soonduree's husband have, therefore, no claim to it. The decision of the Lower Appellate Court must be overruled, and the special appeal allowed with costs.

The 26th November 1867.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Pre-emption.

Case No. 1456 of 1867.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 8th April 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 28th December 1866.

Luchmee Narain and others (Defendants), *Appellants,*

versus

Bheemul Doss (Plaintiff), *Respondent.*

Baboo Chunder Madhub Ghose for Appellants.

Baboos Onookool Chunder Mookerjee and *Unnoda Pershad Banerjee* for Respondent.

A contract having been entered into for the sale and purchase of certain property, the plaintiff, pre-emptor, was not bound to defer the enforcement of his right of purchase till the bill of sale had been delivered or registered, or payment made.

Jackson, J.—THE Court below appears to be right. A contract was entered into by the owner of certain property to sell it for a certain price, and the defendant agreed to purchase it for that price. The circumstance came to the knowledge of the plaintiff, who, as pre-emptor, proceeded to enforce his right of purchase. He was not bound to wait till the bill of sale had been delivered or registered, or payment made. The proceedings of the Lower Appellate Court are, therefore, affirmed.

Mitter, J.—I concur.

The 26th November 1867.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Attaching Creditor—Section 270, Act VIII., 1859.

Case No. 1510 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Mymensingh, dated the 9th April 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 17th September 1866.

Bishen Chunder Surma Chowdhry (Plaintiff), *Appellant,*

versus

Mun Mohinee Dabee and others (Defendants), *Respondents.*

Baboo Gopeenath Mookerjee for Appellant.

Baboo Nuleet Chunder Sein for Respondents.

Section 270 of the Civil Procedure Code does not apply to a case in which property has not been sold in execution of a decree.

Jackson, J.—This is a claim under a prior attachment to obtain a sum of money to which one of the defendants was entitled. The money was deposited in the hands of the Collector as the produce of an estate which had been sold for arrears of revenue. This estate had been mortgaged by the proprietor to defendant No. 1. It is, therefore, manifest that she, irrespective of any attachment, would have a right over the money in deposit, till she was repaid the mortgage-debt. The suit was, therefore, quite properly dismissed, and the special appeal must, therefore, be dismissed also. Section 270 of the Civil Procedure Code does not bear in any way on this case, as no property had been sold in execution of a decree.

The 6th December 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Damages—Ejectment—Section 25, Act X., 1859.

Case No. 1012 of 1867.

Special Appeal from a decision passed by the Judge of Dacca, dated the 11th February 1867, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 27th May 1866.

Aymel Islam (Plaintiff), *Appellant,*

versus

Jardine, Skinner, & Co. (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Messrs. R. T. Allan and *J. S. Rochfort* for Respondents.

A plaintiff, who had obtained a decree for ejectmen- under Section 25, Act X. of 1859, and did not executu that decree for some months after, is not entitled to a decree in a suit subsequently brought for damages, ie respect of the same lands, for the period included bet tween date of the institution of the ejectment-suit and the execution of the decree in that suit, the occupation of the defendants being the occupation of tenants-at-will, and not of trespassers.

Kemp, J.—The plaintiff is the special appellant.

The suit was for damages under the following circumstances: The plaintiff is the auction-purchaser of an estate sold for arrears of Government revenue. A suit was brought by him to eject the lessor of the defendants under the provisions of Section 25, Act X. of 1859. The defendants were joined in that suit with their lessors, and a decree was obtained, the Courts finding that, under Section 37, Act XI. of 1859, the tenure was not protected, and was liable to be cancelled. This decree was obtained in March 1865, but it was not executed by the plaintiff until October 1865. The present suit is for damages on the allegation that the defendants, Jardine, Skinner, and Co., cultivated indigo on 22 beegahs, 12 cottahs, thereby preventing the plaintiff from cultivating more profitable crops, such as sugar-cane, &c. The damages are assessed

at Rupees 800, and are claimed from date of suit under Act X. to date of ejectment in October 1865.

We are of opinion that the defendants, special respondents, were sued on the footing of ryots in the suit under Section 25, Act X. of 1859. The plaintiff obtained a decree for their ejectment, but he did not execute that decree until October 1865. Up to that date, the defendants were holding over as tenants-at-will, and cannot be considered to have been trespassers. The plaintiff had the remedy in his own hands, and ought to have ejected them at once on obtaining his decree, instead of permitting the defendants to hold on until October 1865.

We, therefore, think the Judge was right in dismissing the plaintiff's suit for damages.

But there is another point which the Judge has omitted to consider. In the suit for ejectment, the defendants pleaded that their tenure comprised only some five beegahs, whereas in this suit the plaintiff's allegation is that the defendants had wrongfully kept possession of 22 beegahs, 12 cottahs, cultivating the same with indigo. With reference, therefore, to the additional 17 beegahs, 12 cottahs, the respondents' occupation of the same and the nature of that occupation, *viz.*, whether it amounts to trespass, must be enquired into, and the point decided. The case is remanded for that purpose.

The 6th December 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Suit for Enhancement—Pottah (Form of words in).

Case No. 1589 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 23rd May 1867, reversing a decision passed by the Deputy Collector of that District, dated the 26th September 1866.

Afsar Mundul (Plaintiff), *Appellant,*

versus

Ameen Mundul and others (Defendants), *Respondents.*

Baboo Woopendur Chunder Bose for Appellant.

Baboo Gopeenath Banerjee for Respondents.

It is not necessary that any particular form of words should be used in a pottah conveying rights to hold at fixed rates.

Seton-Karr, J.—We differ from the Judge as to his conclusions as to the scope and effect of the pottah, and agree with the finding of the first Court on this point. There is not any expression, or expressions, within the four corners of the deed, which can, by any means, be construed as barring future enhancement by the zemindar.

The view which we have taken has been taken by another Bench in a case reported at page 8, Volume V., Weekly Reporter, Act X. Rulings, in which two other cases are quoted; and also by the late Sudder Court (Sudder Decisions for 1859, page 1575).

We are shown by the pleader for the respondent a decision reported in Volume VII., Weekly Reporter, page 394, but that does not alter our view of the matter.

We entirely concur with that Division Bench, which ruled that it was not necessary that any particular form of words should be used in conveying rights to hold at fixed rates.

What is wanting in the deed before us is *any* form of words or expression which can, by any construction, bar enhancement.

The decision of the Judge is reversed, and the case is remanded to the Judge to find on the question of rates, on which no judgment has been pronounced.

The plaintiff, special appellant, will get his costs of this appeal.

Macpherson, J.—I concur.

The 6th December 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Remands—Informal notice of enhancement—Clauses 1 and 3, Section 17, Act X., 1859—Irregularity cured by lateness of objection.

Case No. 1097 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 22nd February 1867, affirming a decision passed by the Deputy Collector of that District, dated the 29th March 1866.

Kasheenath Deb (Defendant), *Appellant,*

versus

Moharanee Shibessuree Debia and others (Plaintiffs), *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Mr. Mackenzie and *Baboo Romesh Chunder Mitter* for Respondents.

Where the Lower Court had not fully carried out an order of the High Court remanding the case, yet as the case appeared to have been substantially tried fully on its merits, the High Court thought there should not be a second remand.

Where a notice of enhancement, though informal, was sufficient to inform the ryot of the landlord's intention to increase the rent to the rates paid for similar lands in places adjacent, and the notice was accepted by the ryot, and treated by him in the Lower Court as a notice under Clause 1, Section 17, Act X., 1859, it was held that the informality could not be objected to for the first time in the High Court in special appeal.

Macpherson, J.—It is argued for the appellant in this case that the case ought to be again remanded upon the ground that the Lower Court has failed to carry out the order passed by this Court in remanding it in July 1866, and that, after ascertaining whether the notice of enhancement was duly served, the Court should then enquire into the other points arising in the case.

Although the Court has not, upon remand, gone into all "the other points arising in the case," we think there should not be a second remand; because, taking the first judgment of the Lower Court, together with the judgment immediately before us in appeal, and considering the line of conduct adopted by the appellants, both in the Lower Court and in this Court, it appears to us that the case has substantially been fully tried upon the merits, and that it would in no degree serve the ends of justice to remand the case again. We think, however, that, as the first remand was based upon the preliminary objection that service of notice of enhancement had not been proved, the appellant has a right to take up any of the grounds of special appeal filed on the first appeal, as well as those filed on the present occasion.

The first of the grounds which has been argued here to-day is, that the notice of enhancement is altogether informal, and that the suit ought to have been dismissed in consequence.

There is no doubt that the notice of enhancement is in itself most informal; and, if this objection had been taken in time, it might have been a very good reason for the dismissal of the suit. But the objection was never taken until the case came up to this Court in special appeal; and, although the notice is informal and indistinct, still it appears to us sufficiently to show that the intention of the plaintiff in giving the notice was to inform the defendant, his ryot, that he meant to increase the rent to the rates paid for lands of similar description in places adjacent, under Clause 1, Section 17 of Act X. of 1859. That the defendant accepted the notice as under Clause 1, Section 17, is clear from the course which he followed: issues were fixed as to the rates prevailing in the neighbourhood, and the case went to trial upon them. We think that, although the notice was very informal, yet, under the special circumstances of the case, it must now be held that it was a sufficient notice under Section 17.

Then it was contended that the decree, as it stands, is a decree for a greater quantity of land than that for which rent was previously paid by the defendant; and that, inasmuch as the notice was not a notice under the 3rd Clause of Section 17, such a decree is bad.

Here, again, no objection was taken in the Lower Courts to the notice of enhancement on this ground, and the case was allowed to go to trial upon the issue as to what the quantity of land was which was to be assessed at the enhanced rates. We think the objection now made on this ground is made too late; and that the defect, if any, is cured by the objection not having been taken earlier.

On the general finding of the Court as to the rates, and as to the quantity of land, it does not appear to us that there is anything wrong. The Judge has found all the facts against the present appellant, and there is no error of law, so far as we can see, in his finding.

The plaintiff's suit seems to us to have been misconceived throughout; and upon his own statement of his case, so far as we can understand his position, the suit ought to have been a suit simply for a kubooleut, and not for enhancement of rent at all. The form in which the suit was brought has led to infinite confusion and misunderstanding, and the whole litigation has been of the most unsatisfactory description—the plaintiff being the person mainly to blame for not bringing the suit in a proper shape. The defendant is also to blame, however, for not having at once objected to the form in which the suit was brought.

We dismiss the appeal, but, under the circumstances, without costs; each party will pay his own costs throughout the suit.

This order will govern special appeals Nos. 1093, 1098, 1105, and 1171 of 1867.

The 6th December 1867.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Putneedar—Abatement of rent—Fraud—Jurisdiction—Section 18 and Clause 3, Section 23, Act X., 1859.

Case No. 1448 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 16th February 1867, affirming a decision passed by the Deputy Collector of that District, dated the 20th August 1866.

Shokoor Ali (Plaintiff), *Appellant,*

versus

Umola Ahalya and others (Defendants), *Respondents.*

Mr. C. Gregory for Appellant.

Mr. R. E. Twidale and *Baboo Shoshee Bhoosun Bose* for Respondents.

Section 18, Act X. of 1859, is not applicable to a case in which a plaintiff-putneedar sues for an abatement of rent on the ground of fraud caused by the concealment from him of the existence of an intermediate tenure created by the zemindar. Clause 3, Section 23 of that Act, is wide enough to admit of such a suit being tried by the Revenue Courts.

Loch, J.—This suit was brought by the putneedar for an abatement of rent on the ground of fraud, inasmuch as the existence of a certain intermediate tenure created by the zemindar was concealed from him when he took the putnee.

In appeal, the Judge has thrown out the case, holding that the terms of Section 18, Act X., 1859, do not apply to the case, and that, where abatement has been allowed to parties in the position of the plaintiff, it has been solely on the ground of the diminution of the tenant's area.

We concur with the Judge in thinking that Section 18, Act X. of 1859, is not applicable to the case, and we have no doubt that plaintiff might have sued to be relieved of his contract altogether; but we think that the Judge was wrong in considering that the case could not be tried by the Collector.

The words of Clause 3, Section 23, Act X. of 1859, appear to us quite wide enough to admit of this case being tried by the Revenue Courts, and the pleaders have been unable to produce any ruling to the contrary. We, therefore, remand the case to the first Court to be disposed of with reference to the above remarks. The Deputy Collector, after fixing the proper issues, will allow the parties to file any additional evidence they may require, and will dispose of the case as soon as it is ready.

The 7th December 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Proclamation regarding recusant witnesses—Court's discretion—Section 159, Code of Civil Procedure.

Case No. 1110 of 1867.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 26th February 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 4th January 1866.

Poran Chunder Ghose and others (Plaintiffs), *Appellants,*

versus

Gopeenath Singh and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Nil Madhub Sein* for Appellants.

Baboos Kishen Succa Mookerjee and *Umbika Churn Banerjee* for Respondents.

Section 159, Code of Civil Procedure, gives a Civil Court a discretion as to the issue of proclamation and subsequent orders for attachment; but such Court is bound to exercise a reasonable discretion.

Glover, J.—THE judgment of the Lower Appellate Court in this case cannot stand. The suit was to recover possession of certain land as lakheraj. The defendant said that it was his lakheraj, and had always been in his possession.

The first Court held that the plaintiff had not proved his possession within twelve years, and that he was, therefore, barred by limitation; and the Judge confirmed that decision.

It is urged in special appeal that the reasons given by the Judge for not insisting on the production of the special appellant's witnesses are altogether insufficient; that he has disposed of the Ameen's report in an improper manner, and has decided on the authenticity of the documents filed by the special appellant on no sufficient grounds.

It appears that the recusant witnesses were proceeded against by the Sudder Ameen under Section 159 of the Civil Procedure Code, and that a proclamation was issued. On the plaintiff's applying to have further proceedings taken under that Section, and to have the property of the missing witnesses attached, the Sudder Ameen refused on the ground that they had been summoned to give evidence of title only, whereas the issue for decision was one of possession. The Judge endorses the order, and adds that, as the witnesses already examined for the plaintiff were altogether unworthy of credit, he should not have believed the other witnesses even if they had been examined.

It is needless for us to point out the impropriety of this order. The Judge most irregularly anticipated evidence, and was altogether wrong in giving such an opinion on the grounds he has recorded. Moreover, we find, on turning to the record, that these witnesses were not summoned to give evidence of title, but of possession; so that both Lower Courts were wrong. Section 159, no doubt, gives a Civil Court a discretion as to the issue of proclamation and subsequent orders for attachment, but such Court is bound to exercise a reasonable discretion, and, in this case, it cannot be said that it was reasonable; on the contrary, it was in the first place opposed to facts patent on the record, and, in the second, was based on grounds which no judicial officer would have been justified in proceeding upon.

Then as to the Ameen's report. The Judge simply says that he disbelieves it, not because there are any special reasons for doing so, but because he thinks the Ameen to be a dishonest man. Why he comes to that decision we are not told, and it appears to us manifestly improper to decide on such a bare assumption. If the Ameen were a dishonest man, the Judge should have taken measures for dismissing him from his office; and, besides, his honesty or dishonesty in the present case should have been tested by reference to evidence recorded in the case.

As to the documents which the Judge disposes of by the remark that they are clearly not 50 years old, we observe that there was never any contention that they were so. The oldest of these dakhilahs is dated 1227

or 46 years ago, and they go down in an unbroken series to 1272.

We consider the Judge's reasoning altogether invalid, and we remand the case in order that the usual legal proceedings may first be taken to procure the attendance of the missing witnesses, and for a fresh decision by the first Court after recording their evidence. If they cannot be found, the Judge will decide on the case *de novo* on the evidence as it is really before him, and not on assumptions which he was not in the least degree justified in making.

Costs will follow the result.

The 7th December 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Fraud—Sale—Section 11, Act XXIII., 1861—Sections 256 and 257, Act VIII., 1859.

Case No. 1299 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 16th May 1867, reversing a decision passed by the Moonsiff of that District, dated the 17th August 1866.

Umbika Churn Chuckerbutty (one of the Defendants), *Appellant,*

versus

Dwarkanath Ghose (Plaintiff), *Respondent.*

Baboo Bungshee Dhur Sein for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

Section 11, Act XXIII., 1861, and Sections 256 and 257, Act VIII., 1859, do not apply to a suit in which fraud is imputed vitiating the sale *in toto.*

Kemp, J.—We think that the decision of the Principal Sudder Ameen is right. Section 11, Act XXIII. of 1861, and Sections 256 and 257 of Act VIII. of 1859, do not, in our opinion, apply to the present suit in which fraud is imputed vitiating the sale *in toto.*

The question to be tried does not arise between the parties to the suit in which the decree was passed, and relating to the execution of that decree, for it is contended that the decree that has been executed was not the decree which was passed between the parties, but a decree which has been modified by a subsequent decretal order. Section 11, therefore, cannot apply. Neither do Sections 256 and 257, Act VIII., which refer to material irregularities in conducting the sale, apply; for, in the present case, it is averred that the sale was brought about by the fraud of the defendant.

The issue of fraud or no fraud must, therefore, be tried, and the Principal Sudder Ameen was right in remanding the case to the Court of first instance for that purpose.

The appeal is dismissed with costs and interest.

The 7th December 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Suit for land in different jurisdictions—Section 20, Act VI., 1862, B. C.

Case No. 1082 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 22nd February 1867, reversing a decision passed by the Deputy Collector of Fureedpore, dated the 18th December 1866.

Mohesh Chunder Sircar and another (Defendants), *Appellants,*

versus

Bholanath Raha Gomashta and others (Plaintiffs), *Respondents.*

Baboo Mutty Lall Mookerjee for Appellants.

Baboos Chunder Madhub Ghose and *Hem Chunder Banerjee* for Respondents.

A suit for enhancement of rent of land situated in different jurisdictions cannot be entertained unless it is first determined, under Section 20, Act VI. of 1862, B. C, in which district or sub-district the greater portion of the lands lie: such suit must be brought in the Court of the district in which the greater part of the lands is situate.

Glover, J.—It appears to us that this suit will not lie in its present form. The

plaintiff sued defendant for enhanced rent on lands situate in three different Mouzahs, belonging to the two districts of Jessore and Furreedpore. The jumma for all was one lump sum, with no specification of what was due on each separate parcel of land. Before the case came on before the Deputy Collector of Furreedpore, however, he abandoned his claims to the enhanced rent of the land in Jessore, and sued only for that due on the Furreedpore lands. The Deputy Collector held that such a suit was irregular.

We think that the Deputy Collector was right. Section 20, Act VI. of 1862, Bengal Council, lays it down distinctly that, when lands held in one tenure and at one rent, which is precisely the present case, are situate within different jurisdictions, the first question to be decided is, in what district or sub-district the greater portion of the lands lie, and no suit can be entertained until that point be settled, and the case brought in the Court of the district in which such greater part is situate.

The law appears to us perfectly clear on the point, and, before the plaintiff can sue the defendant for enhancement, he must first have it decided by the Collector whether the major portion of the lands, the rent of which he claims, are situate in Furreedpore or in Jessore, and proceed with his suit accordingly.

The appeal is, therefore, allowed, and the Judge's order reversed with costs on the special respondent.

The 7th December 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Sale of putnee tenures for arrears of rent—Section 108, Act X., 1859—Incumbrances—Sections 8 and 11, Regulation VIII., 1819—Stipulation reserving right of sale.

Case No. 188 of 1866.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 5th March 1866.

Brindabun Chunder Chowdhry and others (Plaintiffs), *Appellants,*

versus

Brindabun Chunder Sircar Chowdhry and others (Defendants), *Respondents.*

Baboo Onookool Chunder Mookerjee for Appellants.

Baboos Kishen Kishore Ghose, Mohendro Lall Shome, Bungshee Buddun Mitter, and *Bykuntnath Paul* for Respondents.

Suit laid at Rupees 6,500.

In the sale of a putnee-tenure for arrears of rents effected under Section 108, Act X., 1859, the tenure passes free of incumbrances, or not, according as it would have passed had the sale been effected under the provisions of any law in force at the time of the passing of Act X.

It would pass free of incumbrances, if the sale took place in accordance with the provisions of Regulation VIII., 1819, *i. e.*, if the right of bringing to sale for an arrear of rent had been specially reserved by stipulation in the engagements interchanged on the creation of the tenure.

Phear, J.—THE substantial question in this case is whether or not, on the sale of the putnee by the zemindar for arrears of rent, the putnee-tenure passed into the hands of the purchaser free of the incumbrance upon it, which, in the shape of a dur-putnee tenure, had existed up to the time of the sale.

It is admitted that the putnee-tenure was, either by the title-deeds or by the custom of the country, transferable by sale, and the sale in question was effected in execution of a decree for arrears of rent, which the zemindar had obtained in the Collector's Court, an application and order for that purpose having been made, in pursuance of the provisions in that behalf of Section 105, Act X. of 1859. The sale was, therefore, legally good and valid. What then passed by it?

The words of Section 105, Act X. of 1859, do not expressly say whether only the rights and interests of the judgment-debtor in the tenure are to pass, or whether, on the other hand, the purchaser is to get the tenure free of all burdens. If the Section had been entirely silent on the

point, the first of these alternatives would, of course, have been presumed. But this is not strictly the case: the Section refers in certain terms to the rules for the sale of under-tenures "for the recovery of arrears of rent due in respect thereof contained in any law for the time being in force," and in the case of Shahabooddeen *vs.* Futteh Ali, 7 Weekly Reporter 260, a Full Bench of this Court has decided that this reference in effect incorporates into Act X. the provisions of the then existing law with regard to the sale of tenures for arrears of rent.

From this decision, it follows that, in the case of the sale of a tenure for arrears of rent effected under Section 105 of Act X. of 1859, the tenure will pass free of incumbrances, or not, according as the same result would have followed if the same tenure had been sold for arrears of rent under the provisions in that behalf of any law which was in force at the time of the passing of Act X.

Now, at that time, the sale of a tenure could only be free of incumbrances if it took place accordant with the provisions of Regulation VIII. of 1819. Section VIII. of that Regulation, as is observed in the judgment of the Full Bench, points out the conditions under which a tenure may be brought to sale within the terms of the Regulation, and Clause 1 of Section 11 of the same Regulation declares that all such sales (subject to certain exceptions) should be free of incumbrances. Now, the material condition precedent to a sale being made within the Regulation, as given in Section 8, is that "the right of selling or bring-"ing to sale for an arrear of rent may have "been specially reserved by stipulation in "the engagements interchanged on the "creation of the tenure." If this stipulation did not exist, the sale would not carry with it to the purchaser the benefit of the Regulation. It is essential, then, to the defendants' case that this stipulation should have been made in the engagements interchanged at the creation of the putnee. Unless this was so, the title to the dur-putnee which the plaintiff has made out gives him the right to succeed in suit. But there is no evidence whatever on record to suggest that such a stipulation was made at the creation of the putnee: therefore, I think the Lower Court has committed an error in dismissing the plaintiff's suit.

The defendants argued before us that the sales referred to by Section 11 of Regulation VIII. of 1819 were not limited by the words of Section 8, but certainly included all the sales for arrears of rent of that peculiar tenure, which is denominated putnee; and in support of this position they relied on Clause 2 of Section 3 of the same Regulation. This runs as follows: "Putnee "talookdars are hereby declared to possess "the right of letting out the lands composing "their talooks in any manner they may deem "most conducive to their interest, and any "engagements so entered into by such talook-"dars with others shall be legal and binding "between the parties to the same, their heirs "and assignees, provided, however, that no "such engagements shall operate to the "prejudice of the right of the zemindar to "hold the superior tenure answerable for any "arrears of his rent, in the state in which he "granted it and free of all incumbrance "resulting from the act of his tenants."

But, in truth, the term *putnee*, as used in the Regulation, contains in itself the very limitation, for the preamble of this Regulation, when describing the origin and character of the tenure, usually denominated a putnee-talook, "and stating the reasons which rendered it necessary" to regulate and define the nature of the property given and acquired on the creation of such a tenure, expressly stated that, by the terms of engagements interchanged at that time, it is, amongst other stipulations, provided that, in case "of an error occurring, the tenure may be brought to sale by the zemindar." Consequently, as it appears to me, this argument fails to help the defendants.

In my opinion, the decree of the Court below ought to be reversed, and the plaintiff's claim dismissed with costs.

Bayley, J.—I concur in this order and in the view that the material point is, in this case, that it should be shown that there was the stipulation for the agreement between the parties for sale in the event of arrears. No such stipulation has been shown.

Thus, there is an error in the Lower Appellate Court's holding that plaintiff's suit should be dismissed.

h

The 10th December 1867.

Present :

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Onus probandi—Evidence—Depositions given when defendant was not a party.

Case No. 1555 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 30th April 1867, reversing a decision passed by the Deputy Collector of that District, dated the 24th January 1867.

Shumboo Geer Gossain (Defendant), *Appellant,*

versus

Ram Jewan Lall and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Baboo Mohinee Mohun Roy* for Appellant.

Baboo Unnoda Pershad Banerjee for Respondents.

In a suit for rent alleged to be due under a particular arrangement, the existence of which is repudiated by defendant, it is for plaintiff to prove the arrangement.

Copies of depositions given in suits in which defendant was not a party cannot be treated as evidence in a case in which he is a party.

Mitter, J.—The following points have been urged before us in this special appeal:—

1st.—That the Lower Appellate Court has committed an error in law in throwing the onus of proof upon the special appellant.

2nd.—That the reasons assigned by the Lower Appellate Court for coming to the conclusion that the tenure held by the special appellant is a *danabundee* tenure are bad in law.

3rd.—That the amount of rent claimed by the special respondent has been decreed to him without any legal proof.

With reference to the *first* point, we are of opinion that the contention of the special appellant is well founded. After going carefully through the judgment of the Lower Appellate Court, we find that the onus of proof has been wrongly cast upon the special appellant. The respondent is the plaintiff in the cause. He has sued for rent, alleging that the special appellant was bound to pay under a particular arrangement. It was for him to make out this arrangement, when its existence was repudiated on the other side.

With reference to the *second* point, we are of opinion that the Lower Appellate Court is clearly wrong. The first reason assigned by that Court is as follows:—

"It is generally known that, where the "lands are good, the *danabundee* system is "more favorable to the landlord than the "*agorebuttay* system and for obvious "reasons. Now, there are copies of the "putwary Huree Churn's evidence in "other suits, from which it is clear that he "stated the lands in this estate produced "from 18 to 20 maunds per beegah. "There is quite enough to show that they "are good lands, and the probability is "that they are not let to ryots in *agore-*"*buttay*." This mode of reasoning is clearly fallacious. The fact that the *agore-buttay* system is not so favorable to land-

lords as the *danabundee* system does not raise any presumption that a particular tenure belongs to the latter class. Nor can we approve of the mode in which the Lower Appellate Court has come to the conclusion that the disputed lands are good lands. The copies of the depositions of Huree Churn putwary above referred to cannot be treated as evidence in this case, because those depositions were given in suits to which the special appellant was not a party; and we do not see how the disputed lands can be assumed to be good lands, because Huree Churn had deposed that the lands of the respondent's estate generally were good lands.

The *second* reason assigned is that the special appellant had failed to give any evidence that there were other lands in the village held under the *agorebuttay* system. The special appellant was not bound to give any evidence on this point; nor was it in controversy between the parties. But, be that as it may, we cannot see how this reason is sufficient to make out that the tenure in question is a *danabundee* tenure.

The *third* reason assigned is equally erroneous. The Lower Appellate Court has observed that, the *agorebuttay* system being more favourable to the ryot than the *danabundee* system, one Raj Kishore, who has purchased a portion of the lands held by the special appellant, was interested in making out that the tenure in question was of the former description. The Lower Appellate Court seems to forget that the special respondent was interested the other way, and, at all events, it is clear that this mode of reasoning is by no means pertinent to the issue which that Court had to decide upon.

The *fourth* and last reason assigned is that Huree Churn putwary had failed to produce certain chittahs from which the jummabundee papers of 1254 were prepared. The Lower Appellate Court had already observed in an earlier part of its judgment that these jummabundee papers were by no means sufficient to prove that the tenure in question was a *danabundee* tenure; and we fail to perceive how the non-production of the chittahs referred to helped the respondent to prove his case. There is nothing to show that Huree Churn was called upon to produce those papers; but, whether he was or not, the special appellant cannot suffer by his laches.

With reference to the third point, we are by no means satisfied with the mode in which the Lower Appellate Court has fixed the amount of rent payable by the special appellant. The rates demanded have been declared to be honest and fair, but we do not see that this opinion was based upon any legal proof. The rate claimed appears to us to be exorbitant on the very face of it; and we think the respondent must prove it strictly and clearly before he can expect to obtain a decree for it.

The case is, accordingly, remanded to the Lower Appellate Court to be re-tried with reference to the foregoing remarks.

b

The 11th December 1867.

Present :

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Review of judgment—Late Sudder Court.

Application for review of judgment passed by Messrs. A. Sconce and C. B. Trevor, two of the Judges of the late Sudder Court, on the 4th June 1856, in Special Appeal No. 1519 of 1856.

Rao Baneeram, guardian of Rao Madhub Ram, Plaintiff (Appellant), *Petitioner,*

versus

Newaz Bibee and others, Defendants (Respondents), *Opposite Party.*

Baboo Motee Lall Mookerjee for Petitioner.
No one for Opposite Party.

An application for a review, on the ground of the discovery of new evidence, of a judgment of the late Sudder Court rejecting a special appeal, ought not to be made to the High Court, but to the Court of original jurisdiction.

Loch, J.—This is an application to admit a review of the judgment of the late Sudder Court passed in special appeal so far back as 4th June 1856, under which the special appeal was rejected. The present application is based on the ground of the discovery of new evidence. Had the late Sudder Court disposed of the suit in regular appeal, the application to this Court might have been regular; but, as the Sudder Court merely rejected the special appeal, and could not and did not look into the evidence, it is not for this Court to receive any application for the admission of a review on the ground of the discovery of fresh evidence. The application appears to us to be made to the wrong Court. Whether there are grounds for admitting such an application after the lapse of so long a period since the judgment was passed by the Court of original jurisdiction is for that Court to determine. We reject this application.

The 14th December 1867.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Civil Court jurisdiction—Sale by Collector (of land not within his District).

Case No. 1529 of 1867.

Special Appeal from a decision passed by the Judge of Patna, dated the 5th April 1867, reversing a decision passed by the Moonsiff of that District, dated the 23rd April 1866.

Khoonoo and others (some of the Defendants), *Appellants,*

versus

Aoodal Singh and others (Plaintiffs), *Respondents.*

Mr. R. E. Twidale for Appellants.

Mr. C. Gregory for Respondents.

A suit lies in the Civil Court to set aside the proceedings of a Collector who acts without jurisdiction in selling land not within his district.

Macpherson, J.—We dismiss this appeal with costs. As the lands did not lie within the jurisdiction of the Collector of Gya, he acted without jurisdiction in selling them. We think that, in such a case, a suit lies in the Civil Court, to set aside as illegal that which has been done by the Collector. *See* Jokee Lall *versus* Nursing Narain Singh, 4 Weekly Reporter 5 (Act X. Cases).

C

The 17th December 1867.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Eviction—Suit by landlord against lessee's tenants during currency of lease—Premature action.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Patna, dated the 11th December 1866.

Case No. 37 of 1867.

Hedayutoonissa Begum and others (Plaintiffs), *Appellants,*

versus

Shib Dyal Singh and others (Defendants), *Respondents.*

Mr. R. E. Twidale, Moonshee Ameer Ali, and *Baboo Romanath Bose* for Appellants.

Baboos Unnoda Pershad Banerjee, Sreenath Doss, Kishen Succa Mookerjee, and *Poorno Chunder Shome* for Respondents.

Case No. 51 of 1867.

Shib Dyal Singh and others (Defendants), *Appellants,*

versus

Hedayutoonissa Begum and others (Plaintiffs), *Respondents.*

Baboos Kishen Succa Mookerjee and *Unnoda Pershad Banerjee* for Appellants.

Mr. R. E. Twidale and *Moonshee Ameer Ali* for Respondents.

Case No. 158 of 1867.

Velaet Hossein Khan and others (Plaintiffs), *Appellants,*

versus

Shib Dyal Singh and others (Defendants), *Respondents.*

Baboo Mohendro Lall Shome for Appellants.

Baboo Kishen Succa Mookerjee for Respondents.

Case No. 159 of 1867.

Lootf Ali (Plaintiff), *Appellant,*

versus

Shib Dyal Singh and others (Defendants), *Respondents.*

Baboo Mohendro Lall Shome for Appellant.

Baboos Onookool Chunder Mookerjee and *Mohesh Chunder Chowdhry* for Respondents.

Certain landlords' suits to compel their lessee's tenants to clear certain lands of houses and trees, and to restrain them from building or encroaching in future, were held to be premature while the lease was running; their cause of action as regards any eviction, subsequent to the date of the lease, not arising until the lease had expired.

Seton-Karr, J.—In these cases three separate sets of plaintiffs sued the same defendants in three separate cases, claiming to compel them to clear certain lands, in Mouzah Makra, of houses brick-built and built of mud and tiled, and also to compel them to cut down mangoes, bamboos, and other trees. The suits were also intended to restrain the defendants from building or encroaching for the future.

The plaints were all drawn in the same form, and the representation of each plaintiff was that the village had been given to one Soorjo Singh, first in *kutkina,* and then in *ijarah;* and that, from the year 1269, the real defendants, Shib Dyal and Ram Lall,

had gradually outstepped the limits of their homesteads, built houses, laid out gardens, and had usurped much more than they had any right to.

The extent of the plots originally held by the defendants, and the nature of the several encroachments, were all very fully and accurately set forth in the several plaints, with specific boundaries, but it is unnecessary to do more than to advert to this fact.

The defendants pleaded that they had lived on the same lands for several generations; that their ancestral residence stood thereon; that they had only repaired and enlarged the same, as opportunities offered, without any encroachment; and that the plaintiffs had been perfectly well aware of what had been done, and had acquiesced in the same. The defendants also put forth a singular statement to the effect that, in that part of the country, residences were exempt from payment of rent.

The Principal Sudder Ameen took up the three cases together, went into the evidence, which was mainly, if not entirely, oral, and gave a decree to the plaintiffs in each of the cases for plots numbered 5, 6, and 7, refusing them the first four plots.

The plaintiffs have brought three separate appeals to obtain plots 1 to 4, and the defendants have appealed, in No. 51, against the decree for plots 5 to 7.

We have heard some of the material evidence on both sides, but it is unnecessary for us to give any opinion as to the force and weight thereof.

One thing has been overlooked by the Lower Court, and that is that the three suits are premature. The defendants do not deny the title of the plaintiffs as landlord. The plaintiffs, on the other hand, do not deny the lease to Soorjo Singh, under whom the real defendants Shib Dyal and Ram Dyal hold. The extraordinary plea of the defendants as to exemption of houses from rents could not be tried in these suits under any circumstances.

What, however, is quite clear is, that the plaintiffs have no right to set aside, as it were, Soorjo Singh, the lessee, and to go in under him, and compel his tenants to knock down their houses, and cut down their trees. This is not a case of alleged waste or damage.

If the buildings were really in existence when the lease began, as partly seems to be admitted by the plaintiffs, they can have no right now to call on the defendants to remove them. If they were raised, and if the gardens were laid out, by encroachment, after the lease had commenced, then the time for the plaintiffs' action has not arrived.

Our decision must, then, be that the three suits of the plaintiffs are premature; that their cause of action, as regards any evicting subsequent to the date of the lease, does not arise so long as the lease of Soorjo is running, and that these suits ought to have been dismissed.

We, therefore, dismiss appeals Nos. 37, 158, and 159 with costs in all Courts without prejudice to the plaintiffs' right to institute fresh suits hereafter in a proper form, and at a proper time; and we decree appeal No. 51 with costs of this Court, reversing the judgment of the Lower Court, and dismissing the three suits entirely.

The 17th December 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Limitation—Section 4, Act XIV., 1859.

Case No. 100 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Patna, dated the 18th December 1866.

Luchmun Pershad (Defendant), *Appellant,*

versus

Rumzan Ali (Plaintiff), *Respondent.*

Baboos Unnoda Pershad Banerjee and *Poorno Chunder Shome* for Appellant.

Mr. R. E. Twidale for Respondent.

An acknowledgment in writing *sealed*, but not *signed*, by a defendant, is not an acknowledgment within the meaning of Section 4, Act XIV. of 1859.

Macpherson, J.—THE only question which arises upon this appeal is, whether or not the

chittee put forward by the plaintiff is a sufficient acknowledgment within the meaning of Section 4 of Act XIV. of 1859, to prevent the plaintiff's claim from being barred by limitation. The *chittee* in question is not proved to have been signed by the defendant, but we may take it that it has been proved to have been sealed by him.

We are of opinion that, so long as the acknowledgment is not a writing *signed* by the defendant, it is insufficient. Signing is one thing, and sealing is another; and there is no evidence that, in affixing his seal, the defendant meant it to be considered as his signature.

For the respondent it is urged that the question was not distinctly brought to his notice in the Lower Court, and that an opportunity should be given to him to give further evidence.

But the issue of limitation has been distinctly raised from the first, and it was one of the issues fixed at the trial in the Lower Court. Moreover, the plaintiff's case is based upon a *chittee* alleged to be "sealed," and the plaint contains no allegation that it was ever *signed* by the defendant. When the case went to trial, what the plaintiff attempted to prove was that the *chittee* was written by one Omroo Singh, and *sealed* by the defendant. Omroo Singh denied *in toto* that he had written any portion of the *chittee*. But, from inspection of the *chittee*, it is perfectly clear that it is written throughout in one hand; and if the body of it, as the plaintiff says, be written by Omroo Singh, the name of the defendant is written also by Omroo Singh. Defendant's name, we may add, appears, not in the place where a signature is usually to be looked for, but at the head of the paper.

The plaintiff rested his case on an acknowledgment in writing *sealed*, but not signed, by the defendant. Such an acknowledgment does not suffice under Section 4 to prevent the suit from being barred by limitation; and the suit ought to have been dismissed by the Lower Court.

For these reasons, we reverse the decision of the Lower Court, and dismiss the plaintiff's suit, with costs in both Courts.

The 18th December 1867.

Present:

The Hon'ble F. B. Kemp and Dwarkanath Mitter, *Judges.*

Infructuous decree—Point not taken in special appeal, not permitted to be raised in pleadings.

Case No. 1724 of 1867.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 22nd April 1867, modifying a decision passed by the Sudder Ameen of that District, dated the 28th December 1866.

Moharajah Mohessur Buksh Singh Bahadoor (Plaintiff), *Appellant,*

versus

Muthoora Pershad and others (Defendants), *Respondents.*

Baboos Mohinee Mohun Roy and *Romanath Bose* for Appellant.

Baboo Poorno Chunder Shome for Respondents.

An objection having been taken to a decree of a Lower Court, on the ground that it decreed the claim against each shareholder in a talook, without disclosing the extent of his share, it was

HELD by *Kemp, J.* (dismissing the appeal), that this ground could not be permitted to be taken by the pleader, as it had not been taken in special appeal.

HELD by *Mitter, J.* (*contra*), that it was immaterial whether the point had been taken or not, and that the case should be remanded, because the decree was incapable of execution.

Kemp, J.—WE both concur in opinion that the talook is not liable. The second ground which the pleader seeks to raise, *viz.*, that the Judge ought to have passed a joint-decree, and not a decree against each shareholder respectively to the extent of his share, is not taken in special appeal, and I cannot permit it to be taken.

The plaint certainly did in general terms ask to recover certain sums paid by the plaintiff on account of revenue over and above his quota, and it would have been better had the Judge, when he found the talook to be not liable, decided the question of the extent of the respective shares of the defendants, instead of passing what in its present form is an infructuous decree, for it is not capable of execution, inasmuch as the shares are not disclosed even, much less established. But the special appellant has himself to blame for this; he ought to have disclosed his share and that of his co-sharers, and not to have contented himself with going against the talook. Further, he omitted to raise the point in special appeal.

I would dismiss the appeal with costs and interest.

Mitter, J.—I am of opinion that the case ought to be remanded to the first Court, to try the extent of the shares belonging to the different defendants. There is nothing in the form or substance of the plaint to exclude such an enquiry. The parties ought to have been asked to disclose their respective shares, and a decree ought to have been passed in favor of the special appellant against each defendant in proportion to his share. I think it immaterial whether the point has been taken or not. The decree of the Lower Appellate Court, as it stands, is incapable of execution; such a decree ought not to be allowed to stand. This judgment will also apply to special appeal No. 1725 of 1867.

The 18th December 1867.

Present:

The Hon'ble F. B. Kemp and Dwarkanath Mitter, *Judges.*

Parol evidence.

Case No. 1609 of 1867.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 25th April 1867, reversing a decision passed by the Moonsiff of Amdahara, dated the 30th April 1866.

Pheloo Monee Dossia (Defendant), *Appellant,*

versus

Greesh Chunder Bhuttacharjee and others (Plaintiffs), *Respondents.*

Baboos Nil Madhub Sein and *Tarucknath Sein* for Appellant.

Baboos Chunder Madhub Ghose and *Bungshee Dhur Sein* for Respondents.

Parol evidence is admissible to prove the conduct of the parties, the value of the property, and other circumstances connected with the transaction between the parties to the written contract.

Mitter, J.—Two points have been urged before us in this special appeal:—

1st.—That the Lower Appellate Court has acted wrongly in admitting parol evidence to vary the terms of a written contract contrary to the terms of the Full Bench Ruling in page 68 of Volume V., Sutherland's Weekly Reporter.

2nd.—That the Lower Appellate Court has found, without evidence, the facts relied upon by itself to prove the conduct of the parties and the value of the property in suit.

We think that the first objection is without any force. The Full Bench ruling above referred to never meant to exclude parol evidence with regard to the conduct of the parties, the value of the property, and other circumstances connected with the transaction. The Lower Appellate Court was fully right in holding that oral evidence was admissible on such points. We, therefore, reject the first point.

With reference to the second, we observe that the Lower Appellate Court has acted without any legal evidence before it. There was no legal evidence to prove either the value of the property, or the existence of a similar transaction between the parties on a previous occasion. The respondent had appealed to the Lower Appellate Court on the ground that the first Court had refused to take evidence on those points. There can be no doubt, therefore, that the judgment of the Lower Appellate Court ought to be set aside, and we think that, under the circumstances, the case ought to be sent back to the first Court, with a view to allow the respondent the

opportunity of proving his allegations regarding the real character of the transaction in the manner indicated by the Full Bench decision.

The 18th December 1867.

Present:

The Hon'ble F. B. Kemp and Dwarkanath Mitter, *Judges.*

Suit for kubooleut—Intervention—Section 77, Act X., 1859—Receipt of rent up to time of suit.

Case No. 1581 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 26th April 1867, affirming a decision passed by the Deputy Collector of that District, dated the 16th November 1865.*

Kalee Mohun Roy (Plaintiff), *Appellant,*

versus

Shaikh Nazir and others (Defendants), *Respondents.*

Baboo Otool Chunder Mookerjee for Appellant.

Baboos Sreenath Banerjee and *Nuleet Chunder Sein* for Respondents.

* Where the purchaser of a share of a talook, which had been attached under Section 26, Regulation V., 1812, and was under attachment nearly 30 years, sues for a kubooleut, and his suit was opposed by an intervenor who had purchased another share, it was held that the Judge was wrong in dismissing the suit, because the intervenor and her vendors had been in exclusive possession *before the attachment*; the sole question having been who was actually and in good faith in receipt and enjoyment of the rent before and up to the time of the suit.

Kemp, J.—This was a suit for a kubooleut. The admitted facts of the case are these:—

A talook by name Noagazee, an 8-anna share, was held by six co-sharers. The plaintiff is the purchaser of a 2 annas, 9 gds. 2 c. 1 krant share; the intervenor is the purchaser of a 1 anna, 6 gds., 2 c., 2 krants, both in execution of decrees. The entire 8 annas of the talook was attached in May 1837 under the provisions of Section 26, Regulation V. of 1812, and was under attachment for nearly thirty years.

The suit of the plaintiff was opposed by an intervenor by name Kisto Monee, the purchaser of a 1 anna, 6 gds., 2 c., 2 krants share, and, on her intervention, the suit of the plaintiff was dismissed.

The Judge held that he had nothing to do with the respective shares of the parties, the essential point in his opinion being whether plaintiff received rent from the defendant or not, and that, as it had been established that, *before the attachment*, the intervenor and her vendors had been in exclusive possession of Mouzah Bagergaon Nowarpore, the plaintiff's suit for a kubooleut must fail.

We think that the Judge was clearly wrong in looking to a state of things which may or may not have existed thirty years ago, prior to the attachment of the whole talook. The extent of shares is not disputed, and the fact that the whole estate was in the possession of a Surburakar as a joint-property is also admitted. The Judge should, therefore, have looked to this point alone, *viz.*, who was actually and in good faith in the enjoyment and receipt of the rent before and up to the time of the suit, without reference to a state of things existing nearly thirty years prior to the suit.

The case is remanded. The Judge will try this issue with reference to the provisions of Section 77, Act X. of 1859. If the intervenor fail to establish her enjoyment and receipt of the rent in good faith before and up to the commencement of the suit, the Judge must decide as between the plaintiff and the defendant.

It has been said that, even after the removal of the attachment, the intervenor has been in the receipt of the rent. We observe that the attachment was removed in February 1866, and this suit was brought in June 1866. The Judge must, therefore, find whether this receipt by the intervenor, if established, was a *bonâ-fide* one or not.

The special appellant's pleader urges against the order of remand that, as his client has got possession of his purchased

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share in execution of a decree by a Civil Court Ameen, the Judge was bound to consider his client as in possession, and to have refused to hear any application by an intervenor under Section 77, and that, therefore, a remand is unnecessary. A decision, page 11, Act X. Rulings, Weekly Reporter, Volume III., is quoted. But to this it will be sufficient to remark that the respondent was not a party to those proceedings in execution.

The case is remanded with reference to the above remarks. Costs to follow the result.

This decision governs No. 1583.

The 20th December 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Dak Expenses — Putneedar — Special appeal —Section 27, Act XXIII. of 1861.

Case No. 1450 of 1867.

Special Appeal from a decision passed by Mr. A. E. Russell, Judge of East Burdwan, dated the 25th April 1867, reversing a decision passed by the Moonsiff of Mahomedpore, dated the 31st January 1867.

Maharajah Dheraj Mahtab Chund Bahadoor (Plaintiff), *Appellant,*

versus

Radha Binode Chowdhry (Defendant), *Respondent.*

Baboos Juggodanund Mookerj e and *Chunder Madhub Ghose* and *Moonshee Ameer Ali* for Appellant.

Baboos Hem Chunder Banerjee and *Mohinee Mohun Roy* for Respondent.

A case in which a zemindar sues a putneedar for dâk expenses, according to his putnee-jumma, is of a nature cognizable by a Court of Small Causes; and as such, by Section 27, Act XXIII. of 1861, no special appeal will lie.

Seton-Karr, J.—In this case the respondent takes a preliminary objection which, in our opinion, puts the appellant out of Court.

A case, in which a zemindar sues a putneedar for dâk expenses, according to his putnee-jumma, is a case of a nature cognizable by a Court of Small Causes; and, as such, by Section 27 of Act XXIII. of 1861, no special appeal will lie.

The suit is, therefore, dismissed with all costs and interest.

The 20th December 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Evidence—Canoongoe papers.

Case No. 1753 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 30th April 1867, reversing a decision passed by the Deputy Collector of that District, dated the 4th October 1866.

Dwarkanath Chuckerbutty (Defendant), *Appellant,*

versus

Tara Soonduree Burmonee (Plaintiff), *Respondent.*

Baboo Poorno Chunder Shome for Appellant.

No one for Respondent.

Old canoongoe papers cannot, in the absence of evidence to show what they are, and that they came out of proper custody, be received in evidence: before such papers can be admitted as evidence against a party, it must be shown how they can be used against him.

Macpherson, J.—It appears to me that the objection taken to the admission of the *canoongoe* papers is sound, and that those papers were improperly received as evidence against the defendant.

In the first place there is no evidence to show that the papers came out of proper custody, or, in fact, to show what they were; and, in the second place, it does not appear that, even if the papers had been sufficiently proved, they could be used as evidence against the defendant.

The Judge remarks that, because Haradhun, the person named in the *canoongoe* papers, is admitted to have been the defendant's grandfather, therefore the tenure he held must have been the tenure which is the subject of this suit, if it existed. But, in the absence of any evidence whatever upon this point, the inference the Judge draws seems to me to be rather illogical. It does not follow that, simply because Haradhun was the grandfather of the present defendant, therefore the tenure referred to in the *canoongoe* papers is that which is the subject of the present suit.

These papers having been improperly admitted, our decision must be in favor of the appellant.

The decree of the Lower Appellate Court is reversed, and the plaintiff's suit is dismissed with all costs in all the Courts.

The appeal of the plaintiff (No. 1772 of 1867) is, as a necessary consequence, also dismissed with costs.

Seton-Karr, J.—I am of the same opinion. If *canoongoe* papers are shown to have been properly kept, and to have been brought from the proper quarter, they, no doubt, ought to be received, under certain circumstances, as evidence, *quantum valeat*. But, in this instance, I concur in holding that they are not shown to have been properly admitted; and, on the Judge's own showing, it was not legal for him to draw the inference that, by them, the plaintiff had sufficiently rebutted the case set up by the defendant. The whole case should be dismissed with costs and interest.

Appeal No. 1772 must be governed by this, and must be dismissed with costs and interest.

The 24th December 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Suit for abatement of rent.

Case No. 1558 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 22nd April 1867, affirming a decision passed by the Collector of that District, dated the 30th June 1866.

Obhoy Gobind Chowdhry (Defendant), *Appellant,*

versus

Mr. T. J. Kenny (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

No one for Respondent.

A suit for abatement of rent will not lie, unless the plaintiff admits that the relation of landlord and tenant exists between him and the person from whom the abatement is sought as to the lands in respect of which it is sought.

Macpherson, J.—THIS was a suit for abatement brought in the Collector's Court under Act X. of 1859. The Judge has held that, under Section 18 and Section 23, Clause 3, of that Act, the suit will lie. But the Judge found that the real question at issue between the parties was not as to the right to abatement properly so called, but as to whether or not a certain tract of land measuring some 1,800 odd beegahs was included in the plaintiff's pottah. The Judge decides on the evidence that the land in dispute is held by the plaintiff, but not under the defendant; and he has given the plaintiff a decree, accordingly, for a certain abatement.

We think the Lower Court is wrong. The suit is merely for abatement of rent. In suing for abatement, the plaintiff admits, and necessarily so, that the lands in respect of which he seeks abatement were at one time, if not at the time of suit, included in his tenure—that the relation of landlord and tenant exists between himself and the person from whom the abatement is sought, as to the lands in respect of which it is sought.

In the present case, the plaintiff, it appears, denies that the relation of landlord and tenant exists between him, and the defendant as to the land in question. He says that, in a former suit, rent was wrongly assessed against him on lands not covered by his pottah; and he contends that, in now assessing the rent he has to pay, these lands should be included. Such a suit is not a suit for abatement, nor in the nature of such a suit. It is simply a suit for a declaration that, as regards these lands, the plaintiff is not the defendant's tenant.

The suit is wrongly brought, and ought to have been dismissed as soon as it was shown that it was not a suit for abatement. The respondent has not appeared before us; but we have no doubt that the order of the Lower Court cannot stand.

We reverse the orders of the Lower Courts, and dismiss the plaintiff's suit with costs in all the Courts.

The 24th December 1867.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Ancestral property — Alienations by Hindoo widow — Rights of reversioners — Limitation — Suit for possession — Plaintiff's statement on oath — Execution of money-decree — Widow's rights and interests — Collectorate Chellauns — Evidence — Legal necessity.

Regular Appeals from a decision passed by Baboo Gobind Chunder Sandyal, Officiating Principal Sudder Ameen of Sarun, dated the 30th June 1866.

Case No. 320 of 1866.

Ram Shewuk Roy and others (some of the Defendants), *Appellants,*

versus

Sheo Gobind Sahoo (Plaintiff), *Respondent.*

Mr. R. V. Doyne and *Baboos Unnoda Pershad Banerjee* and *Kishen Succa Mookerjee* for Appellants.

Baboos Onookool Chunder Mookerjee and *Tarucknath Sein* for Respondent.

And Appeals Nos. 321, 328, 329, 331, 332, 337, 338, 350, 353, 355, 356, 359, 360, 368, and 369 of 1866.

A Hindoo widow takes, with her husband's estate, the power of alienation; and conveyances made by her give a good title, liable only to the superior claim of such of her husband's heirs as may be alive at the time of her death.

Following a decision of a Division Bench of the High Court, it was held that, on the death of a Hindoo widow, her deceased husband's heirs become entitled to all his immoveable property which was in her hands, except only so much as might have been disposed of by her, under circumstances which would render her alienations binding against them.

In such a case the heir's cause of action, in a suit to obtain possession, accrues on the day of the widow's death.

A plaintiff's statement on oath, as to the re-transfer to himself of certain property which had been sold by him, when unrebutted by any other evidence, was considered some evidence of the fact alleged, and was not allowed to be objected to in appeal.

The sale of a Hindoo widow's *rights and interests* in her husband's estate, in execution of a money-decree against her, does not touch the estate.

Collectorate chellauns, acknowledging the receipt of Government revenue, were held to be no evidence of the necessity for the sale of the ancestral property on account of which the revenue was paid.

Phear, J.—THE above sixteen cases of appeal arise out of two suits of ejectment: the first brought by Sheo Gobind Sahoo and Afnasee Kooer as co-plaintiffs against some one hundred and sixty-one defendants to recover certain land in the district of Sarun; and the other by Deo Koomar Singh against the same defendants with slight variation in respect of the same land.

The facts, so far as they are necessary to render the matter of litigation intelligible, may be shortly stated as follows:—

The property in suit, which is very extensive, consists of a four-annas share in a considerable number of mouzahs, and it was formerly the separate estate of one Baboo Digambur Singh. On his dying, very many years ago, without leaving any issue surviving him, his widow, Bal Kooer, took the property for the estate of a Hindoo widow. She was young at that time, but she lived to attain a great age, and only died so lately as the 13th November 1853. During the early part of her widowhood, she encumbered or made away with the whole of the property in question, and the substantial defendants in these suits are her alienees, or their representatives, claiming under conveyances, which all date back more than twenty-five years. At the death of Digambur, it seems that Raj Coomar Singh, Moharaj Singh, and Joobraj Singh, the three minor sons of his deceased brother Nityanund, were his nearest of kin, and entitled to succeed to his property, had the widow been then out of the way. Both Moharaj and Joobraj died during the lifetime of Bal Kooer. The former had no issue, but the latter left a son Gunga Pershad *alias* Ghuseetun Lall, who, with his uncle Raj Coomar, survived the widow, and is a prominent figure in the present suits. The minors did not allow Bal Kooer to remain in undisputed possession of the property, but sought, in an action brought by guardians on their behalf, to recover it from her, on the allegation that it was *joint* family-property, not the separate property of her late husband. In this contention they entirely failed, and their suit was dismissed in March 1813.

1813, March.

On the 28th September 1853, just 40 years after this event, and when, by the death of both Moharaj and Joobraj, Raj Coomar and Ghuseetun Lall were left the sole representatives of the original plaintiffs, Bal Kooer executed an *ikrar*, in which, after reciting among other things the foregoing litigation, also that an application for a review of the judgment passed in 1813 remained still undecided, and then, setting out the state of the family, she went on to say:

1853, 28th September.

"As the said Baboos" (*viz*, Raj Coomar and Ghuseetun Lall) "bear nearer relation "to my husband than to Baboo Utool Chand, "deceased" (a collateral member of the family), "so they are undoubtedly entitled "to the property of my husband in exclusion "of all other heirs. For fear of God and "of my own free will, I give up my claims "to the heirship of my husband without "any diminution or increase. The right "of my husband aforesaid I make over to "the aforesaid Baboos, and put Baboos "Raj Coomar Singh and Gunga Pershad "*alias* Ghuseetun Singh, son of Joobraj "Singh (deceased), in possession of the "entire property left by my husband as "claimed in the inheritance-case. I shall "be satisfied with receiving from the Baboos "the maintenance which the Shasters allow "to the widows."

1853, November 11th. Bal Kooer was advanced in age when she executed this document, and she died about six weeks afterwards, namely, as before mentioned, on the 11th November 1853.

1853, November 12th. On the very next day, *viz*., the 12th November 1853, Ghuseetun Lall by kobalah, in which he recited the before-mentioned litigation between the minor nephews of Digambur and Bal Kooer, and also that he and Raj Coomar had since become the sole heirs of Digambur, and that Bal Kooer in the previous month of Assin had executed the ikrar of relinquishment of Digambur's 4-annas share, *viz*., the property now in dispute, to him and Raj Coomar as such heirs, conveyed the 2-annas share which he held by such right of heirship to Raj Coomar absolutely in consideration of Rupees 20,000, part of which, namely, Rupees 15,000, was to be set off against a debt of that amount due to Raj Coomar for money lent, and the remaining 5,000 was to be paid to certain unnamed creditors of his (Ghuseetun Lall's).

At the time of the execution of this kobalah, the whole of Digambur's property was in the possession of persons who had purchased it, or taken it in mortgage, from Bal Kooer. Also one Monohur Dass, the purchaser of a decree for money which one Banwaree Lall had obtained against Ghuseetun Lall so long previously thereto as the 17th April 1851, was seeking to obtain satisfaction of the decree by sale of the rights and interests of Ghuseetun Lall in that property. In this state of things, namely, on 15th December 1853, Raj Coomar intervened to prevent a sale being made, and by a petition, dated the 21st January 1854, he argued at great length that the purchasers from Bal Kooer, who had also intervened, in like manner with himself, to assert their claims, had no sort of right to the land in question; he mentioned the unsuccessful litigation of himself and brothers with Bal Kooer, contending that the ultimate decision of the Court only left her the enjoyment of the property *for life*, without power of alienation. He stated that Bal Kooer had, on 28th September 1853, executed in favor of himself and Ghuseetun Lall an *ikrar* purporting to be a renunciation of her husband's property to them, and that Ghuseetun had afterwards executed a deed of absolute sale to him, bearing date the 12th November 1853, "in respect to the two annas, his own "(Ghuseetun's) share out of the property "left by the said Digambur Singh." On these facts, he maintained that, at that time, he alone had any interest in the 4-annas share of Digambur, and that it was not liable to be sold in execution of a decree against Ghuseetun Lall.

The Civil Court of Sarun, which was charged with the execution of the decree, by an order passed on the 21st April 1854, after very clearly describing the position taken up by Raj Coomar, and showing that it depended on the validity of the *bill of sale* from Ghuseetun Lall, rejected Raj Coomar's claim on the ground that that *bill of sale was fabricated* and collusively executed for the purpose of defeating Ghuseetun Lall's creditors.

Accordingly, the execution-proceedings were duly carried out, and Ghuseetun Lall's rights and interests in the property in question were sold at sales which took place on the 5th December 1854 and 5th May 1856. Ajnasee Kooer now represents the persons who purchased at those sales.

Nothing further of importance relative to this property took place for the next four or five years, and meanwhile Raj Coomar appears to have died.

In 1861, Deo Coomar, the only son of Raj Coomar, effected a sale of rights and interests belonging to him in Digambur's property to one Sheo Gobind Sahoo, and, on the 14th December of that year, executed a conveyance of the same to him, in which the conveying words were: "I sell and execute a bill of sale to Sheo Gobind Sahoo, for Company's Rupees 2,000, my right, title, and interest by right of inheritance in the property left by Digambur Singh, deceased, in respect

of two-annas share out of 4 annas of the mouzahs," &c., &c.

At this stage of matters, then, it appears that Ajnasee's predecessors had obtained such rights and interests in Digambur's four-anna share as Ghuseetun Lall could transmit, and that Sheo Gobind had also got Deo Coomar's rights and interests in the same property to the extent at least of 2 annas out of the whole four. It is important here to observe that Deo Coomar's father, Raj Coomar, had by his conduct in setting up the alleged conveyance of 12th November 1853, and by his petitions of objection in December 1853 and January 1851, very distinctly represented that Ghuseetun Lall had by inheritance, and by the operation of Bal Kooer's ikrar, originally taken a two-anna share out of Digambur's four annas. If this were, in fact, so, Ajnasee's predecessors and Sheo Gobind would, as the effect of their several purchases, have become together entitled to the whole of Digambur's four-anna share, subject only to such adverse rights as the purchasers from Bal Kooer could establish against them. They themselves adopted this view of their rights, and accordingly, on the 31st December 186:, in the first of the two suits of ejectment, from which these appeals arise, they jointly sued to recover possession of the whole four-anna share, making the alienees of the widow in possession and Deo Coomar co-defendants in the case. The plaint which they filed set out the respective titles of the plaintiffs, that of the one referring to Deo Coomar's moiety of Digambur's four-anna share, that of the other to Ghuseetun Lall's moiety of the same; and, in answer thereto, Deo Coomar by his written statement disclaimed all interest in the share to which Sheo Gobind made title under the conveyance from him, at the same time remaining silent as to whether or not he supposed himself to possess any interest in the property sued for, outside the portion covered by the conveyance.

This case twice came up to this Court on appeal, and was twice remanded. The judgment of the Lower Court on the second remand was given on 30th June 1866. The suit at that time was treated as two suits, one by Sheo Gobind, and the other by Ajnasee, and the Lower Court, while it dismissed Ajnasee's claim altogether, decreed in favor of Sheo Gobind to the extent of two annas. It is against this judgment that eight of the present appeals are brought: namely, Nos. 320, 329, 332, 338, 353, 360, 369, each by certain of the defendants, and No. 355 by Ajnasee.

Pending this suit, and before its last remand by the High Court, namely on the 27th October 1865, Deo Coomar himself brought a suit (the second of the two suits of ejectment above referred to), against Sheo Gobind, Ajnasee, and the alienees of Bal Kooer, to recover possession of the *whole* of Digambur's four annas. In his plaint, Deo Coomar admitted that he had previously sold two annas of this property to Sheo Gobind, and also the remaining two annas to one Mussamut Rohoman Kooer, but he maintained that the first of these sales was, for a reason given, ineffectual, and that the second moiety had been reconveyed to him by the lady, so that he was then entitled to both portions. Afterwards, however, during the progress of the suit, he gave up his claim to the moiety, which he had conveyed to Sheo Gobind, and from that time the suit became limited to his claim to the other moiety. The Lower Court gave its judgment in this suit also on the 30th June 1866, decreeing generally in favor of Deo Coomar's right to recover the moiety of the property which he sought by the suit in its amended form. The same persons appeal against this decree, as against the decree in Sheo Gobind's and Ajnasee's case, the appeals being those numbered 321, 328, 331, 337, 350, 359, 368, and 356. Substantially, the grounds upon which the appeals are preferred in the two suits are, taking them each pair together, the same. So that, on the whole, we have before us, as the result of the two suits, a judgment in favor of Sheo Gobind for two annas out of the four annas, and in favor of Deo Coomar for the remaining two annas; an appeal against this brought by Ajnasee; and seven other appeals against it brought by seven different sets of the defendants in possession of the property.

This decision of the Lower Court is correct, if Deo Coomar just before, and up to the execution of his conveyance to Sheo Gobind, was solely entitled to the *whole* of Digambur's four annas, and it cannot be supported on any other ground.

Now, during the life of Bal Kooer, Raj Coomar clearly had no interest in this property other than what he may have taken under the ikrar: with this exception, he had at best an expectation of becoming entitled to the inheritance on the death of Bal Kooer. On the other hand, Bal Kooer, undoubtedly, when her husband died, took the whole inheritance for at least the

estate of a Hindoo widow, and, therefore, she took it with the usual incident of the power of alienation, though it may be that this power was limited as against the persons who should be the heirs of her husband alive at the time of her death. Any conveyances made by her would give a good title to the inheritance, liable only to the superior claim of these persons, when they should be ascertained; but, inasmuch as they could not be, in fact, ascertained until the occurrence of her death, up to the time of the happening of that contingency, at any rate, her alienations would be effective. According to this view, nothing can have passed by the ikrar to Deo Coomar and Ghuseetun Lall, for it is admitted on all sides that, long before its execution, Bal Kooer had, for valuable consideration, parted with the whole of her husband's property, and, therefore, she had nothing then remaining in her which she could convey. This circumstance serves to distinguish this case from those cited before us, in which it is said to have been held that the conveyance by the widow to the existing heir of her deceased husband had in a manner accelerated the inheritance as against, so to speak, later heirs. Here, as it seems to me, the ikrar has no effect whatever as an instrument of conveyance. There existed nothing on which it could operate. Neither was it in any sense a family-arrangement which a Court of Equity is bound to uphold, inasmuch as there was no matter of dispute settled by it, or indeed any other kind of consideration for it.

Then comes the question, did Raj Coomar become entitled to that property at Bal Kooer's death, notwithstanding that lady's alienations? He was at that time the sole nearest of kin to Digambur alive, and by Hindoo Law, whether of the Benares or Bengal school, his sole heir. If the law applicable to the case were that of Bengal, it is admitted that the answer to this question would depend simply on the circumstances under which the alienations were respectively made. But the law by which the parties are bound is that of the Mitakshara, and the appellants urge that, under that law, when the widow takes her husband's estate in default of male issue surviving him, she takes it as *woman's property*, descendible to her own heirs instead of her husband's heirs, with complete power of alienation over it. This point was very ably argued before us, and, if the matter were *res integra*, I should require much time for consideration before I should be able to come to the conclusion, on the Benares texts, that the appellant's contention is wrong. But it seems to me that the question has already been judicially decided by this Court. In the suit of Onoop Roy *versus* Goberdhun Nath, reported (as determined on appeal) in III. Weekly Reporter, page 105, a Division Bench of this Court, after reviewing or referring to most of the authorities which bear upon it, held distinctly that, under the Mitakshara Law, "as regards the immoveable property inherited by a widow from her husband, she has nothing but a life-interest, and cannot dispose of it except under peculiar circumstances, and under certain restrictions." It further held that, on her death, it went to the heirs of her husband. It is true that the argument upon which the Court founded its judgment is not altogether satisfactory, for, by a curious mistake, due to the fact of a quotation having been made second-hand from Strange, instead of directly from Colebrooke's Mitakshara, a leading passage of the Dyabhaga is treated as if it were a passage from the Mitakshara, and it is not easy to say how far the opinion of the Court may have been biassed by the erroneous supposition that what was, in truth, a characteristic Bengal text, was a correct enunciation of Mitakshara Law. Still the Court, in that case, deliberately setting aside the disposition of the property made by the widow, declared the husband's heir, living at her death, entitled to recover against her devisee, and, as this decision seems to me strictly in point, I feel myself bound to be guided by it, because I am not prepared to express my dissent from it, and on that ground to make a reference to the Full Court.

Following this precedent, it appears to me that, on the death of Bal Kooer, Raj Coomar became entitled to all Digambur's immoveable property which had been in her hands, excepting only so much as might have been disposed of by her under circumstances which would render her alienations valid against her deceased husband's heirs. He, therefore, at the same time acquired the right to bring a suit for possession against all persons who wrongly kept him out of possession of that property. He did not himself obtain possession, and Deo Coomar, his son, admits that, since his father's death, he has conveyed his rights in two annas of Digambur's property to Sheo Gobind: so that, as between these two persons, each has a right to sue for recovery of a moiety of

Digambur's estate, and, subject only to such titles to the same as Bal Kooer's alienees may be able to establish, each can show a good title against third persons, unless, on the facts as already narrated, it is to be concluded, either that two annas of Digambur's four annas was actually at some time conveyed to Ghuseetun Lall, or that Deo Coomar is estopped from denying that it was so, in which case Deo Coomar would have nothing left in him, and his place would be filled by Ajnasee, claiming through Ghuseetun Lall. There is, however, nothing but the ikrar of Bal Kooer, which can be suggested as an instrument of actual conveyance to Ghuseetun Lall, and I have before pointed out why I consider that document to have passed nothing. But it is said that Raj Coomar, by accepting that ikrar, and afterwards taking a conveyance from Ghuseetun Lall of his share thereunder, and still more by his publicly founding on his ikrar and conveyance an objection in open Court to the sale of Ghuseetun's moiety of Digambur's estate, so asserted Ghuseetun's right to that moiety as that he cannot now set up his claim to the same against the purchasers at Ghuseetun Lall's execution-sale. I do not think that this contention can be supported. It seems to me, on the facts, that Raj Coomar, and indeed, until very lately, all parties, labored under the erroneous impression that Ghuseetun Lall, after the death of Moharaj Singh without issue, became sole co-heir with his surviving uncle to Digambur's property, and that, as such, he became entitled to a moiety of it in possession by the relinquishment of Bal Kooer. So that, whatever might have been the motive with which the conveyance from Ghuseetun was framed, the representations of Raj Coomar as to Ghuseetun Lall's title were in no way fraudulent; nor were they made with the least intention of inducing persons to purchase at the execution-sale. On the contrary, the action taken by him was intended to prevent the sale from being carried out, and I see nothing in the shape of an estoppel between him and the purchasers at that sale to bar him from setting up the truth against them, as soon as he might become aware of it. If this be so, Ajnasee, the present representative of these purchasers, can effect no defence against the case made by Deo Coomar in the suit wherein he is plaintiff, and still less can she succeed in the suit brought by herself against Bal Kooer's alienees in possession, because she cannot rpoduce any evidence at all, not even the evidence of possession, that Ghuseetun Lall had any right, title, or interest in the property which she claims through him.

I think, therefore, that the Court below rightly decided against her in both suits, and that her present appeals Nos. 355 and 356 must be dismissed with costs.

It remains to be seen whether any of the other seven sets of appellants can, so far as concerns themselves, properly impeach the decrees passed in favor of Sheo Gobind and Deo Coomar respectively. Some of these appellants took a preliminary objection to Deo Coomar's suit, alleging that it was barred by the law of limitation. They maintained that the cause of action accrued upon the execution of Bal Kooer's ikrarnamah on the 28th of September 1853, while the plaint was certainly not filed until the 27th October 1865, *viz.*, after the lapse of 12 years and one month from that date. However, as I have already said in my judgment, the cause of action on which Deo Coomar sues first accrued to his father Raj Coomar on the day when Bal Kooer died, namely, the 11th November 1853, and consequently the suit instituted upon it in October 1865 is within time.

It was also urged on behalf of more than one set of appellants, defendants in possession, that Deo Coomar's own evidence showed he had no title to any portion of the land in question at the time of bringing his suit; for by his own account he had previously conveyed one moiety of the four annas to Gobind, and the other to Mussamut Rohoman Kooer; and they argued that he had wholly failed to make out that the alleged reconveyance to him by the Mussamut had been effected before the filing of the plaint. The whole of the materials on which the plaintiff relied for evidence on this point were, *first*, the testimony of him-

self given on oath during the trial of the cause, in which he said that the two annas were re-transferred to him by Mussamut Rohoman Kooer in Kartick 1273; *secondly*, the statement of his pleader, not on oath, that the re-transfer took place a fortnight before the plaint was filed; and, *thirdly*, a petition filed in this suit on 19th April 1866, by Mussamut Rohoman Kooer (not a party thereto), by which she disclaimed all right to the property on the ground that she had received back her purchase-money. Obviously, neither this petition nor the pleader's statement is admissible as evidence of the reconveyance as against the defendants in this suit; and, therefore, the plaintiff's testimony alone is all the evidence bearing on this point which we can rightly consider. It must be confessed that this is exceedingly unsatisfactory. All the plaintiff says is, that the re-transfer was made in Kartick, and, as the last day of Kartick in that year was the 4th November, it is consistent with his statement that the re-transfer should have occurred a whole week after the filing of the suit. Also the plaintiff does not mention the form in which the re-transfer was effected, *viz.*, whether by a written document or by parol agreement. If it was in the former shape, the document itself is the primary evidence of the fact, and ought to be accounted for before we should receive the plaintiff's parol version of it. However, it lay upon the defendants to elicit these things by cross-examination of the plaintiff. As they have not chosen to do so, we must take the plaintiff's testimony for as much as it is worth; and, meagre as it is, it certainly affords some evidence in support of the reconveyance having been made by Mussamut Rohoman Kooer as alleged in the plaint. On the other hand, there is not a tittle of evidence of any sort to rebut it. Under these circumstances, I think this last-mentioned objection of the appellants falls to the ground, equally with the plea of limitation. As there are no other objections by way of bar to the suits presented to us and persisted upon, this conclusion disposes of all the appeals which do not raise a defence on the merits of Bal Kooer's alienation. This is the case with appeals 320 and 321, 331 and 332, 337 and 338, 359 and 360: these appeals must, therefore, be dismissed with costs.

The appellants in 328 and 329 say that their predecessors in title bought from Bal Kooer under circumstances which are sufficient to protect them in their possession. It appears that Bal Kooer had borrowed money on the security of a *zur-i-peshgee* lease of the land, reciting in the lease that the money was required for the purpose of paying the Government revenue. The creditor afterwards brought a suit against the lady to recover his money, and obtained a decree. A sale took place in execution of this decree, and at that sale the appellant's predecessors bought. It is now argued that the recitals in the *zur-i-peshgee* lease, the decree, and the execution-sale proceedings are facts which go so far as to prove a binding necessity for the alienation, or at least show a reasonable justification for a presumption on the part of the purchaser that there was such a necessity, and, therefore, are sufficient to give him a good title against Digambur's heirs. However, we learn that the creditor did not sue on the basis of the *zur-i-peshgee* transaction: that, indeed, he did not sue at all until, for some reason or another, he had lost the power of availing himself of the *zur-i-peshgee* security, and then he brought his action against Bal Kooer personally on her simple money-debt to him. The decree which he obtained in that suit could not, and did not, in the least touch Digambur's estate, but merely ordered Bal Kooer to pay her debt; and

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the sale in execution which followed thereon was merely a sale of the lady's *rights and interests* in the property. It is, therefore, clear that the whole foundation of the appellant's argument disappears, and we are not called upon to say whether the recitals in the *zur-i-peshgee* could in any case have been taken as evidence of necessity against the claims of the heirs. The appeals 328 and 329 must be dismissed with costs.

The appellants in Nos. 368 and 369 objected that the Lower Court was wrong in holding that the sale by Bal Kooer upon which their title depended was not justified by necessity. They relied upon the recitals in the bynamah from Bal Kooer, dated the 25th December 1844, which the Lower Court refused to admit as evidence on the ground that it was not proved. They also desired permission of this Court to put in as evidence of the necessity of the sale certain Collectorate challans, which had been omitted to be tendered in the Court below, and which purported to acknowledge the receipt of Government revenue in December 1844, in respect of the portion of the property held by the appellants. I see no reason for saying that the first Court erred in rejecting the bynamah; and, as to the challans, it is clear that they speak to nothing but the actual receipt of the money on account of revenue, the person which paid it, and the estate for which it was paid. But, inasmuch as the Collector, as a matter of duty, receives without question money tendered on account of Government revenue, when due, from any hand whatever, and from as many hands simultaneously as choose to offer themselves, the mere factum of receipt can afford no evidence of the cause which led to the payment. And in this particular instance, the appellants do not by any evidence identify the name which is mentioned in the challans as that of the person paying the money for the revenue, with the purchaser from whom they claim, or any one acting on his behalf. So that, in truth, the challans sought to be used here stand altogether unconnected with the transaction of the purchase, and cannot give the least clue to its character, I think, therefore, that they are inadmissible. It results, then, that the appellants in these cases have no evidence upon which to base their arguments, and that these appeals must be dismissed with costs.

In appeal No. 350, Deo Coomar, and in that of No. 353, Sheo Gobind and Ajnasee, complain that the Lower Court has, without sufficient evidence, found a certain specified alienation of Bal Kooer's to have been justified by necessity. The evidence bearing on the point consists of recitals in the deed of sale which the purchaser obtained from Bal Kooer, and also Collector's challans similar to those which have just been commented upon. The recitals state that the property covered by the deed was sold to discharge a lien upon it created by Bal Kooer in favor of a third person by a certain zur-i-peshgee lease, but they do not mention anything in the shape of justification for the imposition of this lien. If, therefore, the recitals of the vendor can be appealed to by the vendee as evidence of the necessity for the sale or of his, the vendee's, honest belief in its existence, which possibly may be questioned, still in this instance the recitals do not go far enough, and in truth amount to nothing in the appellant's favor. The zur-i-peshgee lease itself is not proved. Then the challans, for the reasons already mentioned, are valueless; and so it seems to me the appellants are right in contending that the decision of the Lower Court on this point is without any evidence to support it. The appeals Nos. 350 and 353 must, therefore, be decreed generally with costs. It seems,

however, to be admitted that the appellants had named in their petitions of appeal two persons, *viz.*, Ramanund and Rama Pershad, as respondents, who were not parties to the suit in the Court, and who have not been made parties since the trial. These nominal respondents have appeared in obedience to notice given by the appellants, but they appear under protest, and ask for their costs. I think that they are entitled to their costs, and also that the appeal record should be amended by striking out their names therefrom.

Bayley, J.—I concur in the decision of these sixteen Regular appeals in the manner set forth by Mr. Justice Phear. That is to say, I think, the *ikrar* cannot affect the case against the alienees, for Bal Koer made that deed when she really had nothing to pass to Raj Coomar and Ghuseetun. I do not think she could declare who were her heirs, as she does in that ikrar, till they became so legally by her death. She might survive one or both of them, or various other contingencies might arise. In respect to the real property becoming Bal Kooer's as woman's property, and so passing under Mitackshara Law to the heirs of the woman and not reverting to the husband's heirs, I think that the widow takes the real estate only as part of her deceased husband for her life, and while, on the one, she can make alienations under legal necessity, still, on the other, such property does not go like *peculium* to the woman's heirs, but to the heirs of the husband from whom alone the woman derived it.

There is no reason or evidence to support the contention that Raj Coomar objected to the sale in execution in fraud, or that Ghuseetun had any right in the property after his sale of it to Raj Coomar.

I would dismiss appeals 355 and 356 accordingly.

I agree, for the reasons before given, as to the right accruing to Raj Coomar from the death of Bal Coomar, that the cause of action arose then, 11th November 1853, and the suit is admittedly within twelve years of that date.

As to Deo Coomar's having no title when he brought the suit, owing to his having stated that he had conveyed half, 2 annas, of the jumas to Sheo Gobind, and half, 2 annas, to Mussamut Rohoman, we have at least his oath to the fact of reconveyance from the latter. I think this evidence might be *ordinarily* insufficient to prove this reconveyance, especially as the deed is not put in. But here, there is at least that deposition on *oath* on one side, and *nothing whatever* on the other. I, in concurrence, then, with Mr. Justice Phear, would dismiss appeals 320, 321, 331, 332, 337, 338, 359, and 360.

As to 328 and 329, I think that the recitals in the zur-i-peshgee would not of themselves alone be sufficient evidence of legal necessity. But this does not arise, for what was sold was merely rights and interests for a person's money-liability.

As to 368 and 369, the only evidence of Collectorate would merely show that a certain person paid certain Government revenue due on account of a certain mehal. But legal necessity and enquiry into it must be better shown than by such alone.

I therefore concur in the judgment of Mr. Justice Phear in the whole sixteen cases.

Decree accordingly.

RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 1st June 1867.

Present :

The Hon'ble W. S. Seton-Karr and F. A. Glover, *Judges.*

Criminal Breach of Trust.

Queen *versus* Banee Madhub Ghose.

Committed by the Magistrate, and tried by the Sessions Judge of Beerbhoom, on a charge of criminal breach of trust.

Where a Court Inspector improperly delegated to a constable the custody, &c., of Government monies (taking from him private security to save himself from loss in case of defalcation), and the constable dishonestly converted the money to his own use, although he afterwards restored it, the case was held to fall under Section 408, and not Section 409, of the Penal Code, and the sentence reduced from 10 years' transportation and a fine of 500 Rs. to one year's rigorous imprisonment without fine.

Seton-Karr, J.—THERE is no doubt that the prisoner, who was a head constable of the Beerbhoom Police, has been guilty of criminal breach of trust under one or other of Sections 405, 406, 408, or 409. He has been convicted under the last Section. The guilt is proved from the evidence and from the prisoner's own admission. The pleader for the appellant very wisely confines himself to an argument in favor of mitigation of the sentence.

On what grounds the Sessions Judge thought fit to sentence the prisoner to such a terrible punishment as 10 years' transportation and a fine of 500 rupees, I am wholly at a loss to discover.

The prisoner was a constable drawing 10 rupees a month, and he had been entrusted by the Court Inspector, the main witness in the case, with the keeping of monies received on divers accounts as specified, with the accounts relative to the same, and with the transmission of the monies, either to the Collectorate, or to the parties entitled to receive it.

This trust was delegated by the Court Inspector of his own authority and responsibility, without the sanction of the Magistrate and without his knowledge.

Of course, it is not to be wondered at that, under the lax system thus improperly introduced, the money was embezzled on several occasions; and it seems that a sum of 1,000 rupees was unaccounted for, whereof nearly two-thirds were at once, on enquiry, made good by the *Court Inspector himself*, and rather more than one-third by the prisoner.

The Judge very properly makes some severe remarks on this laxity; he holds that the Court Inspector is unfit for his appointment, but he then passes this extreme sentence on the guilty but unfortunate prisoner, the constable.

I am decidedly of opinion that the offence of which the prisoner has been found guilty under such circumstances will be suitably punished by a sentence of one year's rigorous imprisonment without any fine.

Let the case go to a second Judge.

Glover, J.—I concur with Mr. Justice Seton-Karr in reducing the sentence to one year's rigorous imprisonment.

But I think that the prisoner ought not to have been convicted under Section 409 of the Penal Code at all. That Section, so far as regards the present case, applies to persons entrusted with dominion over property in the capacity of public servants, and it appears to me that the prisoner was not so entrusted. The Court Inspector was the party responsible for the money, and he had no authority, as he himself admits, to delegate his power to others, or to make any other public servant, whom he chose to make the depositary for the time being responsible as such.

Indeed, from the Court Inspector's evidence, it is clear that he did not look upon the head constable as employed in a public capacity when he entrusted him with the Government monies, for he took private security from him to save himself from loss in case of defalcation.

If, then, the prisoner was not entrusted with the money as a public servant, Section 409 will not apply.

But there is no doubt that the prisoner was entrusted as a private individual with monies by the Court Inspector, which, instead of paying into the Collectorate, he dishonestly converted to his own use, although he afterwards restored them, and Section 408 would, therefore, apply to his case, the constable being employed by the Court Inspector to collect and pay over the money deposited in his hands, and being, for that purpose, his servant under a special trust.

The limit of punishment under that Section is seven years' imprisonment with fine; but taking the many circumstances of extenuation in this case into consideration, I concur with my learned colleague that one year's rigorous imprisonment is a sufficient punishment.

Seton-Karr, J.—I concur in holding that the commitment should be under Section 408 of the Penal Code.

The 3rd June 1867.

Present:

The Hon'ble J. P. Norman and W. S. Seton-Karr, *Judges.*

Transportation (in lieu of Imprisonment).

Queen *versus* Gour Chunder Roy.

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Jessore, on a charge of false evidence, &c.

Under Section 59 of the Penal Code, no sentence of transportation for a shorter period than 7 years can be passed on any charge.

Therefore, where a prisoner was convicted on separate charges of giving false evidence in a judicial proceeding under Section 193 and of forgery under Section 467, and sentenced to seven years' transportation for the first offence, and a further period of transportation for 3 years for the second offence, the second sentence was quashed as illegal.

Norman, J.—The appellant objects, amongst other things, that the Sessions Judge was wrong in comparing the handwriting of the signature of Degumber Roy in the receipts with the signature as appearing in the kubala marked A, inasmuch as that kubala was not an undisputed and admitted document. I may admit that the Sessions Judge so describes A. But I will, for the moment, assume that he was wrong that the signature was not an undisputed signature.

It will come to this that the comparison of hand-writing was only one out of many proofs in which the Sessions Judge bases his conclusions.

The case has been most fully and carefully tried, and there is no ground for questioning the correctness of the Sessions Judge's finding.

As regards the sentence, the prisoner has been convicted on two charges, *viz.*, one under Section 193 of the Indian Penal Code, of giving false evidence in a judicial proceeding; and one under Section 467 of the forgery of a receipt; for each of which offences he was liable to imprisonment for seven years.

The Judge has sentenced him to transportation for 10 years, *viz.*, seven years on the first charge, and a further period of three years on the second charge.

According to the construction which has been put upon Section 59 by several decisions of the High Court—*see* 2 Weekly Reporter, page 1; 5 Weekly Reporter, page 44, Criminal Rulings—the correctness of which I do not question, no sentence of transportation for a shorter period than seven years can be passed in any case. The words "in every case" in Section 59 have been construed as "on any charge" or "for any offence;" therefore the sentence of three years' transportation on the second charge in the present case cannot stand.

It appears desirable that sentences in cases like the present should be homoge-

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neous. It would seem to be likely to lead to some public inconvenience if, by the force of the sentence, and not at the will of the Government, a part of the sentence on a prisoner must be worked out at one place, and the residue in another.

There are many cases when prisoners may be convicted on two charges, each being of offences for which the offender is liable to transportation when the magnitude of an offence may imperatively call for a sentence of seven years' transportation, but where a further sentence of seven years on the second offence would be too severe a punishment.

In the present instance I would quash the second sentence as illegal. As the two offences in which the prisoner has been convicted are mixed up together, I do not think it necessary to pass any sentence of imprisonment or substitution for such illegal sentence.

The prisoner will, therefore, be transported for seven years, instead of ten.

Seton-Karr, J.—I concur in the reduction of the sentence as proposed.

The 3rd June 1867.

Present :

The Hon'ble F. A. Glover and C. P. Hobhouse, *Judges.*

Kidnapping—Punishment.

Queen *versus* Mussamut Bhoodeea.

Committed by the Magistrate, and tried by the Sessions Judge of Patna on a charge of kidnapping.

The maximum sentence prescribed for the offence of kidnapping should only be awarded in a case of the most aggravated nature.

Glover, J.—No point of law is raised in this appeal. The question was one of evidence, and the Jury were left to decide whose story was the true one. On that evidence, they found the prisoner guilty, and there is no ground for interfering with their verdict.

But I think the sentence of seven years' transportation too severe, and, under the circumstances, would reduce it to five years' rigorous imprisonment.

Hobhouse, J.—I concur. I observe that imprisonment for seven years, convertible to transportation for a like period under Section 59, is the maximum sentence which the law prescribes for the offence of kidnapping under Section 363.

I would, therefore, hold that this maximum sentence should only be awarded in a case of the most aggravated nature of the kind contemplated.

But here there are no circumstances of an aggravated nature disclosed; but, on the contrary, there was some temptation to commit the offence offered by the carelessness of the child's natural guardian, and the offender was clearly not a hardened criminal, for she at once and penitently admitted her guilt.

The 3rd June 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Rioting with deadly weapons.

Queen *versus* Moorut Mahton and others.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of being members of an unlawful assembly.

In a case of rioting with deadly weapons, the side found guilty of using them and causing grievous hurt are properly punishable more severely than the men of the other side.

Glover, J.—THE evidence in this case was fully laid before the Jury. They were

told that a party in peaceable possession of lands, and attacked by others in force, would be justified in resisting, if they had no time to apply for the protection of the authorities, and if they used no greater violence than was necessary; and they were further told to apply the evidence to these points. There can be no doubt, we think, that this was the proper way to put the case to the Jury.

Mr. Twidale for the Sohra people contends that, as the Jury found both sides guilty of rioting, the Judge should have inflicted the same punishment. But the Sohra people were, in addition to the offence of rioting with deadly weapons, found guilty of using them, and of causing grievous hurt, and were, therefore, properly punished more severely than the men of the other side. In any case, this would not be a point of law on which an appeal lies.

The petition is rejected.

The 3rd June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Abkarry Licenses.

Criminal Revisional Jurisdiction.

Reference under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

Queen *versus* Ram Kishen.

Under Section 43, Act XXI. of 1856, only persons holding licenses, and not their servants, are subject to the penalties specified in the Section.

Jackson, J.—We think that the Sessions Judge is right in the view he has taken, and that, under the 43rd Section, Act XXI. of 1856, only persons holding licenses, and not their servants, are subject to the penalties specified in the Section. We, therefore, order that the conviction of the parties named be set aside, and that the fines, if levied, be returned to them.

The 3rd June 1867.

Present:

The Hon'ble L. S. Jackson, and C. P. Hobhouse, *Judges.*

Witnesses (Summoning of).

Criminal Revisional Jurisdiction.

Revision of the proceedings under Section 404, Code of Criminal Procedure.

Queen *versus* Meer Zakir Ally.

In the case of a charge of an offence triable by the Court of Session alone, the Magistrate is bound to summon the complainant's witnesses.

Jackson, J.—It appears to me that the petitioner is entitled to a precept directing the Magistrate to pass orders on the petition, dated 20th March, in which the petitioner prayed that his witness might be summoned.

The complaint was laid on the 12th, and the day for hearing was the 20th, on which day the complainant made his further application, and the Magistrate might thereon have made an order under Section 262, Criminal Procedure Code, in satisfying himself by the oath of complainant that the witnesses were material, and would not appear voluntarily.

Instead of doing so, he remarked that the complainant was not prepared to prove his case.

He does not say that he considered the petitioner to have unduly delayed the application for a summons; and, looking at the circumstances, I cannot say there was such delay. I am, therefore, of opinion that the order dismissing the complaint should be set aside, and the Magistrate required to proceed with the case.

Hobhouse, J.—The charge was in this instance a charge of the offence of mischief by destroying a valuable security, to wit, an ikrar under Section 477, Indian Penal Code.

This is a charge of an offence triable by the Court of Session alone.

Therefore, under Section 186 of the Criminal Procedure Code, the Magistrate was bound to summon complainant's witnesses. He refused to do so.

Under these circumstances, I concur in the order my brother Jackson would pass.

The 4th June 1867.

Present :

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges.*

False Evidence—Abetment.

Queen *versus* Chundi Churn Nauth and another.

Committed by the Magistrate, and tried by the Sessions Judge of Mymensing, on a charge of false evidence.

Where *C* falsely represented himself to be *U*, and the writer of a document signed by *U*, and *T*, knowing that *C* was not *U*, and had not written such document, adduced *C* as *U* and as the writer of that document—HELD that *T* ought to have been convicted on a charge of abetting the giving of false evidence.

Hobhouse, J.—IN this case the evidence on record clearly proves, and the Assessors and the Judge below have found these facts, *viz.*, that the prisoner, appellant, Chundi Churn Nauth, falsely represented himself to be Udoy Chand Nauth; that, so falsely representing himself, he further falsely swore that he wrote a certain document, and that the prisoner, Tarifat Beopari, knowing that Chundi Churn was not Udoy, and that Chundi Churn had not written the said document, adduced Chundi Churn as Udoy Chand and as the person who had written the said document.

On the finding of facts the Court below found Chundi Churn guilty of intentionally giving false evidence in a judicial proceeding, and found Tarifat guilty of corruptly using as genuine evidence he knew to be false, and under the provisions of Section 293 and, Section 196, Indian Penal Code, respectively, sentenced each of the prisoners to 3 months' rigorous imprisonment.

The finding against the prisoner Chundi Churn is good in law and in fact, and the sentences on both the prisoners are appropriate, and so with these sentences, and in this finding I would not interfere. But the finding on the prisoner Tarifat is, in my judgment, incorrect in law.

The word "evidence" cannot, in my judgment, be strained to include an individual, and it cannot therefore be said that Tarifat used Chundi Churn corruptly as "evidence true and genuine which he knew to be false and fabricated." The offence of Tarifat was that of abetting the offence of Chundi Churn, and he should have been found guilty of that offence under Section 193 read with Section 109, Indian Penal Code, and then sentenced under these Sections to 3 months' rigorous imprisonment.

The Judge should amend the conviction in accordance with these remarks.

Jackson, J.—The phraseology employed was not the best possible description of Tarifat's offence, and I agree that it would have been better to convict him on a charge of abetting the giving of false evidence. But I am inclined to think that the charge may stand as it is. The Judge probably did not mean that Tarifat had used Chundi Churn as false evidence, but had used the evidence which Chundi Churn gave. That evidence being false, and Tarifat knowing it to be false, and as placing Chundi Churn in the box, and causing him to give evidence, was, in fact, using the evidence which he gave, however unsuccessfully, although the expression is not happy, and the other charge would have been preferable, I should suggest that it be allowed to stand, but that the proper charge be pointed out.

Hobhouse, J.—Very well. I think the Judge may have intended what Mr. Justice Jackson suggests. So the conviction may stand, but the Judge should be informed that the more proper charge was that pointed out by me.

The appeal is dismissed.

The 4th June 1867.

Present :

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges.*

Erroneous orders—Dismissal of complaint—Application by complainant for adjournment.

Criminal Revisional Jurisdiction.

Queen *versus* Ramnarain Ghose.

Revised under Section 404, Code of Criminal Procedure.

The Deputy Magistrate adjourned the case to the 21st, on which day he ordered the case to be dismissed for non-attendance of the complainant, but on the following day cancelled that order and revived the case on the ground of his having dismissed the case by mistake in ignorance of the complainant having petitioned for an adjournment by reason of sickness. The Magistrate on appeal reversed the order of the Deputy Magistrate. As the order of the Deputy Magistrate was manifestly wrong, the High Court set aside the whole of the proceedings, and restored the case to the position in which it stood before the 21st.

Jackson, J.—BABOO Otool Chunder Mookerjee appears to show cause, and relies upon a case referred to in the note on Section 259, Prinsep's Criminal Procedure Code. The report of that case is not before us (461 of 1859); but it seems to have been held that a case dismissed under the Sections referred to cannot be revived; it is therefore contended that, although the Magistrate had clearly no authority to make the order before us, yet, as it merely had the effect of setting aside an illegal order of the Deputy Magistrate, this Court ought not to interfere.

The circumstances of the case are these: The complainant preferred a charge of criminal trespass and hurt, which a Deputy Magistrate proceeded to try under the Procedure Code, Chapter XV. The complainant and his witnesses attended, and their evidence was recorded; but, owing to the absence of the defendant, the case was not completed. The Deputy Magistrate then went away on leave, and was succeeded by another officer, who, taking up the case, observed that he could not decide upon evidence recorded by his predecessor, and ordered the attendance of the parties *de novo* on the 7th January. On that day and the two following days, the Deputy Magistrate records that he was disabled by sickness from hearing the case, and he adjourned it to the 21st. On that day, he ordered the case to be dismissed, the complainant being absent. On the next day, 22nd, he passed a further order, stating that the case had been dismissed in mistake, as the complainant had previously filed a petition for adjournment by reason of his sickness, a fact of which the Deputy Magistrate had not been aware, and he revived the case. Against this order the defendant appealed to the Magistrate, who, it would seem consciously without jurisdiction, reversed the order, and the complainant is now before us. In the state of facts which we have described, it would be a clear denial of justice to allow the complainant's case to be lost on account of the Deputy Magistrate's order of the 21st. We do not wish now to decide the point whether the Deputy Magistrate was competent under the circumstances to review or to withdraw his own order of the 21st. But, as that order was in itself manifestly wrong while the complainant had a petition before him for adjournment, we think it proper to rescind and set aside the whole of those proceedings, and to restore the case to the position in which it stood before the 21st January.

We, therefore, direct the Deputy Magistrate to re-place the case upon his files, and proceed with it according to law; and, looking to the defendant's conduct, we think it right that the petitioner should have his costs.

The 4th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Breach of Contract—Act XIII. of 1859—Coolies in Assam.

Criminal Revisional Jurisdiction.

References under Section 424, Code of Criminal Procedure.

Queen *versus* Gaub Gorah Cacharee and others.

Coolies in Assam, who have received advances in contemplation of work to be done, may be proceeded against under Act XIII. of 1859.

Jackson, J.—WE think there is nothing in the terms of Act XIII. of 1859 to support the view taken by the Judicial Commissioner.

It appears to us that the Legislature, in taking measures for the protection of employées who have made advances of money in contemplation of work to be done, advisedly employed the widest terms to designate the person receiving such advance: in using the words artificer, workman, or laborer, they evidently intended to include labor, as well unskilled as skilled, and in extending or making it legal to extend the operation of the Act to a region like Assam, where labor would be chiefly agricultural or out-door labor, they doubtless had in view the common cooly, whose services it is necessary there to secure by an advance.

We do not quite understand what is meant by the Judicial Commissioner's expression "work of a specific character;" but the 4th Section of the Act provides that the contract to be enforced may be for a term certain, or for special work or otherwise.

Probably, the work of a garden-cooly is something well understood in Assam, and the work would, in that case, be of a specific kind, even if that were necessary.

We are of opinion that the Deputy Commissioner was competent to summon the coolies complained of, and to make an order under the 2nd and 3rd Sections of the Act.

The 5th June 1867.

Present:

The Hon'ble F. B. Kemp, W. S. Seton-Karr, and F. A. Glover, *Judges.*

False Evidence (by Ryots).

Queen *versus* Dhurrani Dutt Rai and another.

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Tirhoot, on a charge of false evidence.

Discussion as to the extent of punishment to be passed upon certain ryots who, in a case of criminal trespass brought by an indigo planter, falsely swore that cotton, and not indigo, had been raised on the land in question during the past year. Punishment reduced. *Seton-Karr, J.*, would have reduced the punishment still more for reasons given.

Seton-Karr, J.—THESE two appellants have been convicted of giving false evidence under Section 193, in that when they were witnesses for the defence in a case of trespass brought on behalf of the Pandoul Factory against certain ryots, they swore that no indigo had been grown on the land which formed the subject of suit, and that cotton had been grown thereon.

It seems impossible to doubt from the evidence of Mr. Gale, of Mr. Forbes, of Mr. Lamb, and of the jemadar of the factory, that this land was sown with indigo last year, and that the evidence of the prisoners to the contrary effect in the trespass case was not correct. Stumps of indigo were seen on the land, which could only have been grown last year; and, altogether, looking at the defence of one of the prisoners in the Sessions and at the whole details, there can be no doubt that the evidence given on the side of the factory was correct, and that the depositions of the prisoners in the trespass case were knowingly false.

But while I have no doubt that the conviction should be upheld, I have just as little that the amount of punishment is quite disproportionate to the offence, and that it ought to be *materially* reduced. My only doubt has been to what extent the excessive sentence of four years, passed by the Sessions Judge, ought to be reduced, and on this point I have conferred with several of my colleagues.

It is necessary to examine narrowly the facts proved in this case, and I may observe that they have had my earnest and repeated consideration.

The original case was an ordinary case of trespass brought against two men in respect of 25 cottahs of indigo stated to be grown for the factory by one Shib Dyal, and the two defendants charged with trespass were said to have been instigated by this Shib Dayal to plough up the land, and to sow cotton on it, in order to injure or annoy the planter. The question was treated by the Magistrate, who tried the trespass case, simply as one of possession. The Magistrate remarked that it was very unusual that such land should have been in possession of the factory; but being bound by the evidence, which appeared very strong for the factory, and contradictory and full of falsehoods for the defence, the Magistrate, after an examination of the spot where he found indigo stumps actually in existence, sentenced the two defendants to four weeks' imprisonment, under Section 447 of the Penal Code (criminal trespass).

So far there was nothing whatever remarkable in the case of trespass. It was not a case where large bodies of men entered with violence on lands belonging to the factory. The amount of land in dispute was very trifling, and the case does not appear to have been invested with unusual importance, or to have been remarkable as a precedent, or on any other ground.

As regards the conduct of the two prisoners now on appeal before us, they were witnesses for the defence.

Lal Dhari, the first prisoner, clearly knew the land pretty well, and he deposed in the said trespass case to the effect that during the last 10 years indigo had been only twice grown in the land, but that this was eight *years* ago: and that last year there was no indigo on this land, and no indigo stumps to be seen now.

The evidence of Dhurrani Dutt Rai, the other appellant, was less positive when he delivered what has now been found, and rightly found, to be a false statement. He says, after deposing that the land belonged to the defendant for whom he was called, "I cannot say whether there were indigo "stumps on the land or not. I saw the land "last year. I have seen it in Aghran, Pous, "Magh, up to the present year." And, then, again, "Cotton was sown in Phalgoon last. "I did not see what crop there was on the land "before that; I did not see what there was "on this land in Aghran this year. It was "prepared for millet in *Aghran*," &c., &c.

Still, the effect of this testimony was adverse to the factory, and it was unquestionably false.

The defence in the Sessions Court of Lal Dhari is that, on the land in question, there was cotton for three years, then cereals for a year, and then *indigo*.

Dhurrani Dutt's defence is that in 1271 and 1272 there was cotton on the lands; that indigo was sown there in 1273 by the hurkura and zillahdars who rooted out the cotton; and that he *deposed incorrectly before the Magistrate*.

This last statement seems to me very like an admission of guilt, and made as if the prisoner threw himself on the mercy of the Court, and allowed that he had spoken falsely to the prejudice of the factory.

The Judge, with whom both Assessors concurred as to the guilt of the prisoners, says that he punishes them "severely as they deserve." But for *this severity he gives no grounds whatever;* neither, as I have shown, are any to be gathered from the complexion or from the minutest details of the original trespass case.

The case was an ordinary suit in which a planter complained that two men were, to use his own words, "ploughing up my *ziraat* land with the intention of annoying me."

It is, however, notorious that in this very concern of Pandoul in Tirhoot, in which this case originated, party feeling lately ran very high between planter and ryot, and that the villagers had sided with their own men. Of course, this party feeling would be no justification, either of acts of violence by any party, or of that fraud and falsehood by which acts of violence might either be supplemented or be met. And it might *possibly* lie in the mouths of the local authorities, charged with the maintenance of the public peace and with the security of property in a populous and extensive district, to say, as a reason for a sentence more severe than usual, that an example was necessary, and that severe punishment, where detection had followed rapidly on crime, was essential to important interests, and was, in the end, the truest mercy and the best policy. *But not one such consideration as the above is to be gathered from any part of the record.* The prisoners have been punished with very nearly fifty times the amount of punishment that the original trespassers received, though, of course, I do not mean to place criminal trespass and false evidence in the same category as crimes.

The punishment should have been made appropriate to the magnitude of the interests and the kind of the false evidence. I mean that our Court has invariably made a distinction between different kinds of false evidence, and we have never awarded the same punishment to the man who falsely swears away the life or liberty of another, and to the man who, on oath, merely denies his relationship to the plaintiff or defendant. Agriculturists should not have been allowed to leave the Court, as they must have done in this case, with the impression that they were punished with extra severity, simply because their opponents were European gentlemen, who, as was legal and proper, were bent on protecting their own land from injury, not by meeting one offence by another, but by resort to the local tribunals, which, in this case, gave them ample and speedy redress.

I cannot think that, if this false evidence had been spoken in a suit where a native was complainant, and which related to a small plot of land, the punishment for such false evidence would have extended to four years: and why this excessive amount should have been awarded because English gentlemen were concerned, I am, as already observed, wholly unable to discover from any single thing on record. Therefore, after giving the subject the very fullest consideration, I am of opinion that Lal Dhari's punishment should be reduced to one-fourth of the original sentence, or to twelve months' rigorous imprisonment, and that of Dhurrani Dutt's to nine months', in consideration of the less positive nature of his testimony, and, as I read his defence, of his throwing himself on the mercy of the Court.

But this is the maximum which the offence deserves, or to which I can consent.

Glover, J.—This case has been referred to me on the question of punishment.

I cannot go so far as my learned colleague proposes. Both the prisoners were most clearly guilty of perjury on a point about which they could have had no doubt.

Giving them the benefit of all extenuating circumstances, it would, in my opinion, be as unjust to the planter to let these men off with what, to my mind, is a disproportionate punishment as it would be to the accused to punish them with exceptional harshness, because the prosecutor chanced to be a European.

At the same time I see no reason for the particular severity with which the Sessions Judge has visited them.

I would reduce the sentence to two years and 18 months' rigorous punishment respectively.

Kemp, J.—I have read the whole of the proceedings in this case, both before the Assistant Magistrate and the Sessions Judge.

I consider this to be a case in which the prisoners knowingly and wilfully deposed falsely. The two prisoners live in the village in which the disputed land is situated, and they knew perfectly well what crop was grown last year in that particular field; so that, when they deliberately stated that cotton, and not indigo, had been raised on that land last year, they were deposing to facts which, they well knew, were wholly false.

After giving false evidence in the original case of criminal trespass, when called upon, after the witnesses for the prosecution had been examined, to state what they had to say in their defence, they both deliberately adhered to their false story.

Before the Sessions Judge they varied their statement, but even in that Court there was no frank admission of guilt.

The Assessors, two Hindoo gentlemen, were of opinion that the prisoners were guilty, and the witnesses examined for the defence of the prisoner Lal Dhari Rai actually supported the case for the prosecution.

If parties, guilty of such wilful perjury, are not severely punished, it may be that the planter, who, as in this instance, instead of resorting to force, sought the protection of the law, might leave our Court with the idea that the prisoners were tried with unusual lenity, because the prosecutor was an indigo-planter. The ryot, on the other hand, would go back to his village after a few months' imprisonment, and tell his neighbours that perjury, if directed against the interest of an indigo-planter, was not considered by the Court to be a grave offence.

The question at issue between the planter and the ryot, in the criminal trespass case brought by the manager of the factory, was not so much whether indigo or cotton was grown on the small patch of land which formed the subject of dispute, as whether the land were the ziraat lands of the factory, or were in the possession and cultivation of the ryots. The question was of the greatest importance to the planter, for on the result depended the fate of many other cases, and probably involved the closing of the factory had the ryots succeeded in proving their occupation. With deference to the very great experience in matters connected with indigo-disputes, undoubtedly possessed by my learned brother, Mr. Justice Seton-Karr, I cannot concur in the sentence proposed by him for so grave an offence.

Had the case come before me in the first instance, I should have confirmed the original sentence as against the prisoner Lal Dhari Rai, and mitigated it as against the other prisoner whose guilt is not, in my opinion, so grave. As it is, I do not object to the sentences proposed by Mr. Justice Glover.

The 6th June 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Irregularity—False Evidence.

Queen *versus* Doorga Nath Roy and another.

Committed by the Magistrate, and tried by the Sessions Judge of Mymensing, on a charge of corruptly using, or attempting to use, as genuine evidence, a document knowing it to be false and fabricated.

Although a Civil Court acted irregularly in sending to the Magistrate for investigation a case of using or attempting to use false evidence when no suit was pending in that Court, yet, as the Court had given its sanction to the prosecution of the offence—HELD that it was in the competency of the Magistrate, under Section 68 of the Code of Criminal Procedure, even without a charge or complaint, to proceed to investigate, and, if necessary, to commit for trial to the Sessions Court.

Kemp, J.—THESE two prisoners have been convicted of the offence of using, as genuine, evidence which they knew to be false and fabricated.

The circumstances of the case are somewhat peculiar. The prisoner Doorga Nath Roy, who is a mooktear practising in the Courts of Zillah Mymensing, was employed with others as an attorney to conduct a suit under Act X. of 1859 in the Collector's Court. A sum of Rs. 150 as fees was due to the mooktears engaged, but not to the prisoner alone. In the decretal order, these fees were made payable to Kali Nath Nundee; Doorga Nath's name, though he certainly appears to have been the most active agent in conducting the suit to a successful issue, was not mentioned.

Subsequently, Doorga Nath, associating with himself as co-plaintiff, the other prisoner, Pearee Mohun Shaha, to whose master the prisoner Doorga Nath was indebted, brought an action in the Court of the Additional Moonsiff of Mymensing for the recovery of these fees. It was arranged that Pearee Mohun was to find the funds for carrying on the suit, and to receive 6 annas of the amount recorded, which was to go to pay off the debt of Doorga Nath to Pearee Mohun's employer. The name of Kali Nath Nundee, which appeared in the copy granted by the Collectorate Amlah of the original decree in the Act X. suit, was partially erased, that is to say, the Kali and the Nundee were struck out, and Doorga and Roy inserted, leaving the original Nath. The suit in the Moonsiff's Court was ready for hearing, and it is clear that it would have been a defended suit. Doorga Nath, apprehensive that the erasure in the copy of the decree under Act X., upon which document the suit was based, would be detected, attempted, in the first instance, to obtain the permission of the Additional Moonsiff to withdraw from the suit with leave to bring a fresh one under the provisions of Section 97 of Act VIII. of 1859. The Additional Moonsiff, for grounds which do not appear on the record, refused his permission, when Doorga Nath applied to have the suit dismissed as compromised, and the suit was accordingly dismissed.

On the same day it was brought to the notice of the Moonsiff that the copy of the decree under Act X. had been tampered with. An enquiry was instituted, which resulted in the Moonsiff sending the case for investigation to the Magistrate, who eventually committed the two prisoners to take their trial before the Sessions Court. Mr. Doyne, who has been heard for the prisoner Doorga Nath Roy, contends that the committal is illegal, inasmuch as no case was pending in the Court of the Additional Moonsiff when it appeared to that Court that the prisoner had been guilty of the offence described in Sections 193 and 196 of the Indian Penal Code, and that, under Section 16, Act XXIII. of 1861, it is only when a case is actually pending before the Civil Court that the Court is competent either to commit the offender to take his trial before the Sessions Court, or, after making such preliminary enquiry as may be necessary, to send the case for investigation to any Magistrate who shall thereupon proceed according to law.

We are of opinion that the Additional Moonsiff acted irregularly in sending this case for investigation to the Magistrate, as it was not then pending before him; but, as he gave his sanction to the prosecution which is necessary in offences provided for in Chapter XI. of the Code of Criminal Procedure before the Magistrate could take cognizance of the offence, it was in the competency of the Magistrate, under Section 68 of the said Code, even without a charge or complaint, to proceed to investigate, and, if necessary, to commit for trial to the Sessions Court.

On the merits of the case, after reading the evidence, it appears to us clear that the prisoner Doorga Nath, with the fraudulent intent, erased the name of Kali Nath Nundee, and substituted his own, for the purpose of obtaining a decree for the whole amount of the fees to which he was only entitled in part. The other prisoner, Pearee Mohun, though he wittingly acted as Doorga Nath's tool, his guilt is by no means so grave.

The sentence upon Doorga Nath of five years' rigorous imprisonment appears to us to be too severe. We think that a sentence of two years' rigorous imprisonment will meet the justice of the case, and be sufficient as an example. The sentence passed upon Pearee Mohun of six months' rigorous imprisonment may stand.

The 8th June 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Using forged Document.

Queen *versus* Hatim Moonshee *alias* Mahomed Hatim.

Committed by the Magistrate, and tried by the Sessions Judge of Tipperah, on a charge of forgery, &c.

Where an intention to use a forged document, if necessary, was inferred from the facts of the case and from the conduct of the prisoner.

Seton-Karr, J.—We have considered this case together, and we think that the Judge was justified in differing from the Assessors and in convicting the prisoner.

The prisoner, from the evidence which the Judge credits, and which we see no reason to doubt, looking at the prisoner's own account of the transaction, appears, pending a certain case in which he had been sued, to have produced a *kabin* before certain witnesses, which *kabin* was full of blots and erasures, and subsequently to have produced another *kabin* without blots or erasures to the Deputy Magistrate in whose Court he had been summoned as defendant in the case alluded to, which was one of criminal breach of trust.

He has been convicted of forging a valuable security under Section 467, and of being possessed of a valuable security, knowing it to be forged, and with intent to use it as genuine, under Section 474. We think that in this case it will be safest to base the conviction on Section 474.

That the prisoner came to the Deputy Magistrate's Court with the intent to use the fresh and forged document, if necessary, may be safely inferred from the facts of the case and from the conduct of the prisoner. And it may also be fairly argued that he had the document in his possession, knowing it to be forged, and intending to use it at any time should it be necessary.

But there is no proof that he actually forged the document himself.

On the other hand, the guilt of this prisoner does not appear to be of a very heinous kind, comparatively.

There is nothing to show that he intended to defraud the widow of Zumir; on the contrary, there is evidence that she had received a sum which satisfied her claims under the kabin. The case in which the prisoner had been sued for breach of trust in not realizing the money due under the kabin had been compromised; and, under all the circumstances, we think that the ends of justice will be met by reducing the sentence under Section 474 to two years' rigorous imprisonment in lieu of seven years' transportation under Section 466.

The 10th June 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Evidence—Character of prisoner.

Queen *versus* Phoolchand *alias* Pholeel Ahir and Sheosurrun.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of dacoity.

Evidence of a prisoner's previous convictions and bad character and of the bad character of his relations is inadmissible.

If a person is before the Court as a witness, his evidence must be recorded as the law directs: if he is not a witness, and is not examined as such, the Judge has no right to allude to his having made any statement.

Macpherson, J.—We have had great doubts as to whether the convictions in this case ought not to be quashed on account of the improper reception of evidence by the Sessions Court. Had the case been tried by a Jury, we should have considered it absolutely necessary to adopt that course, it being wholly impossible to estimate the extent to which the Jury might have been

influenced by the evidence in question. As, however, the case was tried by the Judge with Assessors, and as there is on the record what appears to be very ample proof of the prisoner's guilt independently of the objectionable evidence, we have come to the conclusion that we need not set aside the convictions. But we think that Mr. Elliot, the Judge, has passed so severe a sentence upon the prisoner Phooleel that it will be necessary to reduce the term of imprisonment awarded by one-half.

In his judgment the Judge says that the two prisoners (and others not arrested) "are "all deposed to as residents of, and known "bad characters of, witnesses' village. The "prisoner Phooleel is a released prisoner; "his brother and relations *are more or less* "*jail-birds:* the younger prisoner, Sheo-"surrun, is of a family of similar descrip-"tion." These remarks are based on the following evidence: The witness Wuzeer Ali says: "Phooleel is a *budmash*, and was "released only last month or so from jail. "His brother is in jail, Kashi; and his "nephew is also now released from prison. "Sheosurrun's father was in prison also "for theft. The other four (not before "the Court) were also in jail. They are "all budzats and jail-birds."

The witness Khaja Khan says: "They "are all jail-birds. Phoolcel was about a "year in jail, and his family-men have some "of them been in jail. Sheosurrun has "not been in jail that I know of, but his "father was. The other four men (not "before the Court) have each of them been "in prison before. They are all thieves."

Nothing can be more irregular or more unfair to the prisoners than the admission of evidence such as this. The evidence as to the prisoner Phooleel's previous conviction and character even ought not to have been admitted (*see* VI. Weekly Reporter, page 72, Criminal Rulings). But the Judge must have known perfectly well that what had been done on other occasions by the fathers, or nephews, or brothers of the prisoners, was not, and could not, by any possibility, be evidence either for or against the accused, with reference to the special offence with the commission of which they stood charged. It was the plainest duty of the Judge, not only not to record any such evidence, but to take care that the witnesses were not allowed to make any statements whatever as to the character of any of the prisoners' relations. We may add that the Judge, in our opinion (independently of the absolute illegality of the admission of such evidence), scarcely treats the matter with becoming seriousness in writing in his judgment in an off-hand manner that a prisoner's "relations *are more or less jail-birds.*"

There is another irregularity in the mode in which the case was tried, which we cannot pass over without notice. The Judge names a witness Dhomun Julahir, and then makes a note that he has not recorded his evidence, adding: "I have examined him "verbally, and he confirms the evidence "above in every respect, and is therefore only "a repetition."

This person Dhomun either was or was not before the Court as a witness. If he was, it was the duty of the Judge to record his evidence as the law provides; if he was not, the Judge had no right to allude to his having made any statement.

On the whole, we do not think that we ought to set aside the convictions, as there is ample evidence of a legal character to support them. But, under the circumstances, the case not appearing to us to be at all an aggravated one, the sentence on Phooleel is too severe, and we alter the sentence on him from six years' to three years' rigorous imprisonment. We reject the appeal of the other prisoner.

The 10th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Dismissal of Complaint—Police Enquiries (Chapter XIV., Code of Criminal Procedure).

Criminal Revisional Jurisdiction.

References under Section 434, Code of Criminal Procedure, and Circular Order No. 19, dated the 21st July 1863.

Queen *versus* Harrak Chand Nowlaka and others.

A Magistrate cannot dismiss a complaint without first examining the complainant.

An enquiry by the police into complaints falling under Chapter XIV. of the Code of Criminal Procedure is not warranted by law.

Jackson, J.—THE question referred by the Sessions Judge in this case is, whether the orders of the Magistrate in these cases are not illegal, in consequence of the Magistrate having dismissed the several complaints on the strength of reports made to him by

the police under Section 180 of the Code, the cases being cognizable under the XIVth Chapter of the Code.

We can have no hesitation in saying that it is against the law to throw out any complaint without first examining the complainant, although, after the complainant has been examined, it is quite competent to the Magistrate, if he sees no ground for proceeding, to dismiss the complaint (Section 67). If the case be not triable by the Magistrate, the Sessions Judge may, in such case, order an enquiry.

In the cases before us, the Magistrate states in the 2nd paragraph of his letter, dated 21st May, that he had first examined the complainants; but, on reference to the papers sent up, we are unable to find any trace of such examination, and we, therefore, conclude that the statement is inaccurate.

We have also to observe that an enquiry by the police into complaints falling under Chapter XIV. does not appear to be warranted by law, Section 180 not being one of the Sections of Chapter XII. which are made applicable to Chapter XIV. by Section 249.

The orders of the Magistrate are quashed, and he will proceed to enquire into these cases according to law.

The 13th June 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Confessions (involuntary)—Evidence (by Police Officers)—Judgments (Irrelevant remarks against prisoner).

Criminal Referred Jurisdiction.

Queen *versus* Dhurum Dutt Ojha and two others.

A police officer acts improperly and illegally in offering any inducement to an accused person to make any disclosure or confession. No part of his evidence as to the discovery of facts in consequence of such confession is legally admissible.

Remarks to the effect that the prisoner was a person of wealth and influence, and had prevented truth from appearing, ought not, unless established in evidence, to find a place in a judgment.

Glover, J.—THE prisoners in this case, Dhurum Dutt Ojha, No. 1, Lalloo Rai, No. 2, and Budree Hoormee, No. 3, have been convicted of murder, and sentenced capitally, subject to the confirmation of this Court.

Dhurum Dutt Ojha has been defended by Counsel.

The case for the prosecution is that the Brahmin prisoner, who is described as a man of position and influence, desirous of ridding himself of his kept woman, Mussamat Poosanee, who had brought a suit against him for maintenance, and had otherwise made public the nature of the liaison between them, sent his servant, the prisoner No. 3, to fetch her and her child (an infant of some two years) from Luchmeepore Pookheria, where she had lived in a pucka house belonging to Dhurum Dutt Ojha, to his own residence at Saogaon.

That, on her arrival there, she was made drunk, and afterwards conducted to a mangoe tope, half a mile or less distant, where the prisoner No. 2, likewise a servant of the Ojha, strangled her, the other two prisoners assisting. That the prisoner No. 2 afterwards strangled the child, and that the bodies of the two victims were carried off by Lalloo and Budree, and flung into a neighbouring "*mun*" or lake.

That they were afterwards removed by the same two prisoners, and carried to a small patch of jungle belonging to prisoner No. 1, where they were buried, and from which they were afterwards exhumed by the police.

It appears from the record that the murder took place on the 6th of March. On the 13th, Drigopal Chowkeedar reported the circumstance at the thannah, and the police commenced an enquiry, the result of which, we may state shortly, was that the prisoners Nos. 2 and 3 confessed that what were said to be the remains of the murdered persons were found, and eye-witnesses to the murder discovered.

The prisoners Nos. 2 and 3 confessed to the Magistrate that they had assisted at the murder of the woman and child by the order of prisoner No. 1, and the prisoner Lalloo repeated his confession at the Sessions. The evidence of the Magistrate, Mr. Beames, was taken as to the fact of the confessions having been properly made before him, and there is no reason to suppose that they were otherwise than voluntarily given.

With regard to the prisoner No. 1, Dhurum Dutt Ojha, the case is different; and we think that he cannot be convicted on the evidence as it stands on the record. It is a matter of great regret that the Sessions Judge did not order a conditional pardon

to be offered to the prisoner Lalloo, and so have secured some reliable testimony against the chief offender, the more especially as he evidently distrusted the evidence of the two eye-witnesses. As it is, the result is a lamentable miscarriage of justice.

We will examine somewhat in detail the evidence on which this case has proceeded. Drigopal, a chowkeedar, deposes to having overheard (whilst going his rounds at night) the wife of the prisoner Budree saying to her husband, "Why did you murder?" Next day, this witness spoke to Budree on the subject, and succeeded in eliciting from him the whole story of the murder, on which he started off to the thannah and gave information.

A head constable made the first enquiries, which resulted in the arrest of all three prisoners; but he was speedily superseded by the Court Inspector who had been specially deputed to investigate the case; and here we must remark with strong disapprobation on the way in which the Court Inspector conducted the investigation. Section 146 of the Code of Criminal Procedure expressly forbids a police officer from offering any inducement to an accused person to make any disclosure or confession; but in the face of this prohibition, a prohibition of course well-known to him, he told the prisoners Lalloo and Budree that, if they would confess, he would manage their release: to use his own words: "The prisoners Nos. 2 and 3 were told by me that I would get them released if they would speak the truth; this is the dustoor."

The Sessions Judge remarks on this: "It is extremely doubtful how far witness No. 2 (the Court Inspector) was justified in thus speaking to prisoner No. 3 who was then doubtless under grave suspicion of murder." We have no doubt whatever that the police-officer's conduct was highly improper and illegal, and that no part of his evidence as to the discovery of facts in consequence of the confessions is legally admissible.

The testimony of the two eye-witnesses, Gholam Hossein and Jhapsee Dhanook, is however on record, and we now proceed to notice it. It is the only direct evidence against the prisoner No. 1; but, if credible, it is amply sufficient to convict him of the murder.

Golam Hossein states that, about three days before the "Sooruj Poojah," he went to the prisoner No. 1's pukha house at Saogaon. He does not say in his evidence at the Sessions what he went there for, and as Dhurm Dutt Ojha had some time before turned him out of house and home, and reduced him from a cultivator to a coolie, it is *primâ facie* unlikely that he would have paid a visit to one who had treated him so badly. At all events, an explanation of his presence should have been obtained. Whilst waiting, as he says, at the door of the room in which Dhurum Dutt Ojha was doing poojah, the prisoner Budree came and reported that he had brought the woman Poosanee and her child, and had placed them in the garden (phoolwaree). This witness was apparently allowed to remain where he was in front of the house and within a few paces of the phoolwaree, unnoticed and unquestioned, and from where he was he says that he saw the prisoners eating and drinking two bottles of *sharab* which had been furnished by Dhurum Dutt Ojha. It was at 3 ghurries of the night that this took place, and the night is admitted to have been a dark one. Now, there are startling improbabilities in this story. In the first place, is it likely that the witness would have been allowed to remain in full view, in front of the house, and never have been discovered or questioned? Again, is it likely that he, standing as he says within 10 paces of the drinking party, would have remained unnoticed by persons who, according to his after-statement, were then meditating a dreadful crime? Lastly, is it likely, or rather is it not so unlikely as to be almost beyond the bounds of reasonable belief, that a high caste Brahmin, such as Dhurum Dutt is said to have been, should eat food and drink wine with two low-caste Hindoos? It appears to us only necessary to read this man's evidence to be convinced of its falseness.

To return however. This witness deposes further that, after eating and drinking, the woman (who was somewhat intoxicated) and the prisoner Budree went away towards the west, Dhurum Dutt and Lalloo coming back to the house. The witness remained where he was, still unquestioned—why, is not stated nor explained—and after waiting some time (both ghurry and ghunta are the words used, and it might be an hour or only 20 minutes) he saw the prisoners Nos. 1 and 2 come out of the house and go south. Witness followed them as he says from curiosity to a place called the Maharaja's Bagheecha, half a mile distant, and he there saw the three prisoners with the woman and the child sitting under a tree.

The witness then describes how that the prisoner Budree threw a cloth over the woman's head, and pulled her backwards, when Lalloo fell upon and strangled her, Dhurum Dutt holding her legs, and how the child, beginning to cry, was afterwards strangled by Lalloo.

He goes on to say that, horrified at the sight, he remonstrated and called out, "What zulum are you doing?" On which Dhurum Dutt Ojha, who, if this witness's statement be true, must have been utterly ignorant of his vicinity, replied, "You are my ryot: hold your tongue."

The bodies were then tied to a bamboo, and the prisoner No. 1 ordered the other two to throw them into the lake; the woman's *saree* was taken from her corpse by the prisoner Dhurum Dutt, torn in half, and given to the two others. This is a point in the case which might, if true, have been corroborated. A *dhobee* of the village is said to have taken one of the halves of the *saree* to wash. But the man was not produced, nor was any attempt made to record his evidence.

The witness then went back to the prisoner No. 1's old house, which is half a mile distant from the new one.

But, before going, he found to his surprise that he had not been alone in his place of espial. Another man, Jhapsee Dhanook, witness No. 4, had followed the prisoner likewise out of curiosity, and had witnessed the murder.

This witness deposes to much the same effect as Gholam Hossein, and there is this difference in favor of his position that he was, or says he was, a servant of Dhurum Dutt, and had therefore a reason for being on the premises at the time the woman is alleged to have been brought there.

After a careful review of this evidence, we have no hesitation in expressing our entire disbelief in any part of it. The improbabilities are glaring, and some portion, *i. e.*, those that refer to what took place at the time of the murder, are, we may almost say, physically impossible. The night was dark, the place a thick mangoe tope: under such circumstances, a man could distinguish nothing of what was going on within even a few yards of him, much less detail with such suspicious minuteness everything that is said to have happened from beginning to end.

Whilst on this part of the case, we may remark that the prisoner No. 2, Lalloo, in his confession before the Sessions Court, denies that these witnesses were present at the time of the murder, and alleges that they were taught what to say by the police authorities and in his presence.

We can conceive no reason for this man's speaking falsely on this one point: he had certainly nothing to gain by doing so; and the excessive improbability of the evidence of Gholam Hossein and Jhapsee Dhanook lends a color to his statement.

And lastly, it is scarcely to be believed that Gholam Hossein, a man who, according to his own account, had been deeply injured by the prisoner Dhurum Dutt Ojha, after witnessing what had put his enemy so completely in his power, should keep silence altogether, and neglect to inform the police, although there was a thanah within two miles of the scene of the murder.

The next witnesses for the prosecution are two, Jolahas Pilla No. 5, and Rohman No. 6. They state that one day (date not mentioned), as they were passing by the lake, they saw "a body, with a child tied to it, floating:" they were not able to say whether the body was that of a male or female, although they passed close to it.

They depose, further, that, on the same day, or rather in the night of that day, about 10 o'clock, they met the prisoners Nos. 2 and 3 carrying a body slung on a *latie* from the direction of the lake. They say that they knew the men and accosted them, and that the prisoners replied "choop, choop," and went on their way eastward.

It is remarkable that these witnesses never mentioned a word of what they had seen until the Court Inspector got hold of them. It is suggested, indeed, that the prisoner No. 1 was a person of great wealth and influence, and prevented the truth from appearing; but there is no evidence of this on the record, and such remarks ought not, unless established in evidence, to have found a place in the judgment.

The last witness, Lal Sahai, proves that a Brahminee woman, the mistress of the prisoner No. 1, used to live in his village of Luchmeepore Pookheria, and that the prisoner Budree took her away from there two days before the "Sooruj Poojah."

This was the case for the Crown.

The bones found in the jungle at the place pointed out by Budree were sent to

the Medical Officer, with the request that he would report on the cause of death—a thing he was, as a matter of course, unable to do. He was not asked to state what the bones were—whether those of adults, or of children, or of the male or female sex. This omission on the part of the Magistrate has destroyed one link of the evidence ; and, as the Medical Officer had died before the trial came on, the omission could not be repaired.

As the case stands, therefore, the only evidence against the prisoner Dhurum Dutt Ojha is that of the witnesses Gholam Hossein and Jhapsee ; and, for the reasons above given, we think it altogether untrustworthy.

Without it, the fact of two bodies, not proved to have been those of the murdered women, being seen in the lake, does not affect this prisoner ; nor does the subsequent discovery of certain bones, which may or may not have been the bones of the deceased and her child in the place pointed out by Budree.

Neither does the fact of the woman's being taken away from Luchmeepore Pookheria necessarily connect the prisoner with her disappearance ; it is evidence against the prisoner No. 3, but a matter of suspicion only against Dhurum Dutt Ojha.

It is greatly to be regretted, as we before observed, that the Sessions Judge did not exercise the power given him, and direct a conditional pardon to be offered to the confessing prisoner.

As it is, we are forced to declare that there is no credible evidence on the record against the man who, we have no doubt, is the principal offender, and to direct his release.

The other two prisoners confessed, the one to the Magistrate, the other to both Magistrate and Sessions Judge. There is no reason to suppose that these confessions were not voluntarily given ; and, taken with the circumstantial evidence, they are sufficient for conviction.

We think, however, that it would not be expedient, under the circumstances of this case, to confirm the sentence of death passed upon these prisoners. We therefore commute it to one of transportation for life.

The 15th June 1867.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Abetment—Section 94, Act XX. of 1866.

Queen *versus* Gopal Prosaud Sein and others.

Committed by the Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of making a false statement, under Section 91, Act XX. of 1866, &c.

Under Section 94, Act XX. of 1866, an abettor may be punished more severely than his principal can be.

Macpherson, J.—We dismiss these appeals, as the convictions and sentences appear to us to be fully supported by the evidence. Nilkunt Nund might have been, and perhaps it would have been better if he had been, charged under Section 474 of the Penal Code. And in his sentence there is this peculiarity and apparent anomaly, that he has received a heavier sentence as an abettor than could have been passed upon him if convicted for the principal offence. But the sentence which has been passed upon him is strictly in accordance with the provisions of Act XX. of 1866, Section 94, from which it appears that the Legislature intended that the Courts should have power in certain cases (as for instance when he is the chief offender, the person really pulling the strings, and for whose benefit the offence is, in fact, committed) to punish the abettor more severely than the person wh actually commits the substantive offence Moreover, the prisoner Nilkunt has in n way suffered from the form which his con viction has taken, for, if convicted unde Section 474, he might have received a fa more severe sentence.

The 17th June 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover *Judges.*

Evidence.

Queen *versus* Mussamut Joomnee and another.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of administering stupifying drug with intent to commit theft.

Recognition of things not before the eyes of deposing witnesses is not evidence against a person accused of having been in possession of those things.

Glover, J.—WITH regard to the appellant Mussamut Joomnee, we think that the facts of the case were properly laid before the Jury, and that their verdict of guilty must stand, there being no point of law involved

But we also think that there has been a misdirection in the case of the other appellant Joomun. He has been convicted of dishonestly retaining in his possession stolen property, the only evidence against him being that a *thalee* said to have been stolen from the prosecutor was found under his arm, he being the brother-in-law of the female prisoner.

Now, this *thalee* was not produced at the trial, and recognition of things not before the eyes of deposing witnesses is not evidence against a prisoner accused of having been in possession of those things.

Moreover, there was no attempt to prove that the prisoner Joomun had a guilty knowledge that the *thalee* had been stolen. He was admittedly altogether unconnected with the theft, and lived a considerable distance off; and, supposing for argument's sake that the *thalee* (an article common in all houses) brought to his house by his sister-in-law was the identical *thalee* stolen from the Pasee, there would arise no presumption that Joomun knew it to be so, or had any reason to suppose that it was so.

We consider that these points in favor of the prisoner ought to have been brought prominently to the notice of the Jury, and that the neglect of the Judge to do so was a substantial misdirection prejudicing the accused's case.

And, as there was no other evidence whatever against the prisoner, we direct his discharge.

The 17th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Irregularity—Conviction and sentence (in the absence of the prisoner).

Criminal Revisional Jurisdiction.

Revision under Section 404, Code of Criminal Procedure.

Queen *versus* Rajcoomar Sing.

A conviction and sentence arrived at by a Deputy Magistrate in the absence of the prisoner were quashed as irregular.

Jackson, J.—THESE proceedings are altogether irregular, and must be set aside.

The conviction and sentence arrived at by the Deputy Magistrate in the absence of the prisoner are quashed, and the proper Magistrate will call the prisoner before him, and, after recording conviction (unless he see reason why the prisoner should not be convicted), he will pass sentence *de novo*, such sentence not exceeding the sentence irregularly passed, and the period of imprisonment which the prisoner has already undergone under such sentence being deducted.

It is not clear what the Magistrate means by the remark that the Joint Magistrate's proceedings, in ordering the prisoner into confinement, were of an executive character, subject to appeal to the Magistrate.

The 17th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Jurisdiction (of Deputy Magistrate to question legality of attachment by Civil Court)—Municipal Tax (Payment of—out of Fine).

Criminal Revisional Jurisdiction.

Reference under Section 434, Code of Criminal Procedure.

Queen *versus* Brojo Kishore Dutt.

The legality or formality of the mode of attachment, allowed by a Civil Court, is not a matter for a Deputy Magistrate's consideration.

Where a Deputy Magistrate, considering that the attachment of a carriage in execution of a decree of a Civil Court was illegal, because it was placed in the custody of the judgment-debtor's husband, and that the husband had acted fraudulently in recovering and concealing the wheels and axles of the carriage on its subsequent distraint for arrears of Municipal tax, convicted him of an offence under Section 424 of the Penal Code, the conviction was set aside.

A Deputy Magistrate has no authority to order arrears of Municipal tax due by a person to be paid out of a fine levied on him.

Jackson, J.—WE are of opinion that the petitioner has been improperly convicted

under the 424th Section of the Indian Penal Code.

It appears from the Deputy Magistrate's judgment that a decree was given against one Panaoolla at the suit of Sowdaminee, the wife of the accused; that, execution of this decree being sued out, the carriage and other moveable property of Panaoolla were attached and placed in custody of the accused.

Subsequently, an officer of the Municipal Commissioners distrained the goods of Panaoolla for arrears of Municipal tax, and seized the carriage in question, after which the accused removed the wheels and axles, and concealed them.

The Deputy Magistrate considered that the attachment of the carriage by placing it in the custody of the accused, who was husband of the judgment-debtor, was illegal and *ab initio* null and void, and that the circumstances of the removal were such as indicated fraud.

We think the legality or formality of the mode of attachment allowed by the Civil Court in this case was not a matter for the Deputy Magistrate's consideration, and that he should confine himself to his own province.

The accused may have acted inconsiderately and improperly in doing any act in infraction of the distraint levied by the Municipal Commissioners, and it was probably with a view to his being dealt with under the provisions of the Indian Penal Code relating to contempt of the authority of public servants or the like that the Chairman authorized the prosecution in the case.

But we think it quite clear that the conviction under Section 424 cannot stand. We set it aside, and order the fine, if it has been levied, to be refunded.

We observe that the Deputy Magistrate ordered the arrears of Municipal tax due from Panoolla to be paid out of the fine, in order for which we are not aware of any authority.

The 17th June 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Finding of Judge—Evidence to prove alibi.

Criminal Revisional Jurisdiction.

Revision under Section 404, Criminal Procedure Code.

Queen *versus* Madho Surrun Singh.

The prisoner was declared entitled to a finding by the Sessions Judge as to the sufficiency or otherwise of the evidence adduced by him to prove his *alibi*, and that he did not abscond to evade justice.

Kemp, J.—THE prisoner has been heard through his pleader.

When this case was before us on a reference by the Sessions Judge under Section 434, we held that the Sessions Judge was wrong in holding that the proceedings of the Assistant Magistrate were illegal, inasmuch as the case had not been struck off the file, because the accused had cleared himself of the crime charged, but simply because there then appeared to be little prospect of bringing the guilty parties to trial.

The prisoner is entitled to a finding by the Sessions Judge of the sufficiency or otherwise of the evidence adduced by him to prove his *alibi*, and that he did not abscond to evade justice.

Remanded for that purpose.

The 22nd June 1867.

Present:

The Hon'ble W. S. Seton-Karr, *Judge.*

Fabricating false evidence—Punishment.

Queen *versus* Kalachand Boidyo, &c.

Committed by the Magistrate, and tried by the Sessions Judge of the 24-Pergunnahs, on a charge of fabricating false evidence, &c.

A sentence of three years' imprisonment is not too severe a punishment for a deliberate attempt to pervert justice by fabricating in one office false statements to be designedly and corruptly used in another.

IN this case the prisoners have been convicted—Kalachand of causing false evidence

o be fabricated, and of having attempted to use the same as genuine; and Motee Lall, of having fabricated false evidence by antedating an order on a petition.

The facts disclosed by the evidence show that the prisoner Kalachand, when accused before the Deputy Magistrate by one Nilmonee Nundee of extortion practised on the 16th of July, wanted to prove that, on the day in question, he was at the Office of the District Superintendent of Police at Alipore, and that Motee Lall, the second prisoner, presented a petition shewing that Kalachand was at Alipore at the cutcherry on the day in question, and got an order endorsed on the back of the petition, and signed by the District Superintendent, Mr. Larrymore.

It now turns out that at the very time the District Superintendent, Mr. Larrymore, was very many miles away from Alipore, engaged on a local enquiry, and that he could not possibly have signed the order on the day in question, nor for some days afterwards.

That the order was antedated and put in to serve the purpose of proving a false *alibi* there can be no doubt; and the inference that Kalachand wanted to make use of this petition in his defence, knowing it to be false, is irresistible.

The second prisoner at first admitted that he wrote the order; but it turns out that he was not really appointed to the office he held until five days after the order.

The Jury were fully and properly charged, and the points in favor of the prisoners, such as they were, laid before the Jury.

The petitioners put in long statements, in appeal, impugning the charge and conviction on the ground of general illegality; but they do not specify what is illegal, or how they are affected thereby, except in a general way.

Act XIX. of 1850, which they quote, has not the remotest bearing on their case; and Section 24 of Act II. of 1855, to which Section I consider they allude, merely says that vakeels are not to disclose the professional secrets of their clients. The witness Nubo Narayan, to whom allusion is thus made, has not made any disclosures. He has merely spoken as to what took place on the original trial of Kalachand, and as to the presentation of the petition at Alipore, on which trial he defended the prisoner. These facts might have been proved without this witness, and, in fact, they are not denied by the prisoner.

Altogether, I am quite satisfied that the prisoners have had a full and fair trial, and that they have been justly convicted.

At the close of their petition, the prisoners complain of the severity of their sentence.

A sentence of three years' imprisonment is by no means too much for a deliberate attempt to pervert justice in this way by fabricating false statements in one office which were to be designedly and corruptly used in another.

The appeals are rejected.

The 24th June 1867.

Present:

The Hon'ble F. B. Kemp, A. G. Macpherson, and F. A. Glover, *Judges.*

Misdirection—Evidence of Accomplice—Corroboration.

Queen *versus* Nawab Jan and others.

Committed by the Magistrate, and tried by the Sessions Judge of East Burdwan, on a charge of dacoity, &c.

Conviction and sentence set aside (Glover, J., dissenting) as to two of the prisoners, on the ground that there was a misdirection to the Jury, because the Judge in summing up omitted to advise the Jury not to convict upon the uncorroborated evidence of an approver, and because he treated as corroborative that which was no corroboration in law.

Glover, J.—ALL the prisoners in this case have appealed, and the appeals of Nawab Jan, prisoner No. 39, Kooderam Mitter, prisoner No. 40, and of Norool Hoodda, prisoner No. 46, have been argued by Counsel.

With regard to the prisoners Nos. 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 26 to 35, and prisoners Nos. 41 to 45, there was independent evidence as to their presence at the dacoity, evidence which appears to have been very fully and fairly laid before the Jury by the Sessions Judge, and no point of law is taken in their petition of appeal. The Jury believed the evidence, and the conviction should stand.

The other three prisoners have been convicted of abetment. And, first, as to the prisoner No. 39, Nawab Jan.

It is contended on his behalf that the Judge misdirected the Jury, and prejudiced the prisoner's case in the following particulars:—

(1.) That he left the evidence of the approver witness Rahmut Sheik to the

Jury, without duly cautioning them as to the nature of that evidence.

(2.) That corroboration of this witness's evidence was necessary, and that what was laid before the Jury as corroborative evidence was in reality not so.

(3.) That the prisoner ought to have had the benefit of the break down of the prosecution in no less than 14 out of the 15 counts charged.

(4.) That the Judge omitted to mention to the Jury the failure of the prosecution in the matter of Nawab Jan's alleged attempt to escape, and of the intercepted letter—omissions which prejudiced the minds of the Jury against him.

(5.) That the Judge ought to have left the question, as to whether the lattials came from the Nawab's cutcherry, and were his servants, for the Jury to decide, and not have directed them that the lattials *did* come from the cutcherry, and *were* the prisoner's servants.

And, generally, that the Jury ought not to have had their attention directed to particular counts of the charge only, but should have been told to consider all the charges together, and to give the prisoners the benefit of any doubt regarding any particular charge, which might arise from the fact that all the rest of the charges had failed.

In support of the appeal, the judgment of the Full Bench of this Court, in the case of Elahee Buksh (V. Weekly Reporter 80), has been relied on; and, with reference to it, I am willing to admit at once that the Judge's charge in this trial is not a satisfactory one; but the question is whether it amounts to a misdirection.

Alluding to the evidence of the approver, the only direct evidence against the prisoner, the Judge said this: "With regard to the "credence to be given to the evidence of "the said Rahmut Sheik, the Jury, when "weighing the same, will remember that it "is the evidence of a party charged with an "offence, deposing under a conditional pro-"mise of pardon. This is no reason for "altogether distrusting the evidence given, "but it is necessary to receive such evi-"dence with caution, especially when it "makes mention of words spoken by the "prisoners, such statements being incapable "of any corroboration or of contrary "proof being adduced to rebut them."

The Judge said further that, although there were various improbabilities in Sheik Rahmut's evidence, still he was of opinion that it should not be rejected as altogether untrustworthy, and he mentioned to the Jury certain circumstances which he considered as corroborative of Rahmut's testimony. This Rahmut was, no doubt, a very unsatisfactory witness; his story was in many points in the highest degree improbable, and he was admitted to have made false statements in at least one particular; still it did not necessarily follow that all that he said was false, and the Judge was not wrong in telling the Jury that it did not.

As to the corroboration, so much of it as referred to Nawab Jan's presence at Kulna, and to his behaviour there, was, I have no doubt, improperly put before the Jury; for corroboration of Rahmut's statement as to the Nawab's going to Kulna would be no evidence to connect the prisoner with the offence of which he has been convicted. Corroboration must be on a point material to the issue, and the evidence of fifty respectable witnesses in corroboration of Rahmut's account of Nawab Jan's presence at Kulna would not make Rahmut's evidence on other and entirely different points a whit stronger than it was before. Then as to the cries or shouts said to have been raised by the lattials at the time of the attack. It is urged that the Judge was wrong in telling the Jury that they (the cries) were corroborative evidence. What the Judge says is: "If the Jury believe that this cry (*i. e.*, this "is the day of Nawab Jan, Koodeeram "Mitter, and Norool Hoodda) was "raised, although the mention of these "names of the prisoners by the lattials "cannot be taken as direct evidence against "them, it is clear that the mention of their "names by parties who are known to have "been their servants may be taken as a "corroboration of the other circumstantial "evidence." What I understand the Judge to mean is, that Rahmut's statement as to Nawab Jan's action in the matter being in evidence, if the Jury *primâ facie* believed his connection with the attack, they might take as corroborative evidence the cries of the lattials, who came from his cutcherry, and were his servants; and, if this were his meaning, I cannot say that the Jury were improperly directed. If he had told the Jury to consider these cries as corroborative evidence *per se*, and without reference to the evidence connecting Nawab Jan with the conspiracy, then I have no doubt he would have been wrong.

Again, as to the corroboration derivable from the prisoner Nawab Jan's motives for

abetting the attack on Jurreefunnissa's premises, it is urged that the Judge should have told the Jury that there was no evidence of any motive. On this point it seems to me that the Judge went quite far enough. He said: "The causes are said "to be enmity existing on account of quarrels "arising out of the institution of a new "market by the prisoner No. 39 (Nawab "Jan) through his servant Koodeeram, and a "claim which had been set up to the pro-"perty held by Jurreefunnissa by the pri-"soner Norool Hoodda."

The Judge then proceeded to comment on the different ways in which different people were actuated, and ended: "The Jury must "consider whether there is proof that some "degree of enmity did exist between Nawab "Jan and the parties who have been attack-"ed in this case, and also whether they are "satisfied with the proof that there was an "intimate relation existing between the "prisoner Nawab Jan and Norool Hoodda." He then mentioned the evidence which appeared to connect the two men together, and left it to the Jury to believe that evidence or not.

With regard to the circumstantial corroboration of the approver's evidence as to Nawab Jan's motive in going to Kulna two days before the dacoity, the Judge said: "The cause assigned for the visit of Nawab "Jan to Kulna is insufficient," and he gave his reasons for so thinking, leaving it to the Jury to say whether the prisoner had accounted for his going to Kulna or not. The question does not appear to have been very material one way or the other, but the Jury were entitled to consider it; it was a circumstance of suspicion which might have been taken in connection with the other evidence in the case. Taking the Judge's charge on the point of corroboration, therefore, as a whole, I should not say that it was wrong in law, though it might easily have been more explicit and careful, considering the extremely weak nature of the evidence throughout. But, were it otherwise, if the Judge's caution to the Jury had been sufficiently strong, the objection would fail, for, if after due and sufficient warning a Jury choose to believe the uncorroborated evidence of an accomplice even in the face of violent improbabilities, their finding would, I apprehend, be legally unassailable.

Then, as to the 3rd objection taken by the prisoner's Counsel, it appears to me that, as the Judge charged for an acquittal on the 14 counts, the prisoner had all the benefit that he was entitled to, and that there would have been no ground for distrusting the evidence in support of the "abetment," merely because there was none to prove active participation in the dacoity itself, or of knowingly retaining portions of the plundered property afterwards. Moreover, the Jury had all the evidence before them, and could judge for themselves. It was not, I conceive, the Judge's duty to do more than point out the weakness of the evidence on these counts.

The 4th objection relates to the Sessions Judge's omissions.

No doubt, it would be a good ground of appeal if, in summing up evidence, a Judge were to lay before a Jury only that which bore against the prisoner, and not that also which was in his favor.

Now, the Judge has admittedly made no mention either of the alleged attempt to escape, or of the letter said to have been found in the Jail well; but nothing was made of these points at the trial. It was never seriously alleged that Nawab Jan attempted to evade arrest (the word escape has been used improperly—Nawab Jan never tried to escape after being arrested), and the question seems never to have been entertained; it was certainly not in the least relied upon for the Crown, and it cannot be supposed that the omission of the circumstance from the Judge's charge had any prejudicial effect on the minds of the Jury.

The same remarks apply to the letter. The evidence on both points appears to me to have been virtually struck out of the record, and was not put to the Jury, either one way or the other. It would have been better had the Judge noticed the circumstance; but I cannot think that his not having done so prejudiced the prisoner, or amounted to a misdirection.

On the 5th objection I think that the Judge did, as a matter of fact, leave both questions to the Jury. There was evidence on both points—in the first a considerable mass of evidence; and although the Judge used the words "known to have been their servants," he referred, as it seems to me, to the evidence which he had already pointed out to the Jury, and left the whole matter in their hands.

His words were: "It is first necessary "to see where the lattials are said to have "come from, and where they are said to have

"returned after the attack. The universal "story is that they came from the Srikisto- "pore cutcherry, and returned to it again; "and, though there appears to be some doubt "as to whether the said cutcherry is actually "visible from the houses which were plun- "dered, there can be no doubt but that the "fact that the attack came from the cut- "cherry is substantially correct: and that this "was the case, is attested directly by the "witness Tofa Sheik, one of the witnesses "for the Crown, who swears that he was "engaged in the attack, and went from the "Srikistopore cutcherry. The Jury will "consider whether this evidence, corroborat- "ing that of the other witnesses for the "prosecution, is to be believed, and whether "they are satisfied that the attack did "emanate from the said cutcherry: that "cutcherry is the sudder cutcherry of the "Kalypore Pergunnah, as has been proved "by the evidence of many witnesses, and "it is not denied that the prisoner Nawab "Jan is the zemindar of that pergunnah, "although it is said that it had been farmed "out to several different parties in the month "of August last, and several of the witnesses "swear that the prisoner No. 39 remained "at that cutcherry in the capacity of naib, "and this is admitted by the prisoner in his "examination before the Court."

On the whole, therefore, and whilst admitting that the Judge's charge is not as full and complete as it ought to have been. that it is in fact an unsatisfactory charge, I do not think that such a substantial misdirection has been made out as would justify this Court in interfering with the verdict found against Nawab Jan.

The case against Koodeeram is somewhat stronger than that against his master Nawab Jan, inasmuch as two approver witnesses deposed to his giving orders for the dacoity, and there was circumstantial evidence besides, which, if believed, went some way to support the charge. The remarks above made regarding the approver's evidence apply equally to this prisoner; and although, as I said before, I could have desired to see the Jury more carefully and strictly warned against what I should have considered, had I been trying the case. very suspicious evidence, still I cannot say that they were *not* warned, or that the Judge's charge was a misdirection.

There remains the case of Norool Hoodda.

And this prisoner is in a very different position from that of the other two appellants. With the exception of the fact that he accompanied Nawab Jan to Kulna, there was no evidence whatever against him. He was not mentioned by the approver witness as having been present when Nawab Jan ordered the attack; nor is there anything to connect him with it. The alleged facts that he was assisted by Nawab Jan in trying to defeat Jurreefunnissa's claims—that he was at feud with that lady, and was to have been put in possession of her property—even if proved, were no evidence against him: nor (he not being proved to have been connected with the conspiracy) were the cries of the lattials at the time of the dacoity. His filing a petition against Jurreefunnissa just before the dacoity, and his sending Prannath to do the same after the dacoity, may have been suspicious circumstances, but they raise no fair presumption that he abetted the commission of the dacoity, and the evidence of alleged enmity was altogether inadmissible, and should have been rejected.

It appears to me therefore that, as regards this prisoner, the Judge should have directed the Jury to find a verdict of "not guilty," on the ground that there was no evidence against him, and that the Judge's charge in this respect was a substantial misdirection prejudicial to the prisoner.

I would order the discharge of this prisoner.

A question was raised by the appellant's Counsel as to the amount of punishment. They contended that, even if guilty, the prisoners Nawab Jan and Koodeeram had been visited with the heaviest punishment allowed by law, and that such excessive severity was uncalled for.

The sentences—ten years' transportation with heavy fines—are undoubtedly severe, but I cannot say that they are excessive for the offences found to have been proved. Two separate dacoities, with reiterated assaults on the police, disclose a state of lawless violence which most properly subjects the abettors of such outrages to very severe punishment, and this Court would not, in my opinion, be justified in practically nullifying the verdict of the Jury, because it had doubts as to the correctness of that verdict.

I would dismiss the appeals of Nawab Jan and Koodeeram.

Kemp, J.—I quite concur with my learned brother in rejecting the appeals of the prisoners Nos. 10 to 35, and Nos. 41 to 45.

I am also of opinion that there was no evidence whatever to go to a Jury in the case of the prisoner Norool Hoodda, and that he must be discharged.

With reference to the prisoners No. 39, Nawab Jan, and No. 40, Koodeeram Mitter, who have been convicted of the offence of abetment of dacoity, I am of opinion that the Judge's charge to the Jury contains misdirections in points of law; that he has omitted to guide the Jury as to the nature and weight of the evidence; in short, that there are defects and omissions whereby the prisoners have been materially prejudiced. Such being the case, I would set aside the verdict of the Jury and the convictions founded upon it, and order the prisoners to be discharged.

My learned brother, whilst admitting that "the charge of the Judge is not as full and "complete as it ought to have been, that it is "in fact an unsatisfactory charge," is nevertheless of opinion "that no such substantial "misdirection has been made out as would "justify the Court in interfering with the "verdict found against the prisoners Nawab "Jan and Koodeeram Mitter." I regret that, after much consideration, I cannot concur in this opinion.

I take the case of the prisoner Nawab Jan first. This prisoner was arraigned on no less than 15 counts, including one charging him with the guilty receipt of a portion of the stolen property, a charge which hopelessly broke down. He was acquitted on 14 out of the 15, and was convicted of abetment, and sentenced to 10 years in transportation, and to pay a fine of rupees 10,000, which is to be levied from his estate, and paid as compensation to Jureefunnissa and Muksood Ali in equal proportions.

Against the prisoner Nawab Jan, the case being stripped of all extraneous and suspicious features, such as his presence at Kulna at the time of the dacoity without any apparent good reason, there is absolutely nothing that can be called evidence beyond the statement of the approver-witness Ruhmut Sheik. This witness, the menial servant of the prisoner, states that two days before the plunder took place, he took a letter from the prisoner Nawab Jan to the Srikistopore cutcherry, a cutcherry admittedly situated in the prisoner's zemindary—that Nawab Jan sealed the letter, the contents of which were unknown to the witness. He also refers to a conversation said to have taken place between Nawab Jan and another prisoner, Prannath, who has been convicted, in the course of which the latter said to the former, "The houses have been plundered, and are burnt;" Nawab Jan said, "Very well." On cross-examination this witness said that Nawab Jan gave the order to the prisoner Koodeeram about 12 days before the plunder; that there was no one present at the time.

In submitting this evidence, which comes from a tainted source to the Jury, the Judge wholly omitted to tell them that this witness had been hunted up after the case had been committed to the Sessions, and while his master, the prisoner Nawab Jan, was in hajut awaiting his trial.

The Judge, in my opinion, did not, with sufficient emphasis, caution the Jury as to the danger of paying any respect to the testimony of the approver Rahmut Sheik, and he wholly omitted to guide them as to what amounted to legal corroboration, *viz.*, that the testimony of the approver ought to be corroborated in some material circumstance, such circumstance *connecting* and *identifying* the prisoner with the offence. In the case of Elahee Buksh, reported in Volume 5 of the Weekly Reporter, Criminal Rulings, page 83, a quotation from the charge of Baron Alderson in the case of Rex *versus* Wilkes and Edwards is given. That learned Judge said: "There is a great difference between confirmation to the circumstance of the felony and those which apply to the individuals charged. The former only prove that the accomplice was present at the offence; the latter show that the prisoner was *connected* with it. The distinction ought always to be attended to."

The Sessions Judge omitted to draw the attention of the Jury to this distinction, and the circumstances of corroboration which he submitted to them as sufficient in law were clearly not so. For instance, he says: "With regard to the prisoners Nawab Jan and Koodeeram Mitter, there is the fact sworn to by many witnesses that their names were called out by the lattials when they attacked the house." "If," says the Judge, "the Jury believe that this cry was raised, although the mention of the names of the prisoners by the lattials cannot be taken as direct evidence against them, it is clear that the mention of their names by parties who are *known* to be their servants may be taken as a corroboration of the other circumstantial evidence which has been adduced against the said prisoners."

I am of opinion that this was clearly a misdirection. It is admitted that the prisoners were not present at the time of the dacoity. To make the cries of the dacoits corroborative evidence against the prisoners, it must first be proved that the dacoits were set in motion by the prisoners, and that the offence was the probable result of the abetment or a part of the conspiracy.

The Judge was wrong in telling the Jury that the cries were uttered by persons known to be the servants of the prisoners. He ought to have told them that, unless the evidence established the fact that the prisoners did abet the offence, and that the dacoits were the hired servants of the prisoners, the cries of the mob ought not to be received as evidence as forming part of the *res gestæ*, and showing the character of the principal fact.

Note.—The prisoners were acquitted of the charge of hiring the lattials.

Again, the Judge tells the Jury "that the witness Rahmut Sheik swears that the prisoner Prannath came to Nawab Jan at Kulna before he had laid his complaint before the Deputy Magistrate, and he swears that Norool Hoodda accompanied Nawab Jan to Kulna, and stayed with him there. "*Any of these points*," says the Judge, "if believed by the Jury, will serve *to connect* the prisoner Nawab Jan in some measure with the commission of the offence.

How the fact of Prannath coming to Nawab Jan at Kulna, or the circumstance that Norool Hooda accompanied Nawab Jan, and stayed with him at Kulna, served to connect the prisoner Nawab Jan with the substantive offence, the abetment of which he is charged, I am at a loss to understand.

It is difficult to estimate to what extent these remarks may have influenced the mind of the Jury. That they were wrong, and calculated to prejudice the prisoner, appears to me to admit of no doubt.

Then, as to the motive for so gross an outrage, an all important feature in the case—for an attack repeated in the presence of and in direct opposition of the police, in which a very large sum of money (Rupees 15,000) and property of great value was robbed, could not but have been with a motive—the Judge tells the Jury that "the causes are said to be" (not proved to be) "enmity on account of quarrels arising out of the institution of a new market by the prisoner Nawab Jan through his servant Koodeeram, and a claim which has been set up to the property held by Jurreefunnissa by the prisoner Norool Hoodda."

The Judge then tells the Jury that the prisoner Norool Hoodda had been already imprisoned on account of a somewhat similar attack during the lifetime of Gholam Rohman, the husband of Jurreefunnissa. He concludes his charge on this head, *viz.*, motive, with these remarks. "The Jury must consider whether they are satisfied with the proof that there is an intimate relation existing between the prisoner Nawab Jan and Norool Hoodda, who, as a claimant for the property, *may be considered* to have some motive to lead him to *instigate* the offence."

These remarks are, in my opinion, altogether improper, and ought not to have been submitted to a Native Jury, who are only too apt to adopt any suggestion, however speculative, as to motives for any given crime.

"Trial by Jury in the Mofussil is," as observed by the learned Chief Justice in the case of Elahee Buksh quoted above, "in its infancy: the persons of whom Juries are generally composed are necessarily more dependent upon the Judge than they are in England for sound and proper advice and assistance." In the present case we find the Judge suggesting to the Jury the following speculative motives for the crime, *viz.*, the erection of a new market, an undertaking in which, I may observe, Nawab Jan appears to have been wholly successful, and which would supply a motive for aggression against him and not on his part, the fact that Norool Hoodda had petitioned to take out letters of administration to the estate of Gholam Rohman, deceased husband of Jurreefunnissa, and the relationship between Nawab Jan and Norool Hoodda, a fact never denied.

A former conviction is also alluded to as tending to implicate Norool Hoodda in the present offence.

The mere existence of relationship between the parties and the assertion of a right under Act XXVII. of 1862 are surely not facts supplying or even suggesting an adequate motive for so grave an offence—much less as serving, as the Judge tells the Jury, to connect any of the prisoners with the commission of the offence. The allusion to the former conviction of one of the prisoners was highly improper, and yet it was

unfortunately just one of those remarks which, of all others, would have very great weight with a native Jury.

As already observed, my learned brother admits that the charge is an unsatisfactory one. I go much farther. I am of opinion that, in a case of this importance, when powerful arguments were doubtless urged upon the attention of the Jury in favor of opposite views of the question, it was of the utmost importance that the summing up of the Judge should be accurate; that it was his duty to have directed the Jury as to the legal weight which ought to be attached to the evidence, as well as to have correctly stated what was, and what was not, legal corroboration of the approver's statement. Not having in my opinion done so, the prisoner has been prejudiced, and he is entitled to his discharge. Under the authority of the decision in the case of Elahee Buksh, I am not necessarily bound to send back the case for a new trial. There was evidence which is valid in law, *viz.*, the uncorroborated testimony of the approver. On the evidence of this witness, if the trial had been with Assessors, I should on appeal have not hesitated to acquit the prisoner. But, for reasons above stated, there was in my judgment error in law in the summing up of the evidence which prejudiced the prisoner, and caused a failure of justice, such as to warrant this Court in setting aside the verdict of guilty, and directing his discharge.

The above remarks apply generally to the case of the prisoner Koodeeram Mitter. This prisoner is the naib of the prisoner Nawab Jan, and it is said that he acted under the orders of his employer. Against this prisoner, there is the evidence of the approvers Koodeeram and Baboo Sheik. This evidence has not been properly submitted to the Jury, and they have been directed to accept, as corroborative of this evidence, facts which do not legally corroborate it. I have entered into this part of the case in treating of the case of the prisoner Nawab Jan. It is not necessary to repeat my remarks. The evidence of the two mookhtars Denoo Sing and Kalichunder Chuckerbutty, which the Judge directs the Jury to consider as against this prisoner, do not in any way connect the prisoner with the particular offence with which he is charged. The conversation said to have passed between him and the mookhtars may have been about a totally different transaction. There is nothing in the conversation to connect the prisoner with the case before the Court.

As this prisoner has been equally prejudiced with the prisoner Nawab Jan by the defects and omissions in the charge, he is in my opinion fairly entitled to his discharge, which I would accordingly order.

Macpherson, J.—As regards the prisoners Nawab Jan and Koodeeram Mitter, I think there has been a misdirection which makes it necessary that the conviction of, and sentence on, each of these prisoners should be set aside.

In the case of Elahee Buksh (V. Weekly Reporter 80, Criminal), which was tried by a Full Bench, it was laid down (page 87) by the Chief Justice, the majority of the Court concurring, that, "if a Judge, instead of "advising a Jury not to convict upon "the mere uncorroborated evidence of "an accomplice, were to advise them to "convict upon such evidence, or were to "tell them that the uncorroborated evidence "of an accomplice under a tender of pardon "was admissible, and that it was for them "alone to form their opinion upon it, "a conviction founded upon such evidence "would be legal, and that such evidence "without corroboration might be acted upon "with as much safety as that of any "other witness; *the error in the direction* "*would form a good ground of appeal.*" And, again, that "*it would be an error in* "*summing up* if a Judge, after pointing out "the danger of acting upon the uncorro-"borated evidence of an accomplice, were to "tell the Jury that the evidence of the ac-"complice was corroborated by a fact which "did not amount to any corroboration at "all."

If the case as against Nawab Jan be looked upon as a case in which the conviction was based exclusively on the uncorroborated evidence of the accomplice, Rohomut Sheik, the conviction is clearly bad under the rule laid down by the Full Bench in the first of the two passages just quoted; because the Judge did not, in his summing up, direct or advise the Jury that they ought not to convict upon the uncorroborated evidence of the accomplice. If, on the other hand, the case is looked on as one the conviction in which is based upon the evidence of the accomplice as *corroborated* by the evidence (which appears to be the view which the Sessions Judge intended the Jury to take of it), then the conviction is, in my opinion, bad, because the evidence of the accomplice is not in fact corroborated by any evidence at all.

There is no corroboration such as adds to the weight of the accomplice's evidence against Nawab Jan; because there is no evidence apart from that of the accomplice which identifies the prisoner with the commission of the offence with which he is charged; nothing which distinctly goes to prove that he was in any way connected with the commission of the principal offence. Facts which do not shew the connection of the prisoner with the commission of the offence with which he is charged are no corroboration in the sense in which the word is used in such cases, although they may tend to shew that certain portions of what the accomplice says are true.

It is said that, as it is proved by many witnesses that, when the house was attacked, the attacking party made use of Nawab Jan's name, this is corroboration of the accomplice's story. But, in my opinion, these cries cannot be used against Nawab Jan. The case for the Crown is that Nawab Jan was at the time many miles off at Kulna, and, that being so, I cannot see that cries used by the lattials are evidence against him. There is nothing in such cries which necessarily brings the offence home to the prisoner. The cries might possibly have been used for the purpose of misleading those attacked, even if the attacking party had had no connection whatever with Nawab Jan.

I think there has been a misdirection and a failure of justice in consequence. It is contended that the summing up is substantially correct, and that the prisoner has not been prejudiced by the errors which have been committed. In this view I cannot concur. The Sessions Judge was bound to follow the rule laid down by the majority of the Full Bench in Elahee Buksh's case. This he has not done, and I consider that the summing up was very substantially wrong. Such being the case, it is impossible for one not to hold that the prisoner has been thereby prejudiced. I, therefore, think the prisoner Nawab Jan should be discharged.

For similar reasons, I am of opinion that Koodeeram Mitter also ought to be discharged. Two accomplices gave evidence against him. In other respects, his case resembles that of Nawab Jan, and is governed by the like principles.

The 24th June 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

False Evidence—Evidence—Misdirection.

Queen *versus* Sheikh Tufani.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of false evidence.

A prisoner's inability to say where his son was on the 4th Pous is no evidence on which to direct a Jury to convict him of false evidence for saying that on the day previous (3rd Pous) his son was ill at home.

Hobhouse, J.—THE prisoner was charged with intentionally giving false evidence in a stage of a judicial proceeding, was found guilty by the Jury, and was sentenced by the Judge to one year's rigorous imprisonment.

The alleged false statement was laid in the following words, *viz.*, "that the prisoner had falsely stated that on the 3rd of Pous his son was at his (prisoner's) house sick of a fever," and it arose in this way.

The said son had charged a certain person with an assault upon him, and the 3rd Pous was fixed as the day of hearing; but on that day the prisoner came forward, and asked for a postponement of the case, on the ground of his son's sickness; and, on the requisition of the Magistrate, the prisoner made declaration on solemn affirmation of that sickness in the words now charged against him as false.

There is not on the record any evidence to shew whether or not the prisoner's son was sick of fever at prisoner's house on the 3rd Pous. The only evidence put before and believed by the Jury was that which went to show that on the 4th Pous the prisoner's son was not at home sick in prisoner's house.

This being the only evidence, the Judge charged the Jury in the following words:—

"The charge against the prisoner is that he intentionally made a false statement before the Magistrate at Moonsheegunge by stating that his son Fyzoo was sick at home that day, the 3rd Pous. An enquiry was made

next morning, and the witnesses state that, when they went with the constable to his house, he himself said that his son was not at home, and he could not tell where he was to be found. What prompted the prisoner to adopt the course he did, is not easy to see; but with that you have no concern; if you believe that the witnessess are speaking the truth when they say that the prisoner on the morning of the 4th could not tell where his son was to be found, there is presumptive evidence of the strongest character that his statement of the previous day was a deliberate false statement."

In these words there is a manifest misdirection and consequent error in law, for it is obvious that the prisoner's inability to say where his son was on the 4th Pous is not only no presumptive evidence, but is no sort of evidence at all, that prisoner spoke falsely when he said that his son was ill at home on the 3rd Pous, the day previous.

The question was, was prisoner's son on the 3rd Pous not sick at home, and, if so, did prisoner know that his son was not so sick at home, or not believe that he was so.

There was no evidence at all bearing on this question.

There was therefore no evidence to go to the Jury on the real point of the prisoner's guilt, and there was a manifest misdirection and error in law in the direction to the Jury to convict on what was not evidence.

Under these circumstances, I think that the conviction must be set aside, and the prisoner discharged.

Jackson, J.—I concur.

The 25th June 1867.

Present:

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges.*

Section 218, Penal Code—False Evidence.

Criminal Jurisdiction.

Reference under Circular Order No. 27, dated 17th June 1863.

Queen *versus* Shama Churn Roy.

Revised under Section 404, Code of Criminal Procedure.

The intention is an essential ingredient in the offence contemplated by Section 218 of the Penal Code.

The making of a false return of service of summons is an offence punishable, not under Section 181, but under Section 193 of the Penal Code, and is cognizable by the Court of Session alone.

Jackson, J.—THIS is a reference which comes before us under somewhat peculiar circumstances. Shama Churn Singh Roy, a peada of the Deputy Collector's establishment at Serampore, was convicted before the Deputy Magistrate of the Division on two charges under Sections 181 and 218 of the Indian Penal Code, and sentenced (for his two offences) to rigorous imprisonment for 6 months. He appealed to the Judge, by whom the conviction and sentence were affirmed, the Judge treating the case as one in which only facts were in issue.

After this, the Magistrate of the District, being of opinion that the conviction was bad in law, requested a reference to this Court, and the Judge has made the reference in the form prescribed by Circular Order, dated 17th June 1863, No. 17.

The facts are these: one Gunesh Mundul had been named as a witness for the defendant in a suit for a kubooleut before the Deputy Collector, Baboo Gopal Chunder Mookerjee, and summons was directed to him, which was entrusted for service to the peada, Shama Churn.

The latter afterwards made return to the effect that he had served the summons on Gunesh; and, as Gunesh did not appear, the Deputy Collector proceeded against him by prosecution under the 174th Section of the Indian Penal Code. Gunesh denied the charge.

In the investigation of *this case*, in which Shama Churn was examined as a witness (19th February), the Deputy Magistrate ascertained that Shama Churn had not gone to serve the summons at all, but that, it had been taken to the house of Gunesh by Shama Churn's brother, Huboo; and that as Gunesh could not be found, personal service was not effected.

He, the Deputy Magistrate, thereupon at once put Shama Churn on his defence for making (19th February) a false return and a false statement on oath. Shama Churn denied

the charges, and named witnesses in his defence. These men were summoned and examined (20th February), but the Deputy Magistrate did not believe them, and convicted Shama Churn on both charges (28th February.)

It is quite clear that the conviction on both heads is erroneous.

That under 218 is wrong, because the facts do not constitute the offence contemplated. The intention is an essential ingredient, and that intention in this case appears altogether wanting. From the ground on which the Deputy Magistrate put the conviction, as well as from the facts in evidence, it would appear that there was no intention, and that the Deputy Magistrate found no intention of the kind mentioned in the Act, and the Deputy Magistrate evidently referred to what is, no doubt, a most reprehensible practice of serving-peons delegating their duties to other parties, and reporting as if they had performed them in person.

The conviction under 181 is wrong, because the offence with which the prisoner was chargeable was clearly the giving false evidence in a judicial proceeding, an offence under Section 193 cognizable by the Court of Session alone. This would be equally the case, whether the evidence was given on the enquiry before the Deputy Magistrate or in the suit before the Deputy Collector.

This is a point upon which the Judge of Hooghly was instructed in a letter from this Court, dated 7th May 1866.

The conviction must therefore be set aside, and the prisoner discharged.

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The 26th June 1867.

Present :

The Hon'ble G. Loch, *Judge.*

Receiving of stolen property—Complaint.

Queen *versus* Gowree Singh.

Committed by the Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of dishonest retention of stolen property.

The police may, without any formal complaint, apprehend any person found with stolen property.

THE objections raised to the conviction are apparently without foundation. There is no necessity for any formal complaint in such cases. By Section 68 of Act XXV. of 1861, the Magistrate has authority, without any complaint, to take cognizance of any offence which may come to his knowledge; and, by Clause 2, Section 100, the police may apprehend any person against whom a reasonable suspicion exists of his having been concerned in any such offence, *i. e.*, those mentioned in Column 3 of the Schedule attached to the Act; and Clause 5 of the same Section says that the police may apprehend any person found with stolen property. It would, as the Judge remarks, have been impossible to identify the property, *viz.*, ghee, unless it had been kept in the original jars, and then those jars might have been identified; but this is immaterial in the present case, for the prisoner confessed to the Magistrate that he had received the ghee from persons who told him that it had been acquired by dacoity. His own confession, therefore, convicts him of a guilty knowledge. I reject the appeal.

The 27th June 1867.

Present :

The Hon'ble G. Loch, *Judge.*

Murder—Culpable Homicide not amounting to Murder—Grievous Hurt.

Queen *versus* Madur Jolaha.

Committed by the Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of culpable homicide not amounting to murder.

Explanation of the difference between murder, culpable homicide not amounting to murder, and grievous hurt.

IT appears to me that the Judge misunderstands the nature of the offence of culpable homicide as set forth in the Penal Code.

Culpable homicide is murder if committed under any of the circumstances mentioned

in the 4 Clauses of Section 300. The offence becomes "culpable homicide not amounting to murder," when it is accompanied by any of the Exceptions mentioned in Section 300.

In both offences, the law supposes that there is an *intent to kill* or *a knowledge that death would result from the act*, but the more heinous features of the offence of murder disappear when any of the Exceptions noted in Section 300 intervene, and the crime then becomes "culpable homicide not amounting to murder." When there is no intent to kill, or knowledge that death is likely to follow the act, the offence is neither murder nor culpable homicide not amounting to murder, but is reduced to "grievous hurt." The Judge will observe that the Penal Code contains no such offence as culpable homicide, as was understood by that term before the Code came into operation. Under the former procedure, the prisoner would have been very properly convicted of culpable homicide; but now, as the Judge finds that the prisoner only intended to inflict injury on his wife, or knew that the blow must have that effect, the offence is one of grievous hurt, and not of culpable homicide not amounting to murder. The conviction should have been of the former offence; but I see no reason to interfere with the sentence passed upon the prisoner, and dismiss the appeal.

The 29th June 1867.

Present:

The Hon'ble W. S. Seton-Karr and C. P. Hobhouse, *Judges.*

Hurt—Grievous Hurt—Evidence—Admission.

Queen *versus* Bysagoo Noshyo.

Committed by the Magistrate, and tried by the Sessions Judge of Dinagepore, on a charge of voluntarily causing grievous hurt, and culpable homicide not amounting to murder.

Where a wife died from a chance-kick in the spleen inflicted by her husband on provocation given by the wife, the husband not knowing that the spleen was diseased, and showing by the blow itself and by his conduct immediately afterwards that he had no intention or knowledge that the act was likely to cause hurt endangering human life—HELD that the husband was guilty of an offence under Sections 319 and 321 of the Penal Code, and not of an offence under Sections 320 and 322.

An admission by the husband in the presence of several witnesses that he had killed the wife, and that she died after receiving the kick, was held to be direct evidence against him.

Hobhouse, J.—THE prisoner who appeals in the case has been found guilty, by the Sessions Judge and Assessors below, of voluntarily causing grievous hurt, and has been sentenced by the Sessions Judge to five years' rigorous imprisonment.

I am of opinion that this finding and sentence are not good in law.

The facts proved in evidence are that the prisoner's wife, the deceased, angered him by negligently permitting some cattle to eat the prisoner's "dhan;" that a quarrel thereupon ensued; that, in the course of that quarrel, the prisoner struck his wife a blow on the face, and gave her a kick in the spleen, and that this kick ruptured the deceased's spleen, so that she died immediately.

Now, there is nothing to show that the prisoner knew that his wife's spleen was diseased; on the contrary, the medical evidence goes to show that he was not likely to have known it, and, on the other hand, there is evidence to show that the deceased gave provocation; and it is a presumption which has not been rebutted that, but for the fact of the spleen being diseased, the kicks given would not have caused death, and that prisoner is therefore in the position of a person who has committed an act falling within the last provision of Illustration (*b*), Section 300, Indian Penal Code.

He did intend bodily injury, but not murder: nor can it, I think, be said that he intended grievous hurt, for it cannot be said that he intended to cause, or knew that he was likely to cause, a hurt endangering life within the meaning of Sections 320 and 322. What he did was to strike a chance blow on provocation given, the striking of which he immediately repented, for he was found with the woman in his arms succouring her.

I would rather say that his act was that of a person who intended to cause hurt within the meaning of Sections 319 and

321, Indian Penal Code, and I would find him guilty under Section 323, and sentence him to one year's rigorous imprisonment.

I observe that the Sessions Judge says that there is no direct evidence against the prisoner; but I find that prisoner admitted in the presence of several witnesses that he had kicked the deceased, and that she had died after receiving the kick, and this, I would remark, is direct evidence against the prisoner.

Seton-Karr, J.—I concur. A sentence of one year is ample for the offence which the prisoner has committed.

The 29th June 1867.

Present :

The Hon'ble W. S. Seton-Karr, *Judge.*

Sessions record—Principal documents.

Queen *versus* Sheikh Bheekun.

Committed by the Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of fraudulently using as genuine a forged document.

The principal documents in a Sessions case should be put in a prominent place on the record, and not buried in a mass of papers.

I HAVE to complain, as I have complained in other cases from other districts, that the two principal documents on which the whole case turns have not been put in a prominent place on the record, but have been buried in a mass of papers.

Papers said to be forged or tampered with should be put with the evidence, taken at the Sessions, in so conspicuous a place as to be available at once.

I do not understand on what grounds the Assessors would acquit the prisoner.

The evidence of Wahed Ali and Sukhawut Hossein and others is precise and quite unrebutted, and the prisoner obviously used the documents, shewn to be forgeries, for his own benefit and with a corrupt intention.

The conviction under Section 471 seems correct and proper, and the punishment is appropriate.

The appeal is rejected.

The 29th June 1867.

Present :

The Hon'ble C. P. Hobhouse, *Judge.*

Mischief by Fire—Charge.

Queen *versus* Durbarro Polie.

Committed by the Magistrate, and tried by the Sessions Judge of Dinagepore, on a charge of committing mischief by fire.

In a case of mischief by fire with intent to cause the destruction of a dwelling-house, the charge should lay the intent as an intent to cause the destruction, not of a house simply, but of a house used as a human dwelling.

THE prisoner is clearly proved guilty of the offence of committing mischief by fire, intending to cause the destruction of complainant's dwelling-house, and has been appropriately punished.

The appeal is, therefore, dismissed.

I observe that the charge lays the intent as an intent to cause the destruction of a "house" simply.

I would point out that this is not a sufficient charge, for the destruction must be a destruction, not of a "house" simply, but, as in this case, of a house "used as a human dwelling."

The 1st July 1867.

Present :

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Jurisdiction—False Evidence.

Reference by Mr. A. J. Elliot, Sessions Judge of Tirhoot, to the Appellate High Court, dated the 15th June 1867.

Queen *versus* Heeramun Singh.

The offence of giving false evidence in a stage of a judicial proceeding is not cognizable by an Assistant Magistrate.

A Sessions Judge in appeal can quash an illegal conviction by an Assistant Magistrate in such a case.

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Case.—On looking at the judgment of the Assistant Magistrate, it is clear that the prisoner should, if found guilty of any offence, have been sentenced under Section 193.

The offence he has been convicted of is the intentionally giving false evidence in a stage of a judicial proceeding—an offence not cognizable by the Assistant Magistrate. That the appellant did intentionally give false evidence in a stage of a judicial proceeding, is *primâ facie* established.

This is not a case falling under Section 427, Act XXV. of 1861, as the charge as laid and pleaded to, and the order of the Magistrate as issued, are under Section 181, Act XLV. of 1860.

Under the above circumstances, I recommend that the sentence of the Assistant Magistrate be quashed as illegal.

The Assistant Magistrate has been directed to release the prisoner, appellant, on bail, pending orders of the High Court.

In the absence of the Assistant Magistrate on leave, the papers of the case were sent to his successor, who has submitted no explanation on the subject.

Jackson, J.—The conviction in this case is erroneous. The case ought to have been dealt with as an offence under Section 193 of the Indian Penal Code. The proceedings of the Magistrate are set aside, and he is directed to proceed according to law.

We are of opinion that this order might have been passed by the Judge himself, the case being before him on appeal, and all questions of law and fact arising out of the case being cognizable by him.

The 1st July 1867.

Present:

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges.*

Separate convictions and sentences—Mischief and Theft—House-breaking and Theft.

Reference from Lieutenant-Colonel J. T. Davis, Judicial Commissioner of Chota Nagpore, to the High Court, dated the 13th June 1867.

Queen *versus* Sahrae and others.

Separate convictions and sentences under Sections 429 and 379, and under Sections 457 and 380 of the Penal Code, were set aside; and the convictions under Section 429 in the former case, and under Section 457 in the latter, allowed to stand.

Case.—In the first case the prisoners Khoodoon and Boodeea have been convicted by Lieutenant E. G. Lillingston, Assistant Commissioner, Lohardugga Division, with the powers of a Magistrate, of mischief in killing a buffaloe, and theft in afterwards stealing the carcase of the said buffaloe, and have been sentenced separately under Sections 429 and 379, Indian Penal Code, to rigorous imprisonment for one year under each Section; but it appears to me that the mischief and theft are parts of one and the same offence, and, therefore, that the conviction and sentence under one head should be quashed as illegal.

In the other two cases the Moonsiff of Lohardugga, with the powers of a Subordinate Magistrate, 1st Class, has convicted the prisoners of house-breaking by night in order to commit theft, *also* of theft in a building, and has sentenced them each to rigorous imprisonment for six months under Section 457, and similar imprisonment for three months under Section 380, Indian Penal Code; as the conviction under Section 380, Indian Penal Code, in both cases is illegal, it should be set aside.

Jackson, J.—The separate convictions and sentences under Section 379 in the first case, and Section 380 in the second, are to be set aside as proposed. The convictions under Section 429 in the first instance, and under Section 457 in the second instance, are to stand.

The 2nd July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Theft (by hired boatman).

Queen *versus* Bawool Manjee.

Committed by the Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of causing disappearance of evidence, &c.

A hired boatman does not come within the definition of a clerk or servant under Section 381 of the Penal Code. Theft by such a person on board a boat comes under Section 380.

Kemp, J.—THIS prisoner has been convicted, under Sections 201 and 381 of the Indian Penal Code, and sentenced to seven years' transportation for each offence. The conviction under the first charge is good, and may stand; but the conviction under Section 381 is illegal.

The prisoner was a hired boatman, and does not come within the definition of a clerk or servant. Section 381 is therefore wholly inapplicable. The theft was committed on board a boat, and comes under Section 380 of the Code. As the case is a very bad one, the prisoner only escaping the graver charge of murder, from the fact that the evidence of the approver-witness does not implicate him, though we have no doubt that he took a part more or less active in the crime, the sentence under Section 380 will therefore be the maximum sentence which the law allows, *viz.*, seven years' rigorous imprisonment in transportation under Section 59.

The 6th July 1867.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble C. P. Hobhouse, *Judge.*

Jurisdiction—High Court (as a Court of Record)—Contempt of Court—Presents to officers of Court by successful suitors.

In re Abdool and Mahtab, Chupprasees of the High Court.

The High Court, as a Court of Record, has the power of summarily punishing for contempt.

Any officer of the High Court, who asks for or accepts a present from any person in whose favor judgment is pronounced by the Court, is guilty of a gross breach of duty and a contempt of Court.

So also any person who offers or gives such present is guilty of a contempt of Court.

THE *Chief Justice*, in addressing the prisoners, said:—

It has been brought to my notice that you Abdool and Mahtab, being officers of this Court and chupprasees assigned to attend upon Mr. Justice Hobhouse, have applied for and received presents from suitors or mooktears of suitors in consequence of judgments having been given in their favor by the Court in which Mr. Justice Hobhouse was one of the Judges.

The *Chief Justice* then asked the prisoners separately whether they had anything to say why they should not be punished for so doing.

The *prisoners* separately answered in the negative, and left the case in the hands of the Court.

The *Chief Justice*, addressing the prisoners, said: Your conduct in this case having been brought to my notice by Mr. Justice Hobhouse, I requested Mr. Field, the Officiating Registrar of the High Court, to make an affidavit of what took place before him. He says that, on the 2nd day of July 1867, he was directed by the Hon'ble Mr. Hobhouse to take down the statements of you, Abdool and Mahtab; that he did accordingly take down your statements: and that the written statements annexed to his affidavit contained a true account of the statements which you made.

You, Abdool, stated that you and Mahtab were disputing; that you were in the habit of asking money from suitors who win their cases; that they (the suitors) do not give you anything unless you ask; that you got in all 8 annas or a rupee; that in some months you got nothing; that you got a couple of annas from each person; that the chupprasees all did the same; that the jemadar sometimes gets *bukshish* as well as others; that Mahtab got his fair share: that they (meaning the suitors) never gave you anything until they were happy at having won their cases; and that you did not ask beforehand, for you knew you would not get it.

You, Mahtab, stated that you were fighting with Abdool; that you had been at feud with him for a long time; that you told the Hon'ble Mr. Hobhouse that Abdool took

all the *bukshish*, and would not give you your share; that you got two or four pice from the mooktears of the suitors who win their cases to buy sweetmeats: that you got this douceur after the cases are disposed of; that you change week about, two men staying in the house and two men remaining in Court; that Abdool gets nothing at the house; that it is at the Court only that you get it; that you do ask for it; that they (the suitors) would never think of giving anything unless you asked for it; that there was a dispute about eight or ten days ago at the lodging; that you are now at Court, and Abdool at the house; that he and you are occasionally both on duty at cutcherry (that is, at this Court); that you are newly appointed, and he an old hand; that you have been eight months employed; that you never took anything yourself, but that the jemadar and Abdool have occasionally given you a few pice as your share; and that only eight or ten annas altogether are made during the month.

There can be no doubt from these statements that both of you have applied to suitors of this Court, who have been successful in the cases which have been decided by a Court of which Mr. Justice Hobhouse is one of the Judges, for *bukshish* or presents in consequence of those decisions. You are both officers in the pay of Government, and both public officers on the establishment of this Court; and although, according to the duty which has been assigned to you, you are to attend on Mr. Justice Hobhouse, you are not the less public officers of this Court and public servants within the meaning of the Penal Code. Although, therefore, you were the officers attending upon Mr. Justice Hobhouse, and the presents which you received had relation to judgments passed by a Court in which he was one of the Judges, your offence is not an offence against that Judge individually, but an offence against the High Court.

If I thought it necessary, I should commit you for trial for an offence punishable under Section 165 of the Penal Code; and, if you should be convicted of an offence under that Section, you would be liable to imprisonment for a term which might extend to two years with or without fine. But, as this is the first time since the High Court was established that an offence of this nature has been brought home to an officer of this Court, I shall not resort to such an extreme proceeding.

The offence of which you have been guilty is, beyond all doubt, a contempt of the High Court, for which the Court has power to punish you without sending you for trial to the ordinary Courts of Criminal Judicature. This Court, by the express terms of the Letters Patent, is a Court of Record; and there can be no doubt that every Court of Record has the power of summarily punishing for contempt.

Among the instances given by Blackstone in the 4th Vol. of his Commentaries, page 284, are those committed by the officers of the Court for abusing the process of law, or deceiving the parties by any acts of oppression, extortion, collusive behaviour, or culpable neglect of duty; "for," he adds: "The mal-practice of the officers reflects "dishonor on their employers, and, if fre- "quent or unpunished, creates among the "people a disgust against the Courts them- "selves."*

I wish to state publicly, and to have it distinctly understood, that any officer of this Court, who asks for or accepts a present from any person in whose favor a judgment is pronounced by this Court, is guilty of a gross breach of duty, and a contempt of this Court. It matters not whether the sum received is large or small; whether it is for services performed or to be performed, or wholly irrespective of any services rendered by the officer. It matters not whether the present is given in consequence of a judgment pronounced by the Judge upon whom it is the peculiar duty of the officer to attend, or to which such Judge was a party, or in consequence of a judgment pronounced by any other of the Judges of the Court. It matters not whether it is before judgment or after judgment. The mere fact of asking for, or receiving, under any circumstances whatever, any present, reward, or gratuity, in consequence of any judgment or proceeding of any kind in this Court or in any way connected therewith, is punishable as a contempt of this Court.

The offence is not confined to those who ask or receive, but it extends equally to those who offer or give. A fruitless request is as great an offence as an actual acceptance, and an offer which is refused is punishable in the same manner as if the present or reward were accepted.

* In Martin's case, in which a person wrote a letter to the Lord Chancellor, stating that he had been threatened with a bill in Chan-

cery, and enclosing a Note for £20, of which he begged the Chancellor's acceptance, the offender was punished for a contempt of Court.

To offer money to an officer of the Court, though, perhaps, not so grave an offence as that of offering it to a Judge, is beyond all doubt a serious contempt of the Court to which that officer is attached.

A suitor who seeks for justice is not, as soon as he succeeds, to be harassed and annoyed by these requests for presents on the part of the officers of the Court. I am determined, as far as lies in my power, to put an end to all practices of this kind in this Court, either on the part of the officers, or of the parties or their mooktears. Every suitor, therefore, may be certain that any charge made upon him for presents to any officer of this Court is wholly unwarranted, and that the party making the charge is liable to severe punishment at the hands of the Court.

As this is the first case in which any officer has been brought before the Court for punishment, I think a very lenient sentence will suffice. I by no means wish it to be understood that the Court will consider such a punishment adequate if, on any future occasion, an officer or other person be brought before the Court for an offence of a similar nature.

You are liable to fine or imprisonment or to both. We have considered anxiously what punishment should be awarded. You are poor men, and I do not wish to deprive you or your families of any part of your wages, and therefore I shall not punish you by fine or add fine to imprisonment.

You, Abdool, have been employed as a public officer for a much longer time than Mahtab. I therefore order that you be imprisoned in simple imprisonment* in the Presidency Jail of Calcutta for the term of 14 days, inclusive of this day.

You, Mahtab, having, as I understand, been employed as an officer of this Court for a period of 8 months only, I order that you be imprisoned in simple imprisonment* in the same Jail for a period of 10 days, inclusive of this day.

You are both dismissed, and your names will be registered in order that you may never be again employed as officers of this Court. I trust that this sentence will operate as a warning to others.

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* A copy of the warrant which was issued by the Court is subjoined for future reference and guidance.

To Thomas Willis (Bailiff of the High Court) and

To the Superintendent of the Presidency Jail in Calcutta and to all Police and other Peace Officers whom it may concern.

Whereas in a Division Court of the High Court of Judicature at Fort William in Bengal, holden on the 6th day of July 1867, before the Hon'ble Sir Barnes Peacock, *Kt.*, Chief Justice, and the Hon'ble C. P. Hobhouse, one of the Judges of the said Court, it was considered by the said Division Court that Abdool and Mahtab, chupprasees of this Court, in attendance upon the Hon'ble C. P. Hobhouse, one of the Justices of this Court, were severally guilty of a contempt of the High Court, and it was ordered and adjudged by the said Division Court that the said Abdool and Mahtab, for their said contempts of Court, be imprisoned in the Presidency Jail of Calcutta in simple imprisonment for the periods following, that is to say, the said Abdool for a period of fourteen days from the 6th day of July 1867 inclusive of that day, and the said Mahtab for the period of ten days from the said 6th day of July 1867 inclusive, the said Division Court having lawful power and authority in that behalf.

This is, therefore, to authorize you, the said Thomas Willis, forthwith to take and convey the said Abdool and Mahtab to the Presidency Jail of Calcutta, and to deliver them, together with this warrant, into the custody of the Superintendent of the Presidency Jail; and you, the said Superintendent of the said Presidency Jail, are hereby authorized and required to receive the said Abdool and Mahtab into your custody, and to keep them safely in the said Jail in simple imprisonment for the said periods of 14 days and 10 days respectively, and after the discharge of the said Abdool and Mahtab forthwith to return this warrant to the High Court, together with a certificate endorsed thereon and signed by you, the said Superintendent, showing how the same has been executed; and all officers of police and other peace officers are hereby required to aid and assist the said Thomas Willis in the execution of this warrant, if required by him so to do.

Given under our hands and the seal of the said High Court this 6th day of July 1867.

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The 8th July 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Section 62, Penal Code—Forfeitures.

Queen *versus* Kripamoyee Chassanee and another.

Committed by the Magistrate, and tried by the Sessions Judge of Beerbhoom, on a charge of causing miscarriage.

Section 62 of the Penal Code, which provides for forfeitures, limits them to cases when the parties shall have been transported or sentenced to imprisonment for at least seven years.

Glover, J.—Both appellants in this case pleaded not guilty at the Sessions. There is no question that their confessions were voluntary, and there is consequently no ground for this appeal.

But it appears to me that the Sessions Judge has acted *ultrâ vires in* directing certain property, given by one prisoner to the other as payment for procuring the medicines necessary to procure abortion, to be escheated to the State.

Section 62 of the Penal Code, which provides for forfeitures, limits them to cases where the parties shall have been transported or sentenced to imprisonment for seven years at least; so that, as these prisoners have been sentenced to three years' rigorous imprisonment only, the sentence would not apply.

It does not appear, moreover, how the Sessions Judge has found that Kripamoyee did make the present in question to Modoo Harin, for he recorded no evidence, finding the prisoners guilty on their own pleas.

I would reverse this portion of the Sessions Judge's order.

Kemp, J.—I concur.

The 8th July 1867.

Present :

The Hon'ble F. B. Kemp and F. A Glover, *Judges.*

Kidnapping—Dishonestly taking property from person of kidnapped child.

Queen *versus* Shama Sheikh.

Committed by the Magistrate, and tried by the Sessions Judge of Moorshedabad, on a charge of kidnapping, &c.

The offence described in Section 363 of the Penal Code is included in that described in Section 369, the kidnapping and the intention of dishonestly taking property from the kidnapped child being included in the latter Section.

Kemp, J.—The prisoner has been convicted of kidnapping under Section 363, and of kidnapping with the intention of taking dishonestly moveable property from the person of the kidnapped child, under Section 369. Separate sentences have been passed under each Section.

The trial was with a Jury. The charge to the Jury seems to be a very proper one; but we think that the offence described in Section 363 is included in that described in Section 369, the kidnapping and the intention of dishonestly taking property from the person of the child being included in the latter Section.

The conviction and sentence under Section 363 is quashed.

The 8th July 1867.

Present :

The Hon'ble C. P. Hobhouse, *Judge.*

Evidence—Admission of accused—Police papers.

Queen *versus* Bussiruddi and others.

Committed by the Magistrate, and tried by the Sessions Judge of Jessore, on a charge of dacoity, &c.

The admission of an accused cannot be taken to be corroborative evidence, or any evidence at all, against any body other than himself.

Police papers ought not to be taken judicial notice of either as evidence or consulted in order to test evidence.

THERE is no ground shewn to me for interfering with the judgment and the sentences on the prisoners, appellants; and the evidence on record clearly establishes their guilt.

I, therefore, dismiss the appeal; but I would call the Judge's attention to certain errors in law, which, if not noticed, may be committed by him again in prejudice, either of accused persons, or of justice generally.

In one part of his judgment he remarks as follows:—

"The Assessors would acquit Yassin on "the ground of his having been recognized "by only one witness; and, were the evidence "of that one witness uncorroborated, I "should hesitate to accept it as sufficient for "his conviction; but, when it is so strongly "corroborated by the confession of Shumboo "Malo * * * * * and "the evidence regarding recognition being "corroborated by Shumboo's confession" * * * * * * * * *

On this I have to note that the Judge has erred in considering that the admission of an accused can be taken to be corroborative evidence, or indeed any evidence at all against any body other than himself; and, this being so, had I been disposed to doubt, as I do not doubt, the testimony of the man Nitai Ghose, I should have been compelled to acquit the prisoner Yassin.

Again, the Judge was in error in taking any judicial notice of the police papers.

He says: "In order to test their evi-"dence, I have inspected the police papers, "and I find that they all mentioned the "names of these individuals when examined "by the police, though Olakmonee, instead of "calling Toriboollah and Tunnoo by their "names, spoke of them as the sons of "Sonaoolla."

Section 154, Criminal Code Procedure, distinctly declares that police papers are not to be treated as evidence; but, when the Judge, "in order to test evidence," consults such papers, it is clear that he does in a manner treat them as evidence, and in this case they were apparently so treated to the prisoner's prejudice.

The 8th July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Riot—Duty of Police.

Criminal Revisional Jurisdiction.

Revision under Section 404, Code of Criminal Procedure.

Queen *versus* Damoo Singh.

Where a man is grievously wounded in a riot, the police are bound to act without taking into consideration who was the aggressing party. In the discharge of their duties, and in the absence of any proof that they exceeded their duty, the police were held entitled to the protection of the Court.

Kemp, J.—THIS case comes up confined to points of law.

Mr. Allan for the petitioner urges that the police were acting in concert with the auction-purchaser, who was attempting to take khas possession of the village of Jowee, contrary to the terms of the perwannah of the Civil Court, which awarded possession only to the extent of receiving the rent from the mokurureedar.

The perwannah was confined to giving possession of the village by affixing an ishtehar, and by beat of drum. The peon accompanied by a gomastah on the part of the decreedar went to the spot, and found some 30 men collected in the aforesaid village apparently in the cutcherry. The gomastah was very seriously wounded, and reinforcements were sent for, and obtained by the mokurureedar.

On a charge being made before the head constable, he, acting within the scope of his authority, the offence being one in which he could arrest without warrant, proceeded to the spot to rescue the wounded man, and to enquire into the cause of the riot. He was pulled off his horse and beaten, subsequently a further body of police were resisted and insulted, and it was only after blank cartridge had been discharged that the rioters dispersed.

The petitioner, who took a prominent part in the riot, has been committed under Section 152, and sentenced to two years' imprisonment.

Whether the auction-purchaser went beyond his right under the decrees is not the

question before us. A man was grievously wounded, and the police were bound to act without taking into consideration who was the aggressing party. In the discharge of their duties, and in the absence of any proof that they exceeded their duty, the police are entitled to the protection of this Court, and we think that, taking into consideration the violent conduct of the petitioner and his party, which, but for the forbearance of the police, when they were represented by numbers bringing them on something like equal terms, alone prevented a very serious riot attended with loss of life taking place, we shall not interfere with the sentence.

Appeal rejected.

The 8th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Nuisance.

Criminal Revisional Jurisdiction.

Reference under Section 434, Code of Criminal Procedure.

Queen *versus* Pitti Singh.

Where a Magistrate has commenced proceedings under Section 308 of the Code of Criminal Procedure, he is not at liberty to proceed otherwise than in conformity with the rules laid down in Chapter XX. of the Code.

Jackson, J.—We are of opinion that the Joint Magistrate's order was unwarranted, and must be set aside.

He contends that it was authorized by Section 62, Code of Criminal Procedure, and alleges that it was made under that Section. Upon this point, as far as we can judge, the Joint Magistrate has deceived himself; for, while his very concise proceedings in no way point to an emergency of the kind contemplated in Section 62, nor take the form of proceedings under that Section, they on the other hand clearly indicate a case of unlawful obstruction in a thoroughfare, although that precise expression is not used, and the order made is precisely that required by Section 308. We can therefore have no doubt that the Magistrate at the time supposed himself to be acting under this last-named Section, which, if he be the Magistrate of a division of a district, he is competent to do. The person complained of appeared and applied for a Jury, and it was the Magistrate's duty to proceed as directed in Section 310; but, instead of doing this, he at once made his order absolute, and directed the police to report whether the order had been carried out within a week. We do not concur with the Sessions Judge in thinking that an order might not be made in such a case under Section 62, for undoubtedly the Magistrate, if he thought such a direction tended to prevent obstruction to persons lawfully employed, might order any person to take action with the wall in his possession in the sense of removing it; and, if the order were disobeyed, and the obstruction anticipated were to arise, the person disobeying might be proceeded against under Section 188, Indian Penal Code. If convicted, he might appeal, or might bring his case before this Court by motion, and the validity of the proceedings would then be enquired into. But we think that the Joint Magistrate, having commenced his proceedings under Section 308, was not at liberty to proceed otherwise than in conformity with the rules laid down in Chapter XX. of the Code.

The 8th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Charge—Duty to give information.

Reference under Section 434, Code of Criminal Procedure, and Circular Order No. 7, dated 2nd June 1864.

Queen *versus* Moosubroo and another.

A charge should distinctly set forth the particular offence in respect of which the accused either omitted to give information, or gave information which he knew to be false; and it should appear precisely what his duty was in the matter.

Jackson, J.—Under the circumstances, we think the commitment and the proceedings of the Magistrate of Monghyr must be quashed, and the case must be dealt with by the Magistrate within whose jurisdiction the offence charged appears to have been committed.

But, if the Sessions Judge, having jurisdiction, had tried the accused, we probably

should not have thought it necessary to interfere, as they would not have been prejudiced by the irregularity. We think it right to observe that the Magistrate's charge is very loosely and insufficiently drawn, as well as ill-expressed.

The charge should distinctly set forth the particular offence in respect of which the accused either omitted to give information, or gave information which they knew to be false; and it should appear precisely what their duty was in the matter.

The 9th July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Confession—Culpable Homicide not amounting to murder—Adultery—Killing of wife and her paramour.

Queen *versus* Sheik Boodhoo.

Committed by the Deputy Commissioner, and tried by the Judicial Commissioner of Chota Nagpore, on a charge of murder.

A prisoner's confession must be taken in its entirety. Where a prisoner confessed that he did not suspect his wife's fidelity; that he left home on business; that on his return he saw what convinced him of his wife's infidelity; and that, maddened at the sight, he killed both her and her paramour—HELD that he was guilty of culpable homicide not amounting to murder, and that the case was one in which he ought to be treated with lenity.

Kemp, J.—THIS prisoner was charged, *1st*, with the offence of murder, Section 302, Indian Penal Code; *2nd*, with the offence of culpable homicide not amounting to murder, Section 304.

The prisoner pleaded guilty to the second charge.

The prisoner made the following statement before the Judicial Commissioner of Chota Nagpore: "I had been married for ten years, and was unsuspicious of anything wrong in her conduct. I left home to collect some money due to me. After an absence of two days, I returned home, reaching it about 8 P.M. I looked through a small hole in the wall used for purposes of ventilation, and saw my wife and another man engaged in criminal intercourse with each other, a sight which so maddened me that I at once rushed inside, and despatched them both with my dagger. I never suspected my wife's fidelity in the least. I always carry the weapon I committed the murder with when travelling. I looked through the hole in the wall before entering my house, because I saw a light in the house."

The Judicial Commissioner observes: "There is neither doubt nor question that the accused caught his wife and Bahadoor together under circumstances calculated to establish clearly the terms of intimacy they were on with each other, if indeed they were not actually engaged at the time in adulterous intercourse; but at the same time I am quite convinced that, when he returned home, he knew, with tolerable certainty, what he might expect to find going on. I do not believe that he sought or voluntarily provoked the provocation he received. I think he left home on *bonâ fide* business; that having reason to doubt the woman's fidelity, he watched her closely, and discovering how she was acting, he lost all power of self-control, and committed the crime he stands charged with. Considering, then, that the case falls under Exception I. of Section 300 of the Penal Code, but that the act by which death was caused was done with the intention of causing death or of causing such bodily injury as was likely to cause death, the Court finds that Sheik Boodhoo is guilty of the offence of culpable homicide not amounting to murder, and directs that he be rigorously imprisoned for ten years."

The prisoner appeals, urging that the Judicial Commissioner is wrong to assume a state of facts different from those stated by the appellant, in the absence of any evidence in support of the same; that, under the peculiar circumstances of the case, the sentence is altogether too severe.

No evidence was recorded by the Judicial Commissioner, the prisoner being convicted upon his own confession. In the absence of any evidence, the Judicial Commissioner was clearly wrong in assuming that the prisoner doubted his wife's fidelity, that he watched her, or that he knew with tolerable certainty what he might expect. The convictions of the Judicial Commissioner are not evidence, and they should not have been allowed to influence his opinion. The confession must be taken in its entirety. The prisoner tells us that he had been married to his wife for 10 years; that he had no reason to suspect her fidelity: that he left his home to collect money due to him: that on his return he saw what convinced him that

his wife was not as he had hitherto believed her to be; and that, maddened at the sight, he killed both her and her paramour.

For a crime committed under circumstances of such sudden and grave provocation, the gravest provocation that can be offered to a man, is the sentence passed by the Judicial Commissioner a proper or just sentence? We think not.

The prisoner is a Mahomedan, and so was the man who dishonored him. Under the Mahomedan Law, the prisoner's act would be justifiable homicide, *see* Beaufort's Digest of the Criminal Law, page 786, Section 3956.

In England, though the crime of which the prisoner has been guilty is not absolutely ranked in the class of justifiable homicide as in the case of forcible rape, it is manslaughter. It is, however, the lowest degree of it. *See* Commentaries on the Laws of England by Stephen, Vol. IV., page 135.

Under the Penal Code the prisoner is guilty of the offence of culpable homicide, for he intended to cause the death of his wife and her paramour; but inasmuch as he was deprived of the power of self-control by grave and sudden provocation, the offence committed by him is reduced to culpable homicide not amounting to murder. The punishment for the offence of culpable homicide not amounting to murder, if the act by which death is caused is done with the intention of causing death, is transportation of either description for a term which may extend to ten years. A fine may also be added. It will be observed that great latitude of discretion is given to the Jury in apportioning the punishment. The circumstances must be considered.

Now, it would be difficult to conceive a case in which the provocation was more grave than that offered to the prisoner. It is clear that he did not seek the weapon, that he acted wholly without premeditation and under the influence of his outraged feelings. Taking all the circumstances into consideration, this appears to us to be a case in which the prisoner ought to be treated with lenity. We therefore sentence him to one year's rigorous imprisonment from the date of the original sentence.

The 10th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Trial by Jury.

Queen *versus* Khoodeeram.

Committed by the Magistrate, and tried by the Commissioner of Cooch Behar Division, on a charge of culpable homicide not amounting to murder.

Trial by Jury ceases in a district when the district ceases to belong to a division to which trial by Jury has been extended.

Jackson, J.—THE trial in this case has been held before the Commissioner of Cooch Behar Division, who is vested with the powers of a Court of Session. It took place in the District of Gowalparah, which was formerly comprised in the Assam Division, but now belongs to that of Cooch Behar, and was conducted with the aid of a Jury. Trial by Jury has not been extended to the Cooch Behar Division, but it appears that trials continue to be held with a Jury in Gowalparah, on the ground that trial by Jury was introduced into that district in common with other districts in Assam by order of the Local Government in 1862.

The notification, which appears in the *Calcutta Gazette* under date 28th March 1862, is to this effect: "It is hereby notified that, in conformity with Section 327 of the Code of Criminal Procedure, the Lieutenant-Governor has been pleased to order that, in all the districts comprising the Assam Division, the trial of all offences by the Court of Session shall be by Jury." There can be little doubt that the words "districts comprising the Assam Division" mean the "districts for the time being comprised in the Assam Division;" and that, when a district ceased to belong to that Division, trials would not be any longer by Jury under that notification. But the order which the Lieutenant-Governor actually made, and which is incorrectly given in the notification, is to be found in the Under-Secretary's letter to the Commissioner of Assam, No. 826, dated 28th March 1862, and is to the effect that "the trial of all offences by the Court of Session in Assam shall be by Jury," &c. This order would not authorize the Court of Session of Cooch Behar to hold trials by Jury in Gowalparah.

When a trial is by Jury under the Code of Criminal Procedure, the decision on facts is exclusively in the hands of the Jury; but, when it is with Assessors, the decision is vested exclusively in the Judge. In the case before us, therefore, the accused who ought to have been tried with Assessors was entitled to the decision of the Judge which he has not had.

The trial must therefore be quashed, and the accused must be tried anew according to law.

The 16th July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Evidence—Confession—Section 366, Code of Criminal Procedure.

Criminal Referred Jurisdiction.

Queen *versus* Mussamut Jema.

A confession before the Magistrate, though afterwards retracted before the Sessions Court, is evidence against the party making it, under Section 366 of the Code of Criminal Procedure.

Glover, J.—THERE appears to us no doubt of the prisoner's guilt. She was last seen with the deceased child, and she admitted to the neighbours, in the presence of the surburakar of the village, that she had killed the child by strangling him, and gave up the silver bracelets which Poddoh wore at the time of his disappearance.

When first examined by the Assistant Magistrate, she confessed in the same manner; and, although on being committed to the Sessions, she retracted her former admission, and said that the child had died from natural causes; her former admission is evidence against her under Section 366 of the Code of Criminal Procedure.

The medical evidence proves distinctly that the child was strangled.

We see no extenuating circumstances in this case, and confirm the sentence of death passed by the Sessions Judge.

The 18th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Conviction (Reasons for).

Criminal Revisional Jurisdiction.

Reference under Section 434, Act XXV. of 1861.

Queen *versus* Peari Raur.

A conviction ought not to be reversed by reason merely of the weakness of the reasons assigned for it when there is ample evidence of the guilt of the prisoners.

WE think there is no sufficient reason for interfering with the order of the Magistrate as recommended by the Sessions Judge in this case.

The complainant stated that he left a quantity of valuable property locked up in a room of a house, of which the man Gopal and the woman Peari were the sole occupants.

On his return home he found his room and his boxes broken into, and the contents either missing, or in possession of the man Gopal, or on the person of the woman Peari.

Persons, his relatives or neighbours, well competent to judge and not discredited, swore to the property as his.

In his presence, and in the presence of other persons, neighbours and not discredited, the accused persons admitted their guilt, and Gopal offered to compromise the matter, and actually entered into negotiations to that end; and the defences made respectively by Gopal and Peari were not in themselves worth anything, and were not sustained by evidence.

Independently, therefore, of that which was treated as, but which the Judge has rightly said was not, evidence against the accused, we think there was sufficient evidence to convict Peari, not of dishonestly receiving only, but of theft, if not of housebreaking.

We also think the male prisoner's conviction ought not to have been reversed by the Sessions Judge. Although the judgment of the Deputy Magistrate does not state

very satisfactory reasons for convicting the prisoners, the record contains ample evidence against them, and we consider that, where this is the case, the conviction ought not to be reversed by reason merely of the weakness of the reasons assigned for it.

There is some truth in the Sessions Judge's observation that the evidence established theft rather than mere guilty receipt of stolen property. But that would be no reason for setting the accused at liberty.

We observe also that the Sessions Judge has further directed the whole of the property found upon the prisoners to be returned to them. This appears to us wholly unaccountable, because the evidence clearly showed it to belong to the prosecutor; and, even if the Sessions Judge's view be adopted that Gopal Churn had made use of it without the complainant's permission, it seems an extraordinary denial of justice to restore to the wrong-doer property which manifestly was not his.

The 22nd July 1867.

Present:

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges.*

Commitment (by Sessions Court of an accused person discharged by Magistrate).

Criminal Revisional Jurisdiction.

Queen *versus* Neetie Dulal.

Where a Magistrate used the words acquittal and release when he intended only to discharge a person accused of an offence not triable by him—HELD that the Court of Session was competent, under Section 435, Code of Criminal Procedure, to order a commitment of such accused person.

Jackson, J.—THIS case has been argued with much ability by Mr. W. Jackson, the Counsel for the petitioner. But it appears to me that the order of the Court of Session must in substance be affirmed.

The argument of the learned Counsel proceeded very mainly with two impressions that appear to me to be mistaken.

It is supposed, *first*, that the Deputy Magistrate considered himself to be dealing with an offence within his own jurisdiction; and, *secondly*, that he acquitted the prisoner of such offence. Now, it is true that the judgment given by the Deputy Magistrate in this case is expressed with singular inexactness of language, and might well bear the interpretation which has been put upon it. But it appears to me, looking at the whole of the judgment, and also looking at the proceedings which took place, that the Deputy Magistrate in point of fact thoroughly understood what the nature of the offence imputed to Neetie Dulal was that he knew that offence to be an offence under Section 326 of the Indian Penal Code, namely, the offence of causing grievous hurt with a dangerous weapon (being a sword); and that, although he has used the words acquittal and release of the accused, he intended only to discharge.

It appears to me that, if the Deputy Magistrate had understood himself to be dealing with an offence within his cognizance, he would, as directed in the 14th Chapter of the Code of Criminal Procedure, before entering upon the defence of the accused person and hearing his witnesses, have recorded a charge and proceeded in the mode prescribed by Sections 250 and 251. On the other hand, in the procedure under the 12th Chapter, the Magistrate may, after hearing the evidence for the prosecution, examine the accused person, and also summon and hear evidence in his behalf before he proceeds to record and exhibit the charge.

In this case, therefore, as the Magistrate has not framed or read any charge to the accused after taking his examination, and hearing witnesses in his defence, I think we must come to the conclusion that the Magistrate found himself to be in the position stated in Section 225, that is, when he finds that there are not sufficient grounds for committing the accused person to take his trial, and he thereupon abstains from framing any charge, and at once discharges the prisoner. There have been cases in which, upon the Magistrate dealing with evidence such as that before us, and convicting the accused person erroneously upon a minor charge instead of a graver charge which the evidence would support, and upon such cases coming in appeal before the Sessions Judge, and the Court of Session quashing that conclusion, and ordering a commitment upon the graver charge, this Court has set that order aside. That, it seems to me, is quite a distinct case from the present. In such a case the Sessions Judge undoubtedly assumes a function which does not belong to him, and his order is necessarily set aside for want of jurisdiction. But in this case it appears to me that the Court of Session, whether upon the information of the prosecutor or upon any other suggestion, has made an order which is entirely within his jurisdiction. Section 435 provides: "That, in the case of offences not "triable by the Magistrate, the Court of "Session may order the commitment to the "Court of Session of any accused person "who may have been discharged by the "Magistrate."

This clearly was an offence, as described by the Magistrate, not triable by him. It was a case in which grievous hurt of a serious character had been inflicted by a sword, and in which several parties present and concerned in the ryot had been armed with lethal weapons; consequently, in a case of that kind, it was open to the Court of Session to order the commitment of the prisoner Neetie, who was charged with that offence.

It has been suggested, and strongly urged by the learned Counsel, that the orders of the Sessions Judge in this case are opposed to the meaning of Section 55 of the Code of Criminal Procedure. The words of that Section are: "A person who has once been tried for an offence, and convicted or acquitted of such offence, shall not be liable to be tried again for the same offence." Now, if the person had been tried, and either convicted or acquitted of the offence described in Section 326 of the Indian Penal Code, this Section 55 would clearly apply. But it appears to me that he had not been tried: he has undergone only a preliminary enquiry relating to that offence; and, as the result of that preliminary enquiry, he has been discharged. Although in my opinion the order of the Sessions Judge was warranted by law, directing the commitment of this petitioner to take his trial, it occurs to me, and also to my brother Hobhouse, that the Judge has somewhat unguardedly committed himself to so strong an expression of his opinion in respect of the guilt of the petitioner, that it would be neither fair to the Judge himself, nor to the petitioner, to allow his trial to take place in the district of West Burdwan, and therefore it will be in accordance with the interests of justice if we direct his trial to take place in the district of East Burdwan.

Hobhouse, J.—I concur with my learned brother.

What it seems to me to be necessary to see in this case is what it was that the Magistrate thought he was enquiring into. He says that he finds it proved that a certain person was wounded by a sword-cut, and that the persons who wounded him were persons who wore deadly weapons, and that the wound was of that nature that it was grievous hurt by reason of the person upon whom it was inflicted having been in hospital, or at any rate suffering under the wound for 20 days. Therefore it seems to me that the Magistrate thought that what he was enquiring into was a charge of grievous hurt by means of some cutting instrument. That is a charge of an offence under Section 326 of the Indian Penal Code, and offences under that Section are not triable by the Magistrate, but by the Court of Session. Then Section 435 goes on to say that, in the case of an offence not triable by the Magistrate, the Court of Session may order the commitment of the accused person discharged by the Magistrate.

It seems to me therefore that, under Section 435, the Court of Session was right in directing that the accused in this instance should be committed and tried before it.

I also concur in the order that the case should be tried in East Burdwan.

The 22nd July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Railway accidents—Duty of Guard.

Criminal Revisional Jurisdiction.

Revision under Section 404, Code of Criminal Procedure.

Queen *vs.* R. Flood.

Where some coolies were employed in assisting a ballast train into motion at a Railway station, and one of them, after pushing the train, in getting up on the train, or in attempting to do so, fell and was so injured that he afterwards lost his life—HELD that the evidence did not show that it was the duty of the guard to see that no one got up on the train when in motion.

Jackson, J.—IT appears to me that this conviction ought to be set aside.

The petitioner was convicted by the Magistrate on a charge "that he, being a guard in charge of a ballast train, and as such amenable to the Regulations of the Railway Company, and thereby being bound to exert himself to prevent any breach of the bye-laws by passengers or others, did negligently omit to exert himself to prevent certain coolies, being persons about to proceed by a ballast train, from entering the aforesaid train after it was in motion already, one of them through falling under the train sustained serious injury which resulted in his death, and that he has thereby committed an offence punishable under Section 26, Act VIII. of 1854." On appeal to the Court of Session, the Sessions Judge stated: "There is a clear breach of the bye-laws, especially Section 12, Clause 5, and Section 11, Clauses 6 and 20, and he is rightly convicted, under Section 26 of Act XVIII. of 1854, in having negligently and wilfully omitted to do what he was legally bound to do, and by which omission the lives of the coolies travelling in the carriages, and the coolies on the line, were endangered."

The first and principal objection raised by the vakeel for the petitioner in this case is that the petitioner has been convicted under Section 26, Act XVIII. of 1854, for having neglected to do something which he was legally bound to do; that Section 29 interprets the expression "legally bound to do" something as meaning the obligation of a Railway servant to do every thing necessary for or conducive to the safety of the public, and which he shall be required to do by any Regulation of the Company allowed by the Governor-General of India in Council, and of which Regulation such officer or servant shall have notice; but that, notwithstanding this, there was no evidence whatever to shew the existence of any Regulations so made and allowed by the Governor-General in India, or that the petitioner had notice of such Regulations, or that the act charged was a breach of such Regulations. Manifestly, in order to establish an offence under this Section, it would be absolutely necessary to give evidence of such Regulations. The Magistrate having omitted to take evidence upon that point, it would be competent to the Appellate Court, under Section 422 of the Code of Criminal Procedure, to direct additional evidence to be taken upon that point; and, if this were the sole objection to the conviction raised before us, I think it would be our duty to order the Appellate Court, the Court of Session, to exercise the power which it possessed under Section 422, and to direct a further enquiry to be made upon that point, so that the prosecution might be enabled to show that there were such Regulations, and that the prisoner committed a breach of them because, if the petitioner had clearly committed an act which was punishable, it would not, I think, be right that he should be allowed to escape by reason merely of the omission of the prosecutor to put the Regulations in evidence. But, upon careful consideration of the evidence in this case, it appears to me that, if the Regulations which have been referred to before us were put in evidence, they would not establish the commission by the petitioner of any offence. From those parts of the Regulations or bye-laws which I have heard read, it appears to be the duty of the guard, and the petitioner held the situation of guard, to take charge of trains when in motion, and apparently it would be his duty to take all precautions prescribed by the Regulations to prevent danger to passengers or others while the train was in motion. It does not appear to be the duty of the guard to take those precautions, nor is the train under his special control, while at the station. Apparently that is the

duty rather of the Station Master; at any rate, it is not shown to be the duty of the guard. Now, the evidence in this case shows that, when the train was started, the Station Master was apparently present on the platform.

This seems to point to the responsibility resting upon some one else rather than with the petitioner, but I think that we may go further than that. It seems to me that the Legislature, in enacting the Sections referred to, had chiefly in view the protection of the public, and especially of passengers and other persons not directly connected with the Railway, and I very much doubt whether it was the intention of the Act to make the officers responsible for risks to fellow-servants arising out of the particular duty in which they are engaged.

Now, these coolies of whom the deceased person was one were persons actually employed upon the ballast train in question. That train was at first in the siding. To come upon the main line from that siding, the train had to pass over a curve. It appears from the evidence that the engine was not a powerful one, that the grease in the axle-boxes had become congealed, and that consequently the engine from these united causes was unable to overcome the resistance which the curve line presented, and it was necessary to employ the coolies for the purpose of putting the train in motion. There seems to be no reason why coolies employed upon the ballast train, presumably accustomed to work of this description, should not be allowed to move the ballast train any more than they should be allowed to move any other heavy body. By the agency of their coolies, the train was moved from the siding into the main line. Then it appears to have been brought to a stand-still, and after that a signal was given for the train to start.

There is some conflict of evidence as to whether the train was started again with the assistance of the coolies or not. Probably the coolies did assist.

The guard denies, and the engine-driver denies, that he gave any orders for the coolies to push the train upon this occasion. It seems quite probable that the coolies did not receive direct orders from the guard. Then, is he answerable for the fact that they did so assist? It appears to me that he is not. At any rate not answerable under this Act. The Station Master was present, and this happened therefore under his eye, and I should rather say on his responsibility. I say this of course merely for the purpose of showing that, in my opinion, the guard was not directly responsible. Whether, therefore, the coolies actually assisted in the starting of the train or not, it appears to me that the accident which occurred was one for which the petitioner was not responsible. It is quite clear that it will occasionally happen in the case of an engine of defective power that manual labor of some kind will be required to start the train. Then, if the engine is to be stopped, and the coolies are to mount upon the carriages before the train gets into motion, it is quite evident that they will have to get down again and so on *ad infinitum*, or else the train will never be got into motion at all. I therefore think that we ought not to direct a further enquiry, with a view to the Regulations and the sanction of them by the Governor-General being put in evidence, but that the evidence discloses no case against the petitioner, and that the conviction ought to be set aside.

Hobhouse, J.—I concur that this conviction must be set aside.

I will take those facts of the case which I consider to be most against the prisoner, and I still think that there is not sufficient evidence to convict him of the offence with which he was charged. I will take the facts to be that, when the train in this instance was upon the main line, a certain number of coolies, amongst whom was the person who was so injured that he afterwards lost his life, that a certain number of coolies were employed in assisting the train into motion. I will then take the facts to be that the person who was injured, after pushing the train with a number of others for a certain distance, got up upon the train, or attempted to do so while it was in motion, and that he thereby fell, and was injured. Then the question seems to me to be this, was any body, or rather was the accused in this instance, the person whose duty it was to start the train, and was it also his duty, before starting the train or at any other time, to see that, when the train was in motion, this particular person and others who were pushing the train did not get upon it? It seems to me that, if it was his duty in the first instance to have started the train, and then to have seen that no one got upon that train at the time when it was in motion, then undoubtedly it would have been by the omission of that duty that this particular cooly in this instance lost his life. But looking to the evidence, and especially to

the evidence of a person named Lall Behary, it appears to me that the prisoner in this instance was not the person whose duty it was to start the train, or to see that no persons got upon it while it was in motion; and that, if there were any such person so far as the evidence goes, it was not the prisoner, but rather the person above named, *viz.*, Lall Behary. At any rate, it is quite clear to me that the evidence, if there was any evidence, against the prisoner which would have proved that this was his duty, and that he had neglected it, was the evidence of certain bye-laws which were not put in evidence at all, and of which it was not shewn, as it should have been as the law prescribes, that the prisoner was cognizant.

For these reasons I concur that this conviction must be set aside, and the fine remitted.

The 22nd July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Municipal Act—Nuisances.

Criminal Revisional Jurisdiction.

Revision under Section 404, Code of Criminal Procedure.

Queen *versus* Brojo Lall Mitter.

The occupier who suffers the land to be in a filthy state is the person liable for the penalty.

Jackson, J.—THERE is nothing on the record before us to show that the petitioner is not the occupant of the land; but as Mr. Haldane, the Vice-Chairman who appears on behalf of the Municipal Commissioner, admits, for the sake of obtaining an expression of the Court's opinion, that there was an occupier, we proceed to give our decision in the case stated.

It appears to me that the occupier who suffers the land to be in a filthy state is the person liable for the penalty, because the words "owner and occupier" are only words qualifying the main proposition, which is, "Whoever suffers any house, building, or "land in or near any public highway to be in a "filthy state."

Therefore, when land has been leased by the owner to some one else who is an occupier, the Commissioners ought to proceed against the occupier. I am therefore of opinion, supposing the fact to be, as stated in the petition, that the petitioner was wrongfully convicted, that the fine ought to be refunded.

Hobhouse, J.—I concur.

The 24th July 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Discharge—Acquittal—Jurisdiction.

Criminal Revisional Jurisdiction.

Reference under Section 434, Act XXV. of 1861.

Queen *versus* Bipro Doss.

Where there is no *primâ facie* case against an accused, and he has not been put on his defence, nor any charge preferred against him, he should be discharged, and not acquitted.

The Court pointed out the necessity of a Court showing its jurisdiction and competency on the force of all its proceedings.

Jackson, J.—THIS purports to be a reference under Section 434, Code of Criminal Procedure, and is made by the Officiating Deputy Commissioner of Cachar, who appears to be vested with powers under Section 1, Act XV. of 1862.

This officer cannot apparently act as a Court of Session under Section 434, but he may act as a Magistrate, and this Court may (Section 404), "on the report of a Court of Session, or of a Magistrate, or whenever it thinks fit," call for proceedings, and pass such order as to it shall seem right.

The mode in which these references are to be made is prescribed in Circular Order No. 18, dated 15th July 1863. The directions contained in that order have not been complied with, and especially the explanation of the Lower Court has not been called for and transmitted.

It appears to the Court that, if this preliminary step had been taken, the reference might have been avoided.

The Lower Court was that of Mr. J. Birkmyre, Assistant Commissioner of Cachar. Nothing is said as to the powers exercised by this officer; but it may be assumed that he had such of the powers of a Magistrate as enabled him to try the offence of which Bipro Doss was accused, namely, theft (of a cow).

The case came on for hearing, and the complainant Nilnauth and two witnesses were examined. The Assistant Magistrate then recorded his opinion that there was "not the "slightest proof that the accused Bipro Doss "received or retained with guilty knowledge "the cow which Nilnauth, the complainant, "claims as his property."

He went on to say, "The Court finds that Bipro Doss is not guilty," acquits Bipro Doss, and directs that he be *discharged*.

There is, no doubt, an error in recording the verdict of acquittal, as the accused had not been put on his defence, and no charge had been preferred. The Court, however, are inclined to think that the Assistant Commissioner intended to deal with the case under the 250th Section, which directs that, when there is no *primâ facie* case against the accused, he shall be *discharged* without any charge being preferred, and it is probable that the call for an explanation would have elicited this.

On perusal of the evidence recorded, the Court entirely agree with the Assistant Magistrate that there was nothing whatever to show that the accused had been guilty of any offence.

But the proceedings exhibit beyond this a very serious defect of form to which it is necessary to call the attention of the Assistant and of the Deputy Commissioner.

There is nothing from beginning to end of the proceedings before Mr. Birkmyre to show that the trial took place in any Criminal Court, or otherwise than in presence of a private person.

The Court must point out the necessity of showing the jurisdiction and competency of the Court on the face of the proceedings.

Every act of the Court, and all evidence recorded, ought to indicate that it was done and recorded before a Court or person exercising certain powers under the Code of Criminal Procedure. When this is not disclosed, it is impossible to assume the existence of jurisdiction.

The Assistant Commissioner gave judgment on the 13th June, and the complainant appears to have immediately preferred an appeal (contrary to Section 407 of the Code of Criminal Procedure) to the Deputy Commissioner, who received it, and called for the proceedings. It is true that he has not interfered with the order of the Court below, but he ought to have proceeded from the commencement, if at all, under Section 434, that is, supposing the Assistant Commissioner to have been a Magistrate directly subordinate, and the proceedings should have been submitted to this Court through the Sessions Judge.

So much of the Assistant Commissioner's order of the 13th June as purports to acquit the accused Bipro Doss is hereby set aside, and the discharge of him by the Magistrate will be no bar to further proceedings against him, if additional evidence should be discovered.

The 25th July 1867.

Present:

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges.*

Jurisdiction.

Criminal Revisional Jurisdiction.

Reference under Section 434, Act XXV. of 1861, and Circular Orders, dated the 15th July 1863, No. 18, and 2nd June 1864, No. 7.

Queen *versus* Doonda Bhooia.

Where a Magistrate committed to the Court of Session for an offence cognizable by himself, but which (by explanatory note 3rd prefixed to the schedule annexed to the Code of Criminal Procedure) the Court of Session was competent to try, and it appeared convenient that that Court should try and pass sentence on the accused, the High Court declined to interfere.

Hobhouse, J.—THE offence is doubtless cognizable by a Magistrate; and, under ordinary circumstances, he would be wrong to commit for such an offence to the Court of Session.

But, inasmuch as, by the 3rd explanation (note prefixed to the Schedule annexed to the Code of Criminal Procedure), the Court of Session is competent to try the accused, and as it appears in this case to be convenient that it should try the accused, and pass sentence in respect of both the offences with which he is charged, the Court do not think it necessary (if possible) to interfere.

The 27th July 1867.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, H. V. Bayley, F. B. Kemp, W. S. Seton-Karr, J. B. Phear, and A. G. Macpherson, *Judges.*

Murder—Culpable Homicide not amounting to Murder—Riot—Powers of High Court—Lumping of offences.

Criminal Appellate Jurisdiction.

Queen *versus* Sheikh Bazu and others.

Committed by the Magistrate, and tried by the Sessions Judge of Mymensingh, on a charge of culpable homicide not amounting to murder, &c.

Culpable homicide is not murder, unless the case comes expressly within the provisions of Clauses 1, 2, 3, or 4 of Section 300 of the Penal Code.

Under Section 299, an offence may amount only to culpable homicide, not murder, although none of the exceptions specified in Section 300 are applicable to the case.

An express finding by the Sessions Judge that the case does not fall under any of the Clauses of Section 300 is tantamount to an acquittal of murder; and after such an acquittal, the High Court cannot, either as a Court of Appeal or a Court of Revision, look at the evidence for the purpose of reversing the acquittal and of convicting the prisoner of murder.

There had been a riot and fight between two factories—and some members of one party (*A*) were charged with the murder of the leader of the other party (*B*), and some members of the other party (*B*) were charged with causing grievous hurt to the leader of *A*—HELD that the members of each party should have been committed for trial separately, and that the Magistrate was wrong in committing the members of party (*A*) and of party (*B*) for trial all together upon joint charges as if they had had one common object.

This case was referred to a Full Bench by Loch and Macpherson, JJ., under the following orders :—

Loch, J.—IT appears to me that the Judge's finding in this case, in regard to the prisoners Moti Mondul, Seeboo, and Megha, is incorrect. He says in effect that they had no intention to kill Solim, but that they must have known that they were likely by what they did to cause death. They were, therefore, clearly guilty of culpable homicide. Culpable homicide is not murder if accompanied by any one of the exceptions mentioned under Section 300. If one or other of those exceptions exist, the case falls under Section 304 (culpable homicide not amounting to murder); and when this offence has been committed without intention, but with knowledge that death may be the result of the act done, the punishment is limited to imprisonment, or fine, or both. Now, in this case, none of the exceptions exist to take the case out of the category of murder, of which the prisoners should have been convicted. The finding appears to me to be incorrect, and the sentence of five years' imprisonment to be illegal.

I see no objection to the sentence passed on Bazu, and would confirm it.

Macpherson, J.—It appears to me that, so far as the appeal of Moti Mondul, Seeboo, and Megha, is concerned, they have nothing to complain of in the sentence which has been passed upon them. On the contrary, they have been convicted of an offence less heinous than that proved against them: for in my opinion the offence which they committed amounts to murder, and the sentence passed upon them ought to have been that of transportation for life, instead of imprisonment for five years.

The prisoners are charged (among other charges) with the murder of Solim. There is, on the evidence, no doubt whatever that Solim died from the effects of a blow on the head which he received in the course of a riot in which the prisoners took part; but it is not proved who struck the fatal blow. No reliance is to be placed on the statements made by most of the witnesses. And indeed there is but little evidence as to what occurred upon the occasion of the riot, beyond the fact that when the Police, on information received from the prisoner Bazu (who had himself been wounded), repaired to the spot, they found Solim lying senseless on the ground, with Moti Mondul lying not far off with several very severe sword-cuts—Seeboo and Megha being also there, and wounded, though less severely. From the statements made by the prisoners themselves, as well as from other evidence, it sufficiently appears that quarrels accompanied by litigation had for some weeks been going on between Moti Mondul and the deceased. They lived in the same village, and all the villagers appear to have taken the side of either the one or the other.

Of the particular riot in the course of which Solim received the blow of which he died, the Judge says: "It would appear "that the common object on Moti Mondul's "side was to put an end to the case Solim

"had brought, and to punish him and his "witnesses. Murder probably was never "intended, but Solim met his death in the "riot."

The Judge's finding as to the prisoners Moti Mondul, Seeboo, and Megha, is as follows: "I find that they were members of "the same riotous party which, *in prose-"cution of a common object*, caused the "death of Solim. I find no intention to "cause death proved. I am unable to state "with what weapon Solim was killed. I "consider the crime does not come "under any of the Clauses in Section "300, but think that there must have been "a knowledge that death was likely to "result from the proceedings in this riot, "and I consider the prisoners all equally "guilty under the latter part of Section "304, and sentence each of them to five "years' rigorous imprisonment." The conviction is for culpable homicide not amounting to murder, the Court holding that the prisoners caused the death of Solim by acts done "with the knowledge that their "acts were likely to cause death, but without "any intention to cause death, or to cause "such bodily injury as was likely to cause "death."

I have gone carefully through the whole of the evidence on the record, and I find nothing which makes me doubt the correctness of the Judge's finding upon the facts. Upon those facts, however, I think that the conviction ought to have been for murder, for they bring the case directly and clearly within the 3rd Clause of Section 300.

The Judge has found specifically that the prisoners had neither the intention nor the knowledge necessary to bring the offence within the first or the second Clause of Section 300; but he does not find specifically that they had not the intention necessary to bring the offence under the 3rd Clause. The Judge, in an earlier part of his judgment, says generally that he does not consider the offence comes under any of the Clauses of Section 300. But in the formal finding at the end, he declares (without naming Section 300) that there was no such intention or knowledge as would bring the offence within the first or second Clauses, but does not declare that there was not such an intention as would bring the offence under the 3rd Clause. But the 3rd Clause, as it appears to me, expressly applies to the facts found, and upon the facts which he found the Judge was wrong in law in not applying this Clause, and convicting the prisoners of murder.

Omitting the first and second Clauses of Section 300, the Section runs thus: "Except in the cases hereafter excepted, culpable homicide is murder if the act by "which the death is caused is done with the "intention of causing bodily injury to any "person, and the bodily injury intended to "be inflicted is sufficient in the ordinary "course of nature to cause death." And annexed to the Section, we have this illustration (*c*): "*A* intentionally gives *Z* "a club-wound sufficient to cause the death "of a man in the ordinary course of nature. "*Z* dies in consequence. Here *A* is guilty "of murder, although he may not have intended to cause *Z*'s death."

The present case falls directly within these words. The medical evidence proves that Solim died from the effects of one blow by which his skull was fractured, and that in all other respects the body was in a healthy state. He, therefore, as is in fact found by the Judge, received a wound "sufficient to "cause the death of a man in the ordinary "course of nature;" and, in the absence of any evidence to the contrary, the presumption is that the person who inflicted the wound intended to inflict it, "although he "may not have intended to cause Solim's "death." The offence therefore is murder, unless one or other of the exceptions to Section 300 are applicable. But none of them apply. There had been frequent quarrels and some personal violence used between the parties on previous occasions. When Solim was struck down, the prisoners were all of them members of an unlawful assembly, the common object of which was the punishing of Solim and his supporters. In the "prosecution of the common object of that assembly," as expressly found by the Judge, Solim received a blow on the head of which he died. Reading Section 149 of the Penal Code with Section 300, all the three prisoners are guilty of murder.

The question, then, arises whether, acting as a Court of Revision under Section 405 of the Code of Criminal Procedure, we ought to reverse the conviction and sentence, and to declare that the prisoners are guilty of murder, and must be transported for life.

I am inclined to think that we ought, following the rule laid down in Gorachand

Gopee's case (V. Weekly Reporter, 45, Criminal). Inasmuch as the Judge has not found an absence of the intention mentioned in Clause 3 of Section 300, and inasmuch as the facts found by him clearly bring the case within the terms of this Clause, and shew that the conviction for culpable homicide not amounting to murder is on the facts found by the Judge wrong in law, it seems to me that we should, in reversing this conviction, be acting in accordance with the decision of the Court in the case which I have just mentioned. But I entertain doubts on the subject which arise chiefly from the decision in the case of Torab Sheikh (V. Weekly Reporter 2, Criminal), which in some respects conflicts with the decision in Gorachand Gopee's case. I think that the question ought to be referred to a Full Bench for decision.

As regards the prisoner Bazu, I think he ought not to have been tried along with the other prisoners. Bazu belonged to Solim's party, the common object of which party was the very opposite of the common object of Moti Mondul's party. Moti Mondul, Seeboo, and Megha, are tried and punished for the murder of Solim; Bazu is tried and punished for a wholly different offence, the causing grievous hurt to Moti Mondul. These two charges cannot be properly lumped up together, and tried as one offence, in which all the prisoners are jointly concerned: and prisoners never can be rightly tried together unless for an offence in the commission of which they are all charged with being jointly implicated. In the riot Moti Mondul received several very bad sword-cuts, which might have caused his death. He has recovered; and surely, if Bazu is to be tried for the grievous hurt done to Moti Mondul, it is only reasonable, if not absolutely essential to the ends of justice, that the injured man should be examined as a witness, and that the Court should hear from the witness-box what he has to say on the subject.

It seems to me that, when there is a regular fight, as in this case, between two distinct parties, the object of the one being directly the opposite to the object of the other, the two parties never can be properly put on their trial together when charged with culpable homicide of whatever kind.

I think that the conviction and sentence and all the proceedings as against Bazu ought to be set aside, and that a new trial should be had as regards him.

As Mr. Justice Loch does not concur with me in the view I take as to the conviction of the prisoner Bazu, and as the question seems to me to be one of very great importance, I think that it is desirable that this question also should be referred to a Full Banch.

Loch, J.—Having read the remarks of my colleague, Mr. Justice Macpherson, it appears to me that both the questions mentioned by him, which are of great importance, should be submitted for the decision of a Full Bench. The judgments quoted by him are apparently conflicting, and it is very necessary that the powers of this Court, as a Court of Revision, should be properly defined.

The judgments of the Full Bench were as follows:—

Peacock, C.J. (concurred in by Bayley, Kemp, and Seton-Karr, JJ.).

I cannot concur in thinking that the conviction of the prisoners of culpable homicide not amounting to murder can be set aside, and a conviction of murder substituted by this Court, either as a Court of Appeal, or as a Court of Revision, and I am of opinion that the case cannot be sent back for a new trial.

One of the leading principles of the Code of Criminal Procedure is that there can be no appeal from a judgment of acquittal, and that this Court cannot, as a Court of Revision, alter the finding of a Court of Session upon any question of fact.

An appeal lies upon law or fact. Revision is only in respect of matters of law, or too great severity of sentence. On appeal, a judgment of acquittal cannot be reversed; on revision, it cannot be reversed upon the ground that the evidence would have warranted the Judge in finding the prisoner guilty of a more aggravated offence than that of which he was convicted.

If a prisoner is charged with murder and also with culpable homicide not amounting to murder with reference to one and the same act of killing, and if he is convicted of culpable homicide not amounting to murder, he is substantially acquitted of murder, and the Court cannot upon appeal hold that the evidence was sufficient to warrant a conviction of murder and alter the conviction accordingly, or reverse the finding and send the case back for a new trial.

In the case of Gorachand Gopee, 5 Weekly Reporter, Criminal Rulings, page 45, it was held that this Court, as a Court of Revision, might set aside a judgment of acquittal for error in law, and either pass a proper sentence, or order a new trial according to the circumstances of the case. The case supposed was one in which the facts found would show that the acquittal was wrong in law, not that the evidence would have warranted a different finding on the facts.

In that case the Court said: "Suppose "the decision of a Judge should be monstrously absurd. Suppose, upon an indictment for murdering a child, the Judge and "the Assessors should find that the prisoner "caused the death of the child by doing an "act with the intention of causing its "death, and that the case did not fall "within any of the exceptions mentioned "in Section 300 of the Penal Code. But "suppose they should also find that the "child was under the age of six months, "and the Judge should hold that it was "not murder to kill a child under that age, "and should therefore acquit the prisoner "and order him to be discharged, could it "be contended that the judgment of acquittal "could not be set aside, and that the prisoner "should go free for ever? I apprehend "that the Court, as a Court of Revision, "would clearly have the power to set aside "the judgment of acquittal, and declare "that, upon the facts found, the prisoner was "guilty of murder, and send the case back "to the Judge, ordering him to apprehend "the prisoner (if he had been discharged), "and to pass the proper sentence upon him.

"If, in the case above supposed, the "Judge were to say it is not necessary "to try whether death was caused by "an act done with the intention of causing "death, because, if it was so caused, the "prisoner was not guilty of murder, I find "that the child was under the age of six "months, and therefore acquit the prisoner, "in such a case there would be no finding "on the facts, and the Court, as a Court of "Revision, would merely set aside the "acquittal, and order a new trial. I have "supposed an error in law which is not "likely to occur. I put it merely as an "illustration. There are many constructions "of law equally erroneous, though not so "clearly so."

In the case of the Queen *versus* Torab Sheikh, 5 Weekly Reporter, Criminal Rulings, page 2, this Court held that, by finding the prisoner guilty of culpable homicide not amounting to murder, the Sessions Judge and Assessors had, in substance and effect, acquitted him of culpable homicide amounting to murder, and consequently acquitted him, as well of an intention to cause death as of the knowledge that the act done was so imminently dangerous as to bring the case within the provisions of Clause 4, Section 300 of the Penal Code.

They say: "It appears to us that, by "finding the prisoner guilty of culpable "homicide not amounting to murder, the "Sessions Judge and Assessors, in substance "and effect, acquitted him of culpable homi-"cide amounting to murder; and conse-"quently acquitted him, as well of any "intention to cause death as of the know-"ledge that the act done was so imminently "dangerous as to bring the offence within "Clause 4, Section 300, in the same way as "they would have acquitted him, if they "had expressly found that he caused the "death with the knowledge that the act "was likely to cause death, but without the "intention mentioned in Clause 1, 2, or 3 "of Section 300, and without the know-"ledge mentioned in Clause 4 of that "Section.

"If they had expressly acquitted him of "murder in that way, it would not have "been competent to this Court, either as a "Court of Appeal or as a Court of Revision, "to find that, according to the evidence, "the prisoner caused the death with the "knowledge mentioned in Clause 4, for "whether the death was caused with that "knowledge or not, was entirely a question "of fact.

"As a Court of Appeal, they could not "have done so in consequence of Section "407.

"As a Court of Revision, they could not "have done so, as the error was not one of "law, nor was the sentence illegal (*see* Sec-"tions 403, 404, and 405 of the Code of "Criminal Procedure).

"However wrong the Court may think "that the Sessions Judge and Assessors were "in acquitting of murder, they have no "power, in our opinion, to correct the error. "However inadequate they may consider "the sentence, they have not, in our opi-"nion, any power to enhance it, as the "sentence is one which is authorized by "law for the offence of which the prisoner "was found guilty."

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In that case the question had reference to Clause 4, Section 300. In this to Clause 3 of the same Section. If that decision is correct (and I cannot doubt that it is so), the principle laid down applies equally to Clause 3 as to Clause 4.

The present case falls within Section 299; it does not fall within any of the exceptions to Section 300. Still it is not necessarily a case of murder. It does not follow that a case of culpable homicide is murder, because it does not fall within any of the exceptions in Section 300. To render culpable homicide murder, the case must come within the provisions of Clauses 1, 2, 3, or 4 of Section 300.

In the present case, it has been found that there was no intention to cause death. The case, therefore, does not fall within Clause 1. It is not contended that it falls within Clause 2 or Clause 4; consequently it is not murder, unless it falls within Clause 3 of Section 300.

Was then the act done with the intention of causing bodily injury; and, if so, was the bodily injury intended to be inflicted sufficient in the ordinary course of nature to cause death? The Judge has not found that the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. He finds expressly that the case does not fall under any of the Clauses of Section 300, and the facts found do not show that he was wrong in point of law in holding that the case did not fall within any of those Clauses. If he had found that the act was done with the intention of causing bodily injury to the deceased, and that the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death, the fact so found would have shown that he was wrong in law in holding that the case did not fall within any of the Clauses of Section 300, for the facts so found would have shown that it fell within Clause 3 of Section 300. If he had found that fact, the case would have come within the principle of Gorachand Gopee's case. Not having found the fact, the case comes under the rule laid down in the case of the Queen *versus* Torab Sheik above cited. The evidence might have justified the Judge in finding the fact, but that merely shows that his finding did not come up to the point which the evidence would have justified. It cannot authorize this Court to look at the evidence for the purpose of reversing the acquittal of murder, and of convicting the prisoner of that offence.

The finding of the Judge that there was no such knowledge as would bring the case within Clause 2 or Clause 4, coupled with his omission to find that the bodily injury intended to be inflicted was not sufficient in the ordinary course of nature to cause death, is not tantamount to a finding that the injury intended was sufficient in the ordinary course of nature to cause death, nor can it authorize this Court to find that it was so, and to reverse the Judge's finding that the case did not fall within Clause 3, Section 300, which was included in his general finding that the case did not fall within any of the Clauses of that Section. If the Court was right in Torab Sheik's case in holding that the Judge and Assessors, by finding the prisoner guilty of culpable homicide not amounting to murder, not only acquitted him of an intention to cause death, but also of the knowledge that the act done was so imminently dangerous as to bring the offence within Clause 4, it is clear that a similar finding in the present case must amount to an acquittal of an intention to inflict such bodily injury as would be sufficient in the ordinary course of nature to cause death.

It is said that the Judge has not found that the injury intended to be inflicted was not sufficient in the ordinary course of nature to cause death. Suppose that he had expressly found that it was not sufficient, it is clear that this Court could not have altered his finding in that respect for the purpose of altering his conclusion that the prisoner was guilty of culpable homicide not amounting to murder; or, in other words, of reversing his acquittal of murder, and of convicting the prisoners of that offence.

Suppose a Jury in a special verdict had found the facts as the Judge has done. It is clear that such a verdict would not have amounted to a verdict of guilty of murder, and that the Court could not have supplied the necessary fact by finding that the injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. Nor could the Court have presumed that the Jury intended to find that fact in the affirmative, merely from their omission to negative it. It would be much more reasonable to infer (if the law allowed inferences at all in such a case) that the Jury considered that their omission to find in the negative would never be considered to amount to a finding in the affirmative.

I am clearly of opinion that this Court cannot add a fact to the finding of a

Judge or Jury in the case of acquittal, even if the omission was contrary to the weight of evidence, any more than it can reverse or set aside a judgment of acquittal if it is clearly contrary to the evidence.

The appeal will therefore be dismissed as regards the three prisoners named above.

The Magistrate was wrong in sending up joint charges against persons who took part in the riot in opposite sides, for the two parties had not a common object.

Bazu's case.—The Judge, however, took a right view of the case as regards the prisoner Bazu in deciding whether he was innocent or guilty. This prisoner has had a fair trial, he has not been prejudiced by the error of the Magistrate, and in my opinion there is no ground for setting aside the verdict, or reversing the conviction or sentence. The appeal must be dismissed as regards this prisoner.

Phear, J.—I agree generally in the judgment of the Chief Justice.

We cannot interfere under the circumstances of the case of *Seeboo* and Megha, unless we see on the facts found by the Judge that he has committed an error of law. It is said that he has committed such error by finding facts which amount to the crime of murder on the part of the prisoners, and yet acquitting them of that crime. I do not think that he has found facts sufficient to support a charge of murder. On the contrary, he finds expressly that this case does not fall under any of the Clauses of Section 300. If this finding stood alone, it seems to me that it would, without doubt, be taken to amount to a negativing of the facts mentioned in those Clauses as material to the crime of murder. Then, is there anything in the rest of the judgment to modify it? I think not. The Judge, no doubt, goes on to expressly negative the facts of *two* of those Clauses, and omits at the same time to say any thing with regard to those of the third, although he finds that death was caused by the bodily injury intended to be inflicted; and, no doubt, if that injury was in itself such as would, in the ordinary course of nature, be sufficient to cause death, the requisites of that third Clause would be complied with: still he steps short of here saying in words that it was so sufficient.

I cannot from his silence in this place, coupled though it be with his express denial of the facts in the other Sections, infer that he meant to affirm the sufficiency of the injury in the ordinary course of nature to cause death. This being so, it seems to me that his previous general finding is untouched, and therefore it is impossible for me to say that he has made the error in law which has been alleged.

As to Bazu's case, I think it was extremely improper that this prisoner should have been tried jointly with the other prisoners.

The offence with which he was charged was entirely distinct from those charged against them. So far was he from having any common purpose with them in regard to the conduct which formed the basis of the charges that he and they were clearly members of bitterly hostile parties respectively. However, I do not see, from the materials before me, that any injustice has been done to the prisoner by reason of the irregularity of the trial, and indeed I am disposed to believe that he has, under the peculiar circumstances of the case, been rather advantaged thereby than otherwise. I therefore do not think that there is here any sufficient reason for ordering a new trial.

Macpherson, J.—On further consideration, I think, as regards the first three prisoners, that, as the Sessions Judge has expressly said that the case does not fall within any of the Clauses of Section 300, he must be held to have found (however erroneously) such a state of facts as does not amount to murder, and to have acquitted the prisoners of that offence, notwithstanding the apparent modification of his first finding by his subsequent more detailed finding as to the knowledge and intention with which the act which caused the death was done. I therefore concur in the opinion that we cannot, as a Court of Appeal or Revision, alter the finding of acquittal, and convict the prisoners of murder.

As regards the prisoner Bazu, I remain of the opinion which I expressed in referring his case to a Full Bench for decision.

Loch, J.—I concur with Mr. Justice Macpherson regarding the three prisoners convicted of culpable homicide not amounting to murder. With regard to the prisoner Bazu, I think the preferable course would have been to have committed him separately; but I see no sufficient ground, under the circumstances, to order a new trial.

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The 29th July 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Trial by Jury (Gowalpara).

Criminal Appellate Jurisdiction.

Queen *versus* Bhagidhone Katchari and others.

Committed by the Deputy Commissioner, and tried by the Commissioner of Cooch Behar Division, on a charge of robbery, &c.

The Commissioner of Cooch Behar has no power to hold trial by Jury in the Gowalpara District.

Glover, J.—IT has already been ruled by a Division Bench of this Court in the case of Reg. *versus* Khoodeeram,* on the 10th July 1867, that the Commissioner of Cooch Behar has no power to hold trials by Jury in the Gowalpara District.

Following this ruling, the judgment of the Commissioner of Cooch Behar, in the case of Reg. *versus* Bhagidhone and others, must be cancelled, and the trial quashed.

The Commissioner will hold a new trial with the aid of Assessors.

The 29th July 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Murder—Running-a-muck.

Criminal Referred Jurisdiction.

Queen *versus* Bishonath Bunneea.

Where a quiet, peaceable man, suddenly and without the least motive or provocation, runs-a-muck against all around him, his case is different from an ordinary case of deliberate murder deserving of the extreme penalty.

Glover, J.—THE evidence in this case was very fully and plainly laid before the Jury, and there can be no doubt whatever that the prisoner killed the deceased Pochai, as well as wounded three other persons.

The Jury found that the prisoner was not insane at the time, and there was no evidence to show that he had ever before been out of his senses. That he has been perfectly sane ever since, is unquestionable.

The commission of the murder by the prisoner, and his sanity at the time, are facts found by the Jury after considering all the evidence in the case, and this Court cannot interfere with the conviction.

At the same time, although we consider the Jury justified in finding that the prisoner was sane at the time the act was committed, there are circumstances which seem to make it unnecessary to visit the crime with the extreme penalty.

It is one of those cases in which a quiet, peaceable man, by all accounts, suddenly and without the least motive or provocation, runs-a-muck against all around him. He may have been sane immediately before and immediately after, and there may be no evidence whatever to show that he was insane at the moment of his attack ; still it is impossible to avoid the conviction that the man's mind was not in its normal state, and that this case is very different from ordinary cases of deliberate murder.

We think that, under all the circumstances of the case, we are justified in remitting the capital sentence, and in awarding one of transportation for life.

The 29th July 1867.

Present :

The Hon'ble F. B. Kemp, *Judge.*

Evidence—Statement under promise of pardon.

Criminal Appellate Jurisdiction.

Queen *versus* Radanath Dosadh.

Committed by the Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of dacoity, &c.

A statement made under promise of pardon is no evidence against a prisoner.

THE prisoner has been convicted of dacoity and of escaping from lawful custody. He has been sentenced for the first offence to 10 years' transportation, and a fine of Rs. 250.

A dacoity took place in 1863 in the house of Gordyall Mundle. The prisoner was

* *See* ante, p. 39.

arrested in Ghazeepore, and sent down to Bhaugulpore; he made a full confession, and a promise of pardon was made to him; he then made a statement confirming his previous confession. But, without fulfilling the condition under which pardon was tendered, he escaped from hâjut, and has very lately been apprehended. His defence now is that he is not the Pudarul Dosadh who confessed and then absconded, and that his name is Ghur Borun Dosadh.

The identity of the prisoner is the first question. This has, in my opinion, been satisfactorily established by the evidence, and I entertain no doubt on the question.

The statement made under the promise of pardon is no evidence against the prisoner. To admit such would be contrary to the policy of Section 203, Code of Criminal Procedure, as observed by the Judges of this Court on review of the jail delivery statements. But there is the confession of the prisoner, which is evidence against the prisoner, and which has been proved to have been voluntarily given.

I reject the appeal.

The 29th July 1867.

Present:

The Hon'ble L. S. Jackson and
C. P. Hobhouse, *Judges.*

Section 270, Code of Criminal Procedure—False Complaints—Amends—Criminal Trespass—Mischief upon land—House-breaking by night.

Criminal Revisional Jurisdiction.

Reference under Section 434, Code of Criminal Procedure.

Queen *versus* Lalloo Sing and others.

Section 270, Code of Criminal Procedure (authorizing the award by a Magistrate of amends in cases of false complaints) applies only to complaints made and cases tried under Chapter XV. of the Code, and is limited to cases punishable under the Penal Code with imprisonment for a period not exceeding six months.

50 rupees is the measure of compensation awardable from any complainant, irrespective of the number of accused persons.

Semble.—Criminal trespass is a part of the offence of mischief committed upon land, as well as of house-breaking by night.

Jackson, J.—It seems to me quite clear that the order of the Magistrate in this case was made without jurisdiction.

Section 270 of the Code of Criminal Procedure authorizes a Magistrate, in any case where he shall dismiss the complaint as frivolous and vexatious, "in his discretion "by his order of dismissal to award that "the complainant shall pay to the accused "person such amends not exceeding fifty "rupees as to such Magistrate shall seem "just and reasonable." This Section, both by the place where it occurs, and also by the language which it uses in respect of dismissing complaints, is manifestly applicable only to complaints made and cases tried under the 15th Chapter of the Code of Criminal Procedure, and the procedure in this case is limited by Section 257 to cases punishable under the Indian Penal Code with imprisonment for a period not exceeding six months. The accused persons in this case were not tried under the 15th Chapter of the Code: they were put upon their trial under the 14th Chapter of the Code for an offence under the 427th and 447th Sections of the Penal Code. One of these Sections relates to an offence punishable with imprisonment, which may extend to two years and fine. Such a case is clearly beyond the purview of the 15th Chapter of the Procedure Code.

It has been suggested that the Magistrate might deal with the complaint in this case merely upon that part of the charge which relates to criminal trespass, that being an offence which can be dealt with under the 15th Chapter of the Code. But this clearly is not so, because the offence of which these parties were charged—a graver offence, that is mischief committed upon the land of complainant—must have been preceded by criminal trespass. The criminal trespass, therefore, was merely a portion of it. In the same way, a person who commits house-breaking by night does, at the very first or at some part of his proceedings, commit the act of criminal trespass. It might as well be said that the Magistrate would be at liberty, disregarding the graver portion of the charge, to treat this as a case of criminal trespass, and inflict a fine upon the complainants by way of compensation to the accused. That clearly he could not do.

Another point arises in the case.

The Magistrate awarded to the several accused persons sums of money by way of amends, amounting to 25 rupees to each person. This also, it seems to me, was beyond the power of the Magistrate, because Section 270 provides "that the complainant shall pay to the accused person such amends not exceeding 50 rupees as to such Magistrate shall seem just and reasonable." Fifty rupees, therefore, appears to be the measure of compensation which the Magistrate is authorized to award from any complainant. The Magistrate observes that, if this sum had been divided amongst several accused persons, the compensation would be very inadequate. Possibly it might be. But the injured party may have other remedies, and there are other ways of punishing persons bringing false complaints.

It appears to me, therefore, that the Magistrate's order was erroneous, and ought to be set aside.

Hobhouse, J.—I concur on both points.

The 30th July 1867.

Present :

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Conviction (under Police Act V. of 1861).

Criminal Jurisdiction.

Revision of Proceedings under Section 404, Code of Criminal Procedure.

Queen *versus* Kassimuddin Constable.

That the facts proved would also constitute an offence under a Section of the Penal Code seems to be no reason for quashing a conviction under the special law, Act V. of 1861.

Jackson, J.—INAYET ALI, a police officer, was convicted before the Joint Magistrate of Gya of an offence under Section 29, Act V. of 1861.

He appealed to the Court of Session, and the Judge (whether of his own motion or in consequence of a communication from the Magistrate of the District, does not precisely appear), being of opinion that the facts in evidence amounted to an offence under Section 218, Indian Penal Code, annulled the conviction, and directed the commitment of Inayet Ali and another police officer who was also implicated and had been similarly convicted.

The Sessions Judge assumed jurisdiction to make these orders under Sections 427, 434, and 435 of the Code of Criminal Procedure. Subsequently, having doubts of the legality of his own orders, he made a communication to this Court, and we called for the proceedings.

Clearly the order made could not be supported under Section 427, because the appellant had not been convicted of "an offence not triable by" the Magistrate.

And as the facts certainly did constitute (if proved) a violation of duty, the conviction was not otherwise invalid, and could not be set aside, unless the Appellate Court disbelieved the evidence. That the facts proved would also constitute an offence under a Section of the Indian Penal Code seems to be no reason for quashing a conviction under the special law, Act V. of 1861.

It seems to me, therefore, that the order of the Court of Session was erroneous and must be reversed, and the conviction will be thereby restored.

Hobhouse, J.—I concur.

The 31st July 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Evidence—Certificate under Section 205, Code of Criminal Procedure—Attestation by Magistrate.

Queen *versus* Rezza Hossein and others.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of 24-Pergunnahs, on a charge of kidnapping, &c.

The certificate required under Section 205, Code of Criminal Procedure, need not be in the handwriting of the presiding officer, but may be under his hand only, *i. e.*, signed by him.

Where a Jury is satisfied as to the genuineness of an attestation by a Magistrate, it is unnecessary to call the Magistrate to swear to his signature.

Kemp, J.—THESE prisoners have been convicted; No. 1 with the offence of abetment of kidnapping, the other three with the substantive offence of kidnapping; No. 1 has been sentenced to 3 years, Nos. 2, 3, and 4 each to one year's rigorous imprisonment. The trial was by Jury.

The main points taken before us in appeal were:—

1st.—That the evidence of the girl's age was not sufficient.

2nd.—That the confession of the prisoner Rezza Hossein was not admissible as evidence against him, inasmuch as it had not been taken with the formalities prescribed by law.

3rd.—That the Judge ought to have instructed the Jury to consider the evidence adduced to prove the moowakut or temporary marriage of the prisoner Rezza Hossein with the witness Laddun; for if such marriage be established, the offence of kidnapping falls to the ground.

On the *first* point we have the evidence of the father of the girl, of a near relation, and that of the Civil Surgeon. This evidence was fairly put to the Jury, and they came to the conclusion that the girl was under sixteen years of age.

On the *second* point we find that the confession of the prisoner Rezza Hossein was recorded by the Deputy Magistrate Duliduddin in the language of the prisoner, as well as that of the officer who recorded it. The certificate required under the provisions of Section 205, Code of Criminal Procedure, is appended to the confession, and, though written in Bengalee, is in due form. The initials of the Deputy Magistrate, with his official designation, are affixed in attestation of the examination of the accused. The absence of the signature of the prisoner who can write is not material, for the law does not enact that the examination of the accused is to be signed by him; and that without such attestation it is inadmissible; the certificate being in due form, we are not to presume that the Deputy Magistrate affixed his initials thereto, without being cognizant of the fact that he was certifying that the examination of the accused was taken, as the certificate tells us it was, in the presence and in the hearing of the Deputy Magistrate, and that it contains accurately the whole of the statement made by the prisoner.

The law does not enact that the form of the certificate is to be written in the handwriting of the presiding officer, but that it is to be "under his hand," that is to say, it is to be signed by him. There can be no doubt that the initials are those of the Deputy Magistrate. Section 366 of the Code of Criminal Procedure enacts that the examination of the accused person before the Magistrate shall be given in evidence at the trial, and the attestation of the Magistrate shall be sufficient *primâ facie* proof of such examination, and such attestation shall be admitted without proof of the signature to it, unless the Court shall see reason to doubt its genuineness. The Jury was satisfied that the signature was genuine: it was, therefore, unnecessary to call the Deputy Magistrate to swear to his signature.

We have had our attention called to the case of the Queen *versus* Mussamut Niruni and Moniruddin, reported in Vol. VII. of the Weekly Reporter, Criminal Rulings, page 49. In that case it was very questionable whether the certificate required by Section 205 of the Code of Criminal Procedure was under the hand of the Magistrate. The learned Judges in that case observed that what purported to be the signature of the Magistrate was an "irregularly-shaped mark or figure which might be the rudiments of a signature of some English Magistrate." There was also a disregard of the form in which the certificate ought to be recorded. That case is therefore very different from the case before the Court.

On the last point we find that the Judge did notice the plea of the prisoner that he had been married to the girl Laddun under a form which is prevalent amongst the Mahomedans of the Sheeah sect. This form of marriage is called the moowakut form. *See* Baillie's Digest of the Mahomedan Law, page 18. Evidence was taken in support of the prisoner's plea, which was submitted to the Jury. This evidence did not satisfy the Jury; and, after perusing it, we see no reason to think that the Jury formed a wrong estimate. We may further observe that this plea of a temporary marriage with the girl Laddun was raised for the first time before the Sessions Court. Before the Deputy Magistrate the prisoner stated that he had formed an illicit connection with the girl Laddun, and that she was a consenting party to leaving her father's house and guardianship.

We see no reason to interfere, and confirm the conviction and sentences, rejecting the appeal.

The 3rd August 1867.

Present :

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Prisoner's defence.

Criminal Revisional Jurisdiction.

Reference under Section 434, Code of Criminal Procedure.

Nirba Sing *versus* Tofuzzul Hossein, and *vice versâ.*

The High Court will not interfere upon a mere statement of a prisoner, unsupported by any evidence whatever, that the Magistrate, who convicted him, did not record the whole of the defence he wished to make.

Macpherson, J.—THE Magistrate refers this case to the High Court apparently on the ground that there has been a serious irregularity in the proceedings of the Assistant Magistrate whereby the prisoner has been injured. The irregularity alleged is that the Assistant Magistrate omitted "to record the full defence which the petitioner says he wished to make." The Assistant Magistrate has recorded that which he says is the full defence made by the prisoner. There is nothing to show us that the Assistant Magistrate did not in fact record the whole defence made by the prisoner or which the prisoner wished to make. It is obviously quite impossible for us to interfere upon a mere naked assertion of a prisoner who has been convicted, unsupported by any evidence whatever, of there having been an omission or irregularity on the part of the Assistant Magistrate.

There is nothing illegal in the Assistant Magistrate's proceedings so far as we can see. With the merits of the case we have nothing to do, as there is no appeal to this Court.

The 3rd August 1867.

Present :

The Hon'ble W. S. Seton-Karr, *Judge.*

Record.

Queen *versus* Rutton Meah.

Committed by the Magistrate, and tried by the Sessions Judge of Jessore, on a charge of dishonestly using as genuine forged documents, &c.

Documents which form the basis of a charge against a prisoner should not be buried among a mass of papers in the nuthee, but should be put either in the Calendar or by themselves in an envelope, or in some conspicuous part of the record where they would be seen at once.

THIS is a very clear case. The documents which are dakhilas have been clearly tampered with and altered, and they are shown to have been quite free from erasures when first delivered to the prisoner.

I have again to complain, as I so often have complained, that the dakhilas tampered with are buried in a mass of papers, and that time has been lost in hunting for them.

Documents like these are really parts of the indictment against the prisoner, and should be put either with the calendar or by themselves in an envelope, or in some conspicuous part of the record where they would be at once seen.

The appeal is rejected.

The 5th August 1867.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Dacoity—Approver—Search—Kind of evidence on which Courts will do well not to convict.

Queen *versus* Ram Sagor and others.

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of dacoity.

The evidence of an approver for whose appearance at the trial there was not the slightest reason, and the mere fact that in the houses of each of the four prisoners only one article of the stolen property was found, was held insufficient, under the circumstances of this case where the best witnesses were not examined, to support a conviction of the prisoners on a charge of dacoity.

Seton-Karr, J.—This is a very unsatisfactory case in which four men have been convicted of dacoity on the evidence of one approver and of other witnesses to the finding of one single article of property in each of the houses of the four prisoners.

The dacoity was committed on the boat of a Mr. C. Jackson, and it is somewhat remarkable that neither he nor his servant were able positively to identify a single one of the assailants.

The approver pretends that the four prisoners with others called him away to commit the dacoity, but his version of the attack strikes me as eminently suspicious. He would have us believe that, as he neared Mr. Jackson's boat, another boat, apparently quite unconnected with his own party, attacked the complainant's boat from the other side. Then there is not the slightest reason why the approver should have volunteered a confession in this case at all. Not a scrap of property was found in his house. No one had mentioned him, he is not related to any of the prisoners, and there was no reason for him to apprehend any danger to his liberty or person, as he was arrested on mere suspicion.

I would put aside the evidence of this person altogether.

Then as to the finding and recognition of the articles. The boat, if we are to believe Mr. Jackson, was completely cleared of its contents, and yet no more than four trifling articles are recovered, and these four are all divided amongst the four prisoners, one article to each house.

The Sessions Judge appears to have been struck with this very curious fact.

It is true that all the articles are such as might be easily recognized and identified, and I have no reason to doubt that they belonged to Mr. Jackson.

But only one witness actually deposes that he himself found anything. Mahomed Fuzil, witness No. 6, found the knife in Bachai's house The other articles are a comb, a shirt, and a *lota*, and they are all discovered and dragged to light by a nameless constable, by Bhugwan Muzumdar, and by Chunder Coomar Ghose.

Not one of these persons has been examined; and, though I have no doubt that Mr. Irvine, the Superintendent, did what he could to prevent unfair practices, yet it is impossible to place confidence on the version for the prosecution as to the finding of the articles when the best evidence to that finding, except in one instance, has not been taken. The prisoners, no doubt, are bad characters, and a river-dacoity actually took place. But the whole evidence which would inculpate the four prisoners is to my apprehension so suspicious in some points, and so wanting in others, and the story of the approver is so very unsatisfactory, that I cannot think the prisoners should ever have been convicted.

I am generally unwilling to disturb a conviction, when both the Judge and the Assessors agree; but in this instance I am sure I never should have convicted, if presiding at a Sessions trial, on such evidence, and I would give the prisoners the benefit of all the circumstances and all the doubts which I have pointed out.

The case must go to a second Judge. I think it is too late to take the evidence of Chunder Coomar and others now.

Loch, J.—I have gone through these proceedings more than once very carefully. I think that there can be no question as to the evidence regarding the search of the houses and finding the property, which, no doubt, belongs to the complainant. But the credibility of the evidence on this point does not exclude the possibility of previous collusion, with which the prisoners charge the Darogah, who is a brother of the complainant. I concur with my colleague in rejecting the evidence of the approver. His account appears to me very unsatisfactory. Then as to the search. It was carefully and properly conducted by the District Superintendent of Police, but the fact that only one item of property unmistakably belonging to the complainant, and no more, was found in each of the prisoners' houses, raises in my mind so strong a suspicion as to the truth of the case, that I think it would be unsafe to convict the prisoners merely on the evidence to the search. The prisoners must be released.

The 5th August 1867.

Present :

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Conviction by one Magistrate on evidence recorded before another—Appeal on merits.

Criminal Revisional Jurisdiction.

Revision of Proceedings under Sections 404 and 405 of the Code of Criminal Procedure.

Queen *versus* Poornoo Chunder Doss and others.

Where a prisoner is convicted by one Magistrate upon evidence previously recorded before another, the defect cannot be cured by the evidence being again recorded, and the conviction confirmed.

No appeal upon the merits can be entertained from a conviction which was based on no legal evidence, and which was absolutely bad in law.

We are of opinion that, for the reasons stated in Mr. Justice Jackson's judgment accorded on the 1st July, the proceedings must be set aside, and the conviction quashed.

The judgment of 1st July was as follows :—

Jackson, J.—In this case the petitioners were convicted by the Joint Magistrate upon a trial in which the evidence had been previously recorded before another Magistrate. They appealed to the Sessions Judge, and the Sessions Judge directed the Magistrate to record the evidence in the presence of the accused, and to report the result to the Court of Session. The Joint Magistrate complied literally with this instruction, recorded the evidence, and sent it up to the Court of Session, and thereupon the Court of Session confirmed the conviction and sentence originally, come to. We have therefore this anomaly that the conviction which the Sessions Judge must have considered to have been improperly arrived at was not set aside. The evidence for the prosecution and defence was again recorded in the presence of persons against whom a conviction was standing, and which conviction was subsequently upheld. The Magistrate who heard the evidence recorded no opinion and passed no judgment upon the case, and the Sessions Judge subsequently confirmed the sentence, which he himself held to have been illegally passed.

The petitioner's vakeel now applies to this Court to take up the case and entertain an appeal upon the merits, and he relies upon the case of Mohesh Chunder Chatterjee, which is to be found in Volume II., Weekly Reporter, page 13, Criminal Rulings. This case, it appears to me, is distinguishable from the case cited, because in that case the evidence for the prosecution had been properly taken, and the conviction was passed, therefore, upon legal evidence, but the Sessions Judge thought it expedient that evidence should be recorded bearing upon the innocence of the accused, and he therefore remitted the case to the Magistrate, in order that that evidence might be recorded, and the result communicated to him.

In this case the conviction was absolutely passed upon no legal evidence at all, and it was therefore absolutely bad in law.

I think therefore that we cannot entertain the appeal here as an appeal upon the merits of the case, but that we must send for the record, in order that the proceedings may be entirely quashed, and the Magistrate directed to pass judgment according to law.

The 5th August 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Forcible carrying off of crop—Sections 378 and 114, Penal Code.

Criminal Revisional Jurisdiction.

Revision of Proceedings under Sections 404 and 405, Code of Criminal Procedure.

Queen *versus* Shib Chunder Mundle and another.

Where a Court finds that parties came with a number of armed men and carried off a crop, the finding amounts to that of a forcible carrying off without the consent of the owner. Even if they took no part in the actual taking, they must, with reference to Section 114, Indian Penal Code, be considered guilty of the substantive offence under Section 378.

Kemp, J.—These prisoners have been convicted of theft by the Joint Magistrate of the 24-Pergunnahs, which conviction has

been affirmed by the Sessions Judge of that district on appeal.

The case comes before us under Section 404, and we must, therefore, be satisfied that there has been an error in the decision on a point of law. It appears to us very clear that there has been no such error.

The Joint Magistrate found that the prisoners had plundered the crop of the prosecutor. The Sessions Judge, though he does not use the word "plunder," finds that the prisoners came with a number of armed men and carried off the crop. This finding, in our opinion, clearly amounts to this, that the carrying off was a forcible one, and without the consent of the owner of the crop.

In the Courts below the prisoners took an entirely distinct line of defence from that taken for them by their learned Counsel in this Court.

Below the prisoners set up an *alibi* which they failed to prove. In this Court they abandon this plea, and raise an entirely new case, urging that the crops were taken under distraint. Mr. Bourke also urges that his clients took no part in the actual taking, and that therefore they could not be guilty of theft as defined in Section 378 of the Penal Code. But it has been found by the Courts below that the prisoners took a large body of armed men with them, and that the crops were forcibly cut and carried off under Section 114 of the Penal Code. The prisoners must be considered to have committed the substantive offence. They were present; and, under their orders, the crop was forcibly cut and carried off.

The appeal is rejected.

The 12th August 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Section 434, Code of Criminal Procedure—Evidence of one witness.

Criminal Revisional Jurisdiction.

Reference under Section 434 of the Code of Criminal Procedure.

Queen *versus* Bindu and another.

Section 434 of the Code of Criminal Procedure contemplates cases where the sentence or order is contrary to law.

The evidence of one witness, if credible, is legally sufficient proof of any but certain exempted offences.

Glover, J.—We do not see the necessity for this reference.

Section 434 of the Procedure Code contemplates cases where the sentence or order is contrary to law. Now, the evidence of one witness, if credible, is legally sufficient proof of any but certain specially-exempted offences, and the Magistrate, as he believed that evidence, was justified in convicting.

We observe, moreover, that this witness was a neighbour, living close by, and therefore in a position to speak to the facts deposed to by him.

As to the defendants themselves, we find nothing in the record to shew that they were treated with any harshness; their defence was taken in due form, and they did not call witnesses. Their plea was a simple denial of the charge, coupled with an allegation which they made no attempt to prove.

The 12th August 1867.

Present:

The Hon'ble F. A. Glover, *Judge.*

Jury—Section 14, Act II. of 1855.

Criminal Appellate Jurisdiction.

Queen *versus* Hosseinee.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of abducting a child with intent dishonestly to take moveable property from his person.

Whether or no a child was competent to give evidence within the meaning of Section 14, Act II. of 1855, was a question for the Judge to decide, and not for the Jury: the amount of credit to be given to the statement being all that fell within the province of the Jury.

There seems to be no reason for interfering with the Lower Court's order in this case. The Sessions Judge, however, should not have left it to the Jury to say whether or no the child Nimkee was competent to give evidence within the meaning of Section 14, Act II. of 1855, that being a question for the Judge to decide. The amount of credit to be given to the girl's statement was all that fell within the province of the Jury.

No substantial injury, however, has been done to the prisoner, and the error does not amount to a misdirection.

For the rest, the evidence was very fully and carefully laid before the Jury, and no point of law is raised in appeal.

The petition must be rejected.

f

The 12th August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Commitment of a discharged person—Section 435, Code of Criminal Procedure—Powers of Magistrate and Joint Magistrate.

Criminal Revisional Jurisdiction.

Queen *versus* Tilkoo Goala.

The discharge of a person accused of an offence triable by the Court of Session is no bar to his being again brought, with a view to commitment, before a Magistrate who may proceed in such a case without an order from the Judge. Section 435, Code of Criminal Procedure, applies where a Magistrate has not thought fit to commit.

Legally, and for the purposes of a commitment, a Magistrate and Joint Magistrate have equal powers, and the Joint is not bound to act upon the instructions of the Magistrate in a judicial proceeding such as the commencement of a preliminary inquiry.

Jackson, J.—THE discharge of a person accused of an offence triable by the Court of Session is no bar to his being again apprehended and brought before a Magistrate with a view to commitment. The Magistrate may proceed in such a case of his own motion, and his authority to do so is quite independent of an order from the Court of Session under Section 435, Code of Criminal Procedure, which applies to cases where the Magistrate has not thought fit to commit. As to the question whether a commitment made by a Joint Magistrate under the order of the Magistrate of the District is regular, it seems to me not to affect the question in any way that the Joint Magistrate has received an order of the Magistrate.

Legally, and for the purposes of a commitment, the two officers have equal powers, and the Joint is not legally bound to act upon the nstructions of the Magistrate in a judicial proceeding such as the commencement of a preliminary enquiry; but the Magistrate of the District is the executive superior, and good sense would usually dictate obedience, and in any case I think it is not the business of the Court of Session, when the commitment is otherwise regular, to enquire into the orders which may have put the committing officer in motion.

But especially when the Sessions Judge merely purposes to quash the commitment in order that he may pass a fresh order of commitment, I think that would be a needlessly circuitous proceeding, and it would be better to pass over the irregularity, if there were any; as it is, the proceedings appear to be quite regular.

Hobhouse, J.—I concur in thinking the proceedings regular.

The 13th August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Jurisdiction—Section 174, Penal Code—Order of forfeiture under Section 184, Code of Criminal Procedure—Immaterial error of procedure.

Criminal Revisional Jurisdiction.

Reference under Section 434, Code of Criminal Procedure.

1. Baijoo Baul *versus* Gugun Misser and others

2. Queen *versus* Gugun Misser.

A Magistrate can take cognizance of an offence under Section 174, Penal Code, committed against his own Court.

An order of forfeiture under Section 184, Code of Criminal Procedure, if substantially legal, cannot be disturbed for an immaterial error of procedure.

Jackson, J.—IT appears to me that there is nothing in the law which forbids a Magistrate from taking cognizance of an

offence under Section 174, Indian Penal Code, committed against his own Court.

The case falls under the provisions of Sections 168 and 171. The first of these forbids any other Criminal Court from taking cognizance of such cases except with the sanction of the Court against which the offence was committed. The latter generally directs that the accused is to be sent before a Magistrate having jurisdiction. I see nothing to prevent the Deputy Magistrate from sending the case for investigation to himself. He would, as Deputy Collector, unquestionably do so. A Court of Session in the like case may convict and try on its own charge (Section 172).

As to particular contempts, a Magistrate is restrained (Section 163) from awarding imprisonment or a fine exceeding 200 Rs. for a contempt in his own presence against his own Court. In ordering the accused in this case to be imprisoned in the Civil Jail, if they should not pay the fine inflicted, the Deputy Magistrate had probably the last quoted Section in view. That Section does authorize imprisonment in the Civil Jail in such cases.

In this case the sentence was irregular as far as it directed the imprisonment to be in the Civil Jail, although the law does not appear to provide that persons sentenced to imprisonment for offences shall be confined in any particular place. The irregularity, however, is very trifling.

Another question raised is, that the Deputy Magistrate made an order under Section 184, Code of Criminal Procedure, for the forfeiture of certain property which had been attached, and that the order was recorded in the proceedings taken against the parties under Section 174.

It appears to me that, supposing the order to be in other respects regular, it was not very material whether it was put up with the proceedings of the case in which the parties were summoned originally to appear, or of that in which they were personally dealt with for their non-appearance or separately. There is, on the whole, in my opinion, no sufficient reason for the interference of this Court.

Hobhouse, J.—As I understand the facts of the two cases referred to us, they are these: *First.*—The Deputy Magistrate in a complaint made under Chapter 14, Criminal Procedure Code, issued a warrant against the accused.

The accused concealed themselves so that within the meaning of Section 183 they could not be found.

Proclamation was issued under the above Section and under Section 184 for the appearance of the accused within a certain time and for the attachment of their property; and, on their non-appearance within that time, their property was declared forfeit to Government.

It appears that the order of forfeiture was not issued in exactly the right proceedings, but in substance, as my brother Jackson observes, it was quite legal, and I agree that it cannot be disturbed.

This is the first case referred to us. The second case is this: Certain persons were legally directed to attend the Deputy Magistrate in person at a certain time and place in obedience to a certain order, and they intentionally omitted to attend as directed.

This was a contempt committed against the Court of the Deputy Magistrate, and he himself proceeded to try and punish the offenders.

For the reasons given by my learned brother, I think that the Deputy Magistrate had jurisdiction, and I agree in not interfering with his proceedings.

h

The 19th August 1867.

Present:

The Hon'ble G. Loch and C. P. Hobhouse, *Judges.*

Enquiry under Section 318, Code of Criminal Procedure—Taking evidence in two cases together—Revision under Section 404.

Criminal Revisional Jurisdiction.

Revision of Proceedings under Section 404, Code of Criminal Procedure.

Messrs. Watson and Co., *1st Party,*

versus

Ranee Surnomoyee, *2nd Party.*

Two investigations under Section 318, Code of Criminal Procedure, were before a Magistrate who, after deciding one of the cases, remarked on the other that, because the lands adjoined, he had taken the evidence in the two cases together, and found it unnecessary to continue the enquiry further. HELD under Section 404 that the parties kept out of possession were entitled to a full enquiry.

Hobhouse, J.—THE record shews that there were two investigations under Section 318 of the Code of Criminal Procedure before the Magistrate, numbered 1 and 2 respectively. The enquiry in No. 1 was conducted regularly, and resulted in a decision in favor of the present petitioner, the Messrs. Watson.

On case No. 2 the Magistrate remarks that, because the lands in plots Nos. 1 and 2 adjoined, therefore he took the evidence in two cases together, and then, after hearing the evidence of the witnesses (apparently Messrs. Abbot, Hunt, and Raimer), he found it "unnecessary to continue the enquiry further," because these witnesses had admitted that the land in plot No. 2 had been sown with dhan by the opposite party, Ranee Surnomoyee, and because dhan was in the lands, and therefore "possession was clearly with the other party."

Mr. Allan for the petitioners contends that this refusal to proceed with the enquiry was an error in law, which gives him a right to apply to this Court under Section 404, and he prays that the Magistrate's order directing the opposite party to be retained in possession be set aside, and that full enquiry be allowed to his clients.

We think this contention is good. The cases were two distinct cases, and petitioners were entitled in the words of the law to an enquiry, *i. e.*, of course to a *full* enquiry upon each one of them, and the order in case No. 2, in which such enquiry was denied to petitioners, must be set aside, and a fresh enquiry be held. We would remark too that a full enquiry would seem to have been the more necessary in this case, because from the result of certain criminal trials for trespass which have been put up with the record, it would appear that these very lands were in possession of petitioners, so much so that certain dependants of the opposite party were punished for criminal trespass upon the lands.

The 27th August 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Evidence taken down in English—Section 199, Code of Criminal Procedure.

Criminal Revisional Jurisdiction.

Revision of proceeding under Section 404, Code of Criminal Procedure.

Queen *versus* Issur Raut and others.

Where the evidence was taken down by the Magistrate in English, and no memo. was attached to it (as required by Section 199, Code of Criminal Procedure), stating that the evidence was read over to the witness in a language which he understood, it was held that there had been an error in law by which the accused was materially prejudiced.

Kemp, J.—These prisoners were charged with offences under Sections 144 and 188 of the Indian Penal Code, and were sentenced by the Cantonment Magistrate of Dinapore to 18 months' rigorous imprisonment, or one year under the first charge, and six months under the second. On appeal, this sentence was reduced by the Officiating Sessions Judge of Patna.

The prisoners applied to this Court, setting forth that the conviction and sentence are wrong in law, inasmuch as the Cantonment Magistrate had not proceeded according to the provisions of Sections 198, 199, and 505 of the Code of Criminal Procedure, a fact which is admitted by the Sessions Judge. Other grounds which affect the merits of the case more than any illegal act in the procedure are taken. We dispose of the case on the first ground. This ground was urged before the Sessions Judge, who disposed of it with the following remarks: "The Cantonment Magistrate of Dinapore has submitted an explanation, and though I do not assent to his reading of the latter portion of Section 198 as giving an option rather than as is evidently the meaning, a choice of one of two requirements in a course of procedure which is distinctly enjoined in the preceding part of the Section, and again unmistakably prescribed in the succeeding Section, yet, considering that the evidence of the witnesses and the examination of the prisoners were recorded in full in his own hand, and the prisoners had ample opportunities to cross-examine and demand explanation at every stage of the trial, I am of opinion that there has been no substantial failure of justice to them by the procedure of the Cantonment Magistrate. I therefore overrule the objection."

The objection of the Cantonment Magistrate states that it is the practice of his Court to record the evidence of all witnesses in English, and that no memo. or certificate has ever been appended to the evidence of witnesses as required by Section 199 of the Code of Criminal Procedure.

The questions we have to decide are, *first*, whether the trial of the prisoners has been conducted legally; and, *second*, whether they have been materially prejudiced by a departure from the procedure laid down in the Code. We have no hesitation in deciding the first question in the negative, and the second in the affirmative.

Section 198 of the Code of Criminal Procedure enacts "that, if the evidence be taken down in a different language from that in which it has been given, and the witness does not understand the language in which it is taken down, the witness may require his evidence as taken down to be interpreted to him in the language in which it was given, or in a language which he understands; and Section 199 says that a memorandum to be signed by the Magistrate *shall* be attached to the evidence of each witness, and shall state that the *evidence was read over* to the witness in a language which he understood (naming the language), and that the witness acknowledged such evidence to be correct.

Now, it is very clear that the evidence in this case was taken down in English by the Cantonment Magistrate, and that it was not read over and explained to each witness in a language which he understood, for there is no memo. to this effect as required by Section 199; such being the case, the evidence was not recorded as the law directs. We are also unable to understand how the prisoners could cross-examine witnesses, whose evidence in chief was taken down in a language foreign to the accused, and of which no attempt at explanation was made. There has therefore been an error in law in the procedure of the case by which the accused have been materially prejudiced, and this Court, acting as a Court of Revision, quashes the trial and sentence, and directs that the prisoners be discharged. We also direct the Sessions Judge to call the attention of the Cantonment Magistrate to the provisions of the Code of Criminal Procedure which relate to the examination of witnesses and accused parties, and to enjoin upon him a strict observance of these provisions, which are the only guarantee this Court can have that the examination is conducted fairly and properly.

The 28th August 1867.

Present:

The Hon'ble G. Loch and C. P. Hobhouse, *Judges.*

Incendiarism with a view to a false charge—Sections 211 and 195, Indian Penal Code.

Criminal Revisional Jurisdiction.

Revision under Section 405, Code of Criminal Procedure.

Queen *versus* Bhugwan Ahir.

Where a man burns his own house, and charges another with the offence of doing so, he should be convicted and sentenced under Section 211 (and not under Section 195) of the Penal Code.

Hobhouse, J.—THE facts in evidence show that the prisoner burnt down a house of his own, and then falsely charged the complainant with the offence of burning it under Section 436, I presume, of the Penal Code.

The Judge has found the prisoner guilty under Sections 195 and 211, Indian Penal Code, and has sentenced him under each Section to 18 months' rigorous imprisonment.

I am inclined on the whole to think that the act of the burning of his house by the prisoner was a causing of a circumstance to exist within the meaning of Section 192, and might, therefore, be punishable in certain cases under Section 195, and with some other Section of the Penal Code, as in this case with Section 456, Indian Penal Code.

But here the firing of his house by prisoner was simply, it seems to me, a minor act on his part subordinate to the major act of making the false charge, for the fact of the burnt house was manifestly intended to be used as evidence of the said charge, and I think, therefore, that there should have been one finding and sentence under Section 211, and that the finding and sentence under Section 195 must be set aside.

Loch, J.—There appears to me no doubt that the prisoner has committed an offence under Section 211, but the first offence was committed in furtherance of the second, *viz.*, of being used as evidence in the false complaint which he brought against the complainant. I concur, therefore, in the view taken by my colleague.

The 31st August 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Criminal charge where civil suit applies—Magistrate's duty.

Criminal Revisional Jurisdiction.

Reference under Section 434 of the Code of Criminal Procedure.

Queen *versus* Nubas Muhton.

If a complaint is duly made before a Magistrate, and the act imputed appears to amount to an offence, and there is *primâ facie* reason to suppose the accusation true, the Magistrate is bound to proceed, though he may consider a civil suit more applicable.

Jackson, J.—BY Section 67 of the Code of Criminal Procedure, the Magistrate is authorized and directed on complaint duly made, if it shall appear to him that there is sufficient ground for proceeding, to issue his warrant or summons, as the case may require; and if in his judgment there be no ground for proceeding, he is to dismiss the complaint.

If therefore upon any complaint duly made before a Magistrate it should appear to him that the act imputed amounts to an offence under the Indian Penal Code, or any Penal Code in force, and that there is *primâ facie* reason to suppose the accusation to be true, it is his duty to proceed, although he may consider that a civil suit would afford the more convenient or appropriate remedy.

The order made by the Assistant Commissioner is, therefore, in this point of view, unwarranted by law, and must, I think, be set aside, and he will be required to proceed according to law.

Hobhouse, J.—The Assistant Commissioner in the case referred to us refused to proceed with the complaint, not because there were no sufficient grounds for proceeding, but because in his own words, "though "the case was one of trespass and damages "which might be made a crime according "to the Indian Penal Code," it was yet a case to which in his judgment the civil law was more applicable.

Clearly, there was not under these circumstances sufficient ground for refusing to proceed with the complaint, and I concur in the order of my brother Jackson.

The 3rd September 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Public Servant—Section 186, Penal Code.

Criminal Revisional Jurisdiction.

Revision of Proceedings under Section 404 of the Code of Criminal Procedure.

Joynath *versus* Soorjaram.

Conviction, under Section 186 of the Penal Code, of obstructing a mouzadar in the discharge of his duty reversed, there being nothing to show that the mouzadar is a public servant.

Jackson, J.—THE petitioner was convicted before Mr. T. B. Michell, Assistant Commissioner of Nowgong, of obstructing a public servant in the discharge of his public functions,* and sentenced, by way of exemplary punishment, to pay a fine of 100 rupees, or to be imprisoned rigorously for one month.

*Section 186, Indian Penal Code.

He appealed to the Judicial Commissioner, but that authority for reasons given declined interfering with the sentence.

The facts of the alleged obstruction were these:—

The complainant, one Joynath, who holds the office of mouzadar in a certain village, states that he "received an order from the "Collector's Nazir to collect 1,000 maunds "of wood for the use of Government at Ka-"liabon," and that, in order to carry out this requistion, he was "obliged to collect all "the ryots of his mouzah."

Among the ryots thus "collected" was one Annund Kolita, who, according to the complainant's story, is liable *in the same way* as the other ryots to be taken for Government work. But what the liability was, which was thus common to him and other ryots, neither the witness nor the Court below has stated.

The accused, who is a cousin of this Annund, is said to have interfered, to have begun abusing the mouzadar, and to have dragged off Annund with him.

This allegation of the complainant is supported by a single witness, the Nazir, who was called, having no personal knowledge of the matter.

The accused called three witnesses, who proved that he was absent in the hill at the time of the alleged occurrence. and two others who proved that the complainant had let Annund Kolita go on receiving five rupees from the son of the accused.

The Magistrate, however, believed the evidence for the prosecution, and considered that for the defence unsatisfactory, and, thinking the charge fully made out, passed a sentence which in his opinion would be as "sufficient "to deter others from following the defend-"ant's example."

The result of this case is that, when a mouzadar receives an order from the Collector's Nazir to collect supplies of any description for the use of Government, he is authorized to impress all the ryots in his village for cumpulsory labor; and, if any one interferes on behalf of, it may be, his nearest relation, he is liable to be dealt with under Section 186, Indian Penal Code, and to be imprisoned and fined.

This may be the law in Assam; but, if so, it is so unlike the law in other parts of Her Majesty's dominions that we should expect to find evidence that the law was so.

There is nothing in these proceedings to show that the mouzadar is a public officer at all, and certainly nothing to support the belief that, as such public servant, he is empowered to impress the ryots or inhabitants, and we cannot assume without evidence the existence of so serious a power dwelling upon such an officer on the receipt of orders at second hand from a functionary on the Collector's establishment.

But, apart from the general principle, we think this conviction cannot be sustained.

Upon the evidence as it stands, if we were acting as an Appellate Court, we could have little hesitation in saying that the case of the accused is much stronger than that of the prosecution.

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The Magistrate observes that the witnesses of the accused gave their evidence in a manner which was most unsatisfactory, but it is not stated in what respect he thought it so; no memorandum to that effect is attached to the evidence of particular witnesses, and to us it appears as if that evidence was unsatisfactory only in so far as it contradicted the evidence for the prosecution.

But the Magistrate has sought to restore the balance by throwing in, on the same side of the complainant, a variety of statements and assumptions for which we find no foundation in the proceedings.

We think, therefore, that we should be bound in the particular case to set aside a conviction which was to such an extent based upon matter which was not evidence.

The conviction and sentence upon the petitioner Tajooram (or Soorjaram) are hereby reversed, and the fine inflicted, if it has been levied, will be immediately refunded.

The 3rd September 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Maintenance of wife—Section 316, Code of Criminal Procedure.

Criminal Revisional Jurisdiction.

Reference under Section 434, Act XXV. of 1861, and Circular Order No. 18, dated the 15th July 1863.

Lopotee Domnee *versus* Tikha Moodai.

An order made by a Magistrate under Section 316 of the Code of Criminal Procedure must be founded upon proof in the same proceedings, and not upon knowledge acquired by him in some other case.

Jackson, J.—In this case we concur with the Judicial Commissioner. An order made by the Magistrate under Section 316, Code of Criminal Procedure, must be founded upon proof in the same proceedings, and not upon the knowledge acquired by the Magistrate in some other case.

The Magistrate must also consider any ground of refusal on the part of the wife to live with her husband, and receive evidence which may be offered on the one side or the other.

The order is set aside, and the Magistrate will proceed *de novo*.

The 3rd September 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

False Charge—Sections 182 and 211, Penal Code.

Criminal Revisional Jurisdiction.

Reference under Section 434 of the Code of Criminal Procedure.

Raffee Mahomed *versus* Abbas Khan.

Sections 182 and 211 of the Penal Code distinguished. The latter held to apply to a case of false charge in which the accused in the present case had appeared before the police, and charged the now complainant with having caused the death of the accused's child by poisoning.

Hobhouse, J.—The case referred to us is this: The accused in this instance appeared before the police, and charged the complainant with having caused the death of his (the accused's) child by poisoning.

The Magistrate considered this was a false charge made with intent to injure complainant, and with the knowledge that there was no foundation for it; and he found the accused guilty of an offence under Section 182, and sentenced him to six months' imprisonment.

The Judge considers that the offence comes under the terms of Section 211, last part—an offence triable only by the Court of Session—and recommends that the order of the Magistrate be set aside, in order that the accused be committed to, and tried by, the Sessions Court for an offence under Section 211.

We concur with the Judge that the order of the Magistrate is illegal, and must be set aside.

Section 182 clearly refers to informations of which that given in illustration *b* is an instance.

Section 211, on the other hand, as clearly refers to the exact case before us—to the case of a person who, with intent to cause injury to another person, institutes a crimi-

nal proceeding against that person on a false charge of an offence punishable with death, knowing that there is no just or lawful ground for such proceeding.

Such an offence is cognizable by the Court of Session alone, and not by the Magistrate; and we direct, therefore, that the order of the Magistrate be set aside.

This order being thus set aside, the Judge can exercise his own discretion under Section 435, Code of Criminal Procedure.

The 7th September 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Misdirection to Jury—Issue in charges under Section 218 or 201, Indian Penal Code—Police Diaries not evidence.

Queen *versus* Hurdut Surma.

Committed by the Assistant Commissioner, and tried by the Judicial Commissioner of Assam, on a charge of framing an incorrect record, with intent to save persons from punishment.

Where a person is charged (Section 218, Indian Penal Code) with framing a report incorrectly, or (Section 201, Indian Penal Code) giving false information, with intent to save offenders from punishment, the issue to be tried is not whether such alleged offenders were in fact guilty or not, but merely the belief and intention of the prisoner in respect to their guilt.

Police-diaries cannot be legally used as substantive evidence, or read to the Jury.

Macpherson, J.—In this case the trial was by Jury, and the prisoner was convicted of the following offences:—

First.—(Under Section 218 of the Penal Code) that he, being a police officer, framed a record, namely, his police-diary and report, incorrectly, with intent to save certain persons from punishment.

Second.—(Under Section 201) that he, having reason to believe that an offence had been committed, gave information regarding his offence which he knew or believed to be false with intent to screen the offenders.

Third.—(Under Section 323) that he voluntarily caused hurt to Mussamut Boodoo and Mussamut Rateeboo.

I am of opinion that evidence was improperly received, and that the Jury were misdirected by the Judge who tried the case, and that the verdict and sentence ought to be set aside.

I think evidence was improperly received, and the Jury were wrongly directed in two respects.

The case for the Crown was that two men, named Monzah and Bataboo, were charged before the police with causing the death of a certain person; that the prisoner was sent to investigate the charge; and that he wilfully made a false entry in his diary, and a false report in order to screen the accused. The issue to be tried was whether, at the time the prisoner prepared his diary and made his report (as charged in the first count), and at the time he gave the false information (as charged in the second count), he knew or had a reason to believe that Monzah and Bataboo were guilty, and whether he acted as he did in order to screen them. Under such circumstances it was immaterial whether Monzah and Bataboo were in fact guilty or not, the matter to be determined being merely the belief and intention of the prisoner. This being the case, I think that the Judge misdirected the Jury when he put before them, as a matter to be considered by them in arriving at their verdict, the fact that the two accused men, Monzah and Bataboo, were subsequently brought to trial and convicted.

Their subsequent conviction was no evidence at all as against the prisoner that Monzah and Bataboo were in truth guilty; and if it had been evidence of their guilt, such evidence (as I have already said) was, for the purposes of this trial, irrelevant, as it was wholly immaterial whether they were guilty or not.

This is a misdirection which is most material, and very likely to mislead the Jury in a manner highly prejudicial to the prisoner.

The second misreception of evidence and misdirection is that the records of the police-diaries kept by Ram Coomar and Ram Churn, two other police-officers, who were employed as well as the prisoner in investigating the charge against Monzah and Bataboo, were put in as evidence for the prosecution, and read against the prisoner, and that the Judge in his summing up specially called the attention of the Jury to them. These diaries are wholly inadmis-

sible as evidence for the prosecution (quite independent of the provisions of Section 154 of the Criminal Procedure Code). They, being memoranda recorded at the time of the occurrence of the events to which they related, might properly have been put into the hands of the persons who made them, in order that they might refresh their memories from them. But it was illegal to use the diaries as substantive evidence, or to read them to the Jury. And I am at a loss to understand why they should have been so read, when the persons who kept the diaries were themselves present in Court to speak as to what happened. This also seems to me to be a very substantial and important misdirection.

These defects in the trial of this case apply more immediately to the evidence on the first and second counts. But, although the third count is one merely for causing hurt, the prisoner's guilt on this charge turns so much on the question of the general credibility of the evidence of the witnesses for the prosecution that, so far as this third count also is concerned, I think it quite impossible to say that the prisoner was not necessarily most prejudicially affected by the defects which I have pointed out. The conviction as to this charge also ought therefore to be set aside.

The verdict and the sentence passed upon the prisoner are set aside, and the prisoner will be discharged.

Seton-Karr, J.—With some regret I have come to the conclusion that this prisoner is entitled to his discharge. That he, a police-officer, caused a woman to be struck, and her nose to bleed, and that he made a false report, there is, I think, no moral doubt, and a conviction might have been obtained without reference to what was not legal evidence, and without any such positive and important misdirection as my learned colleague has pointed out.

At the same time it is so necessary that Juries should be properly directed, and that prisoners should not be convicted in such cases, except on strictly legal evidence, that I consent to the discharge of this prisoner.

The 7th September 1867.

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

Act XIII. of 1859—Advances worked off.

Criminal Revisional Jurisdiction.

Reference under Section 434, Act XXV. of 1861, and Circular No. 18, dated the 15th July 1863.

Tara Doss Bhuttacharge, on behalf of Messrs. Lyall and Co.,

versus

Bhaloo Sheik.

Act XIII. of 1859 relates to fraudulent breaches of contract, and does not apply where an advance has not only been worked off by a laborer, but an actual balance is due to him.

Hobhouse, J.—THE facts of the case referred for our orders seem to be simply these:—

One Tara Doss Bhuttacharge, on the part of Messrs. Lyall and Co., silk manufacturers, complained before the Magistrate that one Bhaloo Sheik had broken his contract to work as a katoni or silk-spinner for three years in Messrs. Lyall and Co.'s silk factory, and prayed that, under the provisions of Act XIII., 1859, his complaint might be enquired into and determined.

In making the complaint, Tara Doss admitted that Bhaloo Sheik owed no money for any advances, but rather that he was owed a small sum, it may be presumed, as a balance of wages due.

The Magistrate considered that no *primâ facie* case of advances due was made out against the person accused, and under the provisions of Section 67, Code of Criminal Procedure, dismissed the complaint.

The Sessions Judge is of opinion that, inasmuch as the custom of the district in the matter of silk-spinners is for the manufacturer to make an advance of one month's pay for work to be done, there was in this case sufficient evidence of an advance made on account of work to be done to have made it necessary under the provisions of Section 1 of the Act for the Magistrate to have summoned the accused, and to have enquired

into and determined the case as the law directs.

I observe that in this case there is no evidence of exactly that custom to which the Sessions Judge alludes, but the contract before us shows that Sheik Bhaloo received an advance of something more than five rupees, and thereupon contracted to work as a silk-spinner for three seasons at Messrs. Lyall's factory, on wages of five rupees a month; agreeing that, if he failed so to work, his property might be sold by way of recovering damages, or he himself might be punished in the Criminal Court as the law might direct, and the fact is that no advance is now due from Sheik Bhaloo, but that rather money is due to him.

These facts being so, the case appears to me to be one to which the provisions of Act XIII. do not apply.

The Act is one to provide for the punishment of "fraudulent" breaches of contract by laborers, and the condition therefore which seems to me to be precedent to any enquiry under the Act is, that fraud of some kind should be disclosed.

Now, on the face of this case, there is no fraud disclosed; for, if there was an advance made on account of wages for work to be done, then those wages have not only been worked off, but there is actually a balance due to the accused.

And if, on the other hand, the money advanced was not for wages, then it seems to me the alleged advance was not truly an advance, but was simply a premium upon a contract.

The very penalties imposed under Section 2 seem to me to show that the present case does not come within the terms of the Act, for the Magistrate is either to cause the money advanced or any part of it to be re-paid, or he is to direct the laborer to perform or get performed the work.

But here there is no advance due, and the case is simply that of a laborer who refuses to continue to work for the wages agreed upon.

This may very well be a case for adjudication by a civil tribunal; but, in such a case, the Magistrate was, I think, right in declining to proceed with any criminal enquiry under this Act, and his order must stand.

Jackson, J.—I am of opinion that this was not a complaint cognizable under Act XIII. of 1859.

That Act relates to fraudulent breaches of contract on the part of workmen and others, and I think it ought to appear that the workman refuses or neglects to perform work in respect of which he has received an advance.

When a man has contracted to work for three or ten years for another, and at the time of the making of such contract has received an advance equal to one month's wages, and afterwards works for 12 months, receiving payment on account of wages, and at the end of the 12th month having a small sum due to him, after taking the advance into account, refuses to continue working, can it be said that such a man is under advance, or that his breach of contract is *ipso facto* fraudulent?

If such a case come within the Act, a man might be bound, upon an advance of one rupee, to work for 20 years; and, although the Magistrate might probably not enforce the contract, still the complaint would be cognizable, and the Magistrate would probably be bound to issue his warrant or summons, and the knowledge that the Act might be applied in such a case would have the effect in many instances of reducing the workman to something like bondage. I therefore concur with my brother Hobhouse in holding that the Joint Magistrate was right in refusing to entertain this complaint.

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The 11th September 1867.

Present:

The Hon'ble F. B. Kemp, W. S. Seton-Karr, and Dwarkanath Mittra, *Judges.*

Murder—Clauses 2 and 3, Section 300, Indian Penal Code.

Queen *versus* Dasser Bhooyan.

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Gya, on a charge of murder, &c.

Two parties met each other in a drunken state, and commenced a quarrel, during which they became grossly abusive to each other. This lasted for about half an hour, when one of them ran to his own house, distant 30 yards from the spot, and came back with a heavy pestle, with which he struck the other a violent blow on the left temple as the latter was rising, or had just risen, from the ground, causing instant death. HELD that the act was done with the intention of causing such bodily injury as was likely to cause death, and also with the knowledge that such act was likely to cause death, and that the offence committed was murder within the provisions of Clauses 2 and 3, Section 300, Indian Penal Code.

Seton-Karr, J.—THE Sessions Judge has gone into this case very fully, and his analysis of the evidence is excellent.

The only doubt which suggests itself to my mind is, whether the conviction might not, and ought not, to have been one for culpable homicide not amounting to murder.

I take the bare facts pretty nearly as found by the Sessions Judge.

The prisoner and the deceased were both drunk. Each claimed money from the other, and, according to the evidence of the tari-seller, whom the Sessions Judge rightly credits, the only difference was, that the accused claimed on account of an old debt, while the deceased wanted his share of some pice which had just been given to all the bearers for conveying a person to a marriage. The share of the deceased had admittedly been given into the prisoner's hands. On this point, I do not go so far as the Sessions Judge, when he says that the prisoner was *unlawfully* detaining the money of the deceased; for the prisoner, according to the account of the tari-seller, had a counter-claim of his own against deceased.

Both parties indulged in gross abuse of each other. The prisoner, blind with rage and drink, rushed to his own house just 30 yards off, brought thence a pestle, such being evidently the first thing he could lay hands on, and struck the deceased, as he was rising from the ground, *one blow*, which killed him. There was a contused wound on the side of the head, but, on examination, the skull was found to be smashed.

The Sessions Judge expressly says that there are no circumstances of aggravation or atrocity, "either as concerns the mode, or the weapon used."

Looking to all the facts, I think a Court would have been fully justified in finding that the act by which death was caused was not done with the intention of causing death or such bodily injury as the offender *knew* to be likely to cause death, and that the prisoner did not know that the act was imminently dangerous, &c. In this view the case would not necessarily fall within the provisions of Section 300 of the Penal Code. It might be said, too, that, although bodily injury was intended, it was not *necessarily* sufficient to cause death (Section 300, Clause 3). The prisoner was not acting in self-defence, though he had received gross provocation. On the other hand, it may be said in favor of the Judge's view of the case that such a blow, if aimed designedly at the head, would cause bodily injury, and that such bodily injury would be sufficient, in the ordinary course of nature, to cause death (Section 300, Clause 3).

Had I, however, been presiding at a Sessions, and charging a Jury on these facts, I should have told them that they might, under all the circumstances, find that the offence was not murder, and I should have accepted a finding to that effect, even though I had also pointed out to them that the crime might possibly fall under the higher category. If this could have been done at the Sessions, as I think it could, there seems to me no reason why it should not be done in appeal, where the facts are all open to us. I think the prisoner intended to hurt the deceased; but he had no positive intention to cause death, even if he had the knowledge, in his passion, that death was likely to ensue. Had the blow lighted anywhere else than on the side of the head, the deceased might not have sustained more than a fracture of a limb, if so much.

I do not mean to say that the Sessions Judge's view may not be supported by argument, or that it is on the face of it erroneous; but, on the whole, I think a finding of culpable homicide would equally suit the facts, and would be more suitable to the amount of punishment which the prisoner's conduct deserves.

The punishment of transportation for life seems to me too severe for the crime committed by the prisoner. Drunkenness is no extenuation; but the deceased evidently gave

the prisoner quite as much violent abuse as he received.

I should myself, if sitting in the original trial, have found the prisoner guilty of culpable homicide not amounting to murder. and have sentenced him to ten years' rigorous imprisonment. Then prisoner's defence, I think, may be believed, except as to what he says of the deceased having a stick and fighting with prisoner.

At any rate, the point is one of some nicety; and I should like to have the deliberate opinion of a 2nd Judge on the whole case.

Dwarkanath Mittra, J.—I think that the following facts are clearly and satisfactorily proved by the evidence for the prosecution in this case. On the day of the melancholy event in question, the prisoner and the deceased met each other in the shop of a tari-seller while they were both in a drunken state. They then commenced to quarrel about some pice, and, during the course of this dispute, they became grossly abusive to each other, though there is no evidence as to the precise language used by either of them on the occasion. This state of things had continued for about half an hour, more or less, when the prisoner ran to his own house, which was at a distance of 30 yards from the spot, and came back with a heavy weapon, with which he violently struck the deceased one single blow on the left temple, which killed him then and there. The instrument of destruction used is described by the Sessions Judge to be a formidable club-like weapon called a jhamal or pestle, with which rice is husked in a mortar, about 4 feet long, and varying in thickness from 2 inches at one end to about 4 inches at the other, which end was bound round with iron. There is a conflict in the evidence as to which of these ends was used for striking the fatal blow; but, giving the prisoner the benefit of a doubt, I am of opinion that either end was sufficient, in the ordinary course of nature, to cause death, if sufficient violence was used. The evidence of the Sub-Assistant Surgeon, Baboo Nund Coomar Mitter, coupled with the fact that death was the instantaneous result, leaves no doubt in my mind that the instrument used was one of a very dangerous character, and that the prisoner had used it with sufficient violence. It is also proved, by satisfactory evidence, that the part of the body struck at was the left temple, which was immediately smashed, and it is further shown that the deceased was, at the fatal moment in question, quite unprepared to receive the blow, as he had just risen, or was attempting to rise, from the ground after discharging a necessary function of nature. There is nothing to show or even to suggest that at this time at least he gave any fresh provocation to the prisoner. Upon this state of facts, however, I am of opinion that the prisoner is guilty of the offence of murder of which he has been convicted in the Court below. That he was drunk at the time, is a fact which ought to be eliminated from the enquiry, so far as any question of knowledge or intent on his part is concerned. The act which brought about this state of drunkenness was his own voluntary act, and he is, therefore, to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated. With this necessary qualification there can be no doubt that he has committed the offence of culpable homicide as defined in Section 299 of the Penal Code. Whether he had the intention of causing death or not, there can be no doubt that he intended to cause such bodily injury as is likely to cause death, though it might, I think, be fairly presumed that he had knowledge that he was likely to cause death. But, taking it in the most favorable light possible, it is clear that the offence of culpable homicide is proved against him. It is also clear that the act in question bears the third, if not the second, characteristic of murder as described in Section 300. The nature of the instrument used, the severity of the blow, and the violence with which it was struck, together with the fact that the part of the body struck at was a vital part of the organization, preclude all doubt against the conclusion that severe bodily injury was intended against the deceased, and that this injury was likely, in the ordinary course of nature, to cause death. It only remains to see whether the case falls within the scope of any of the Exceptions laid down in that Section. It cannot, in my opinion, fall within the first, assuming that the prisoner was deprived of all self-control by passion aggravated by drunkenness. I do not think that there was either any sudden or grave provocation to mitigate the character of the offence. Quarrelling and abusing had been going on between the prisoner and the deceased, it is true; but this state of things had been going on for some time, and there is nothing to satisfy my mind that the pro-

ocation, if any, was a sudden one. It is o be remembered also that no immediate provocation was given at the time of the ttack; nor do I think that there was any *rave* provocation within the meaning of he law. Mere abusive language, however ross, cannot reduce an act of murder into ne of culpable homicide not amounting to nurder. There was no menace of bodily arm on the part of the deceased accom-anied by any overt act denoting an imme-liate intention of following it up by an ctual assault upon the prisoner. "No affronts y bare words and gestures, however mali-ious and false, and aggravated with the nost provoking circumstances," says Mr. Russell (in Vol. 1, p. 711), "will free the party rom the guilt of murder." Again, in page 784, "the most grievous words of reproach, contemptuous and insulting actions or ges-ures, will not free the party killing from the guilt of murder, if, upon such provocation, a leadly weapon was made use of, or an in-ention to kill or to do some great bodily harm was otherwise manifested." I have no doubt that in the present case a deadly weapon was used, and that an intention to cause some grievous bodily harm, if not ac-ual death, was manifested thereby. I am lso of opinion that the provocation given was of a trivial character. It is something which frequently happens among people of the same class and of the same habits of life as the prisoner and the deceased, and it cannot therefore, upon any view, be looked upon as a sufficient provocation within he meaning of the first Exception. The second, third, and fifth Exceptions are wholly napplicable to the facts of the case.

There remains only the fourth, and his even, I think, does not apply. There was neither a sudden fight nor a sudden quarrel; nor can it be said that there was want of premeditation. The act was deli-berately done. There is nothing to show that the prisoner did not intend or meditate any harm against the deceased. The deliberate violent use of a deadly weapon is itself a sufficient proof of an intent to kill, as a sane man of the age of discretion like the prison-er is conclusively presumed to contemplate the natural and probable consequences of his own acts; nor can I say that it was done in the *heat of passion*. The provocation re-ceived was quite inadequate, and I do not think that the Legislature intended that mere loss of temper from every trivial cause is to be looked upon as a ground for modifying the guilt of murder into one of culpable homicide not amounting to murder. I think also that there was time to cool. If the deed had been done with the first instru-ment which presented itself to the prisoner whilst he was maddened by rage, the case might have been somewhat different, though I am of opinion that, even in that case, the offence would have amounted to murder upon other grounds to which I shall presently refer. But here the prisoner went to a distance of 30 yards in quest of a formidable weapon, and came back with it with the clear intention of striking the de-ceased. But, allowing that the act had been done in the "heat of passion," and that there was not sufficient time to cool, I am still of opinion that the offence committed is murder. I think that undue advantage was taken over the deceased. The latter was in a state of drunkenness. At the moment when the fatal blow was struck, he had just risen, or was attempting to rise, from the ground. He did not give any fresh provocation to the prisoner at that time, and the entire evidence on the record goes to show that he was taken by surprise, and was wholly unprepared to meet the blow which caused his untimely end. I think that the prisoner took undue advantage of his posi-tion, and there is nothing to show that he had given any previous warning regarding his violent and outrageous intention. I am also of opinion that the act was done in a "cruel manner." To strike a violent blow with a deadly weapon upon a very vital part of the human body, so that death would be the immediate consequence, appears to me suf-ficient evidence of a cruel and depraved heart. It also appears to me that the deed was done in a very "unusual manner." Mere verbal abuse is seldom followed by such dreadful consequences, and the character of the wea-pon used is itself sufficient to prove that the act was done in a very unusual manner. "For if," says Mr. Russell (page 716), "on any sudden provocation of a slight nature, one person beat another in a cruel and unusual manner so that he dies, it is murder by express malice, though the person so beating the other did not intend to kill him." The case referred to here was one in which, upon a chiding between husband and wife, the husband struck his wife with a pestle, and killed her. I, therefore, think that the fourth Exception applies to this case.

Upon the whole, then, I am of opinion that the prisoner has been correctly found guilty of murder by the Sessions Judge.

There are, of course, no such aggravating circumstances in the case as to justify the infliction of the last penalty of the law; but the sentence proposed by the Court below is the only alternative left. However much I might be inclined to agree with my learned colleague in shortening the period of transportation, I am unable, for the reasons above set forth, to interfere either with the verdict or the sentence passed by the Lower Court.

Kemp, J.—The case of this prisoner has been referred to me owing to a difference of opinion between Mr. Justice Seton-Karr and Mr. Justice Dwarkanath Mitter.

The facts of the case have been very fully given by those learned Judges. The point is, what offence has the prisoner committed—murder, or culpable homicide not amounting to murder? I am of opinion that he has committed the offence of murder. The act of the prisoner was done with the intention of causing such bodily injury as was likely to cause death, as also with the knowledge that he was likely, by such act, to cause death. He, therefore, has commited the offence of culpable homicide as defined in Section 299 of the Indian Penal Code. Does, then, the offence amount to murder? To render it such, it must come within the provisions of some one of the Clauses 1, 2, 3, and 4 of Section 300. I consider the offence to fall within the provisions of Clauses 2 and 3 of that Section. I, therefore, concur with Mr. Justice Dwarkanath Mitter, and would confirm the sentence passed by the Sessions Judge of transportation for life.

The 16th September 1867.

Present:

The Hon'ble W. S. Seton-Karr and C. P. Hobhouse, *Judges.*

Search-warrant—Evidence for prosecution (in presence of accused)—Sections 114, 115, 194, Code of Criminal Procedure.

Queen *versus* Syud Hossain Ali Chowdry.

Committed by the Magistrate, and tried by the Sessions Judge of Tipperah, on a charge of intentionally giving false evidence.

It is essential to the legality of a search-warrant, under Section 114 of the Code of Criminal Procedure, that the production of some *specified and particular thing* is desired; that the Magistrate alone shall determine that such production is necessary; and that a specified house or place only is to be searched. The warrant must, under Section 115 of that Code, be directed to some other person, only when a police-officer is not forthcoming.

When the accused has been arrested, the evidence of a witness for the prosecution ought, under Section 194 of the Code of Criminal Procedure, to be taken in the presence of the accused.

Seton-Karr, J.—THE prisoner in this case, Hossain Ali Chowdry, apparently a zemindar of some position, was indicted for giving false evidence on two counts: he has been acquitted by the Judge on one which related to the receipt of a certain letter; and he has been convicted and sentenced to three years' imprisonment on the other. The offence charged and found against him is contained in these words: "I only borrowed one thousand "rupees from the Moulvie (*i. e.*, Golam Ahia). "and I paid it back *in two instalments, each "of Rs. 500*, or words to that effect."

In appeal, Mr. Doyne, on behalf of the prisoner, takes two main points of objection to the finding of the Judge:—

The first is one of law, to the effect that the statement which his client admits to have made was not made in any stage of a judicial proceeding.

The second is one of fact that there is no evidence whatever that this statement is false; that there is every reason to think that it may be perfectly true; and, even if it be inaccurate, there is no evidence whatever of any corrupt intention on the part of the deponent in making the same.

It seems, on the first point, that the Acting Collector had engaged in some enquiry relating to the conduct of a clerk of the Collectorate, one Doorga Churn Dutt; and, in pursuance of this enquiry, he issued a search-warrant under Section 114 of the Code of Criminal Procedure to the Magistrate to search the premises of the prisoner.

The Acting Collector and the Magistrate appear to have been one and the same person, though the offices are of course distinct. I may observe that this search-warrant appears to have been couched in the most ample and general terms, and it seems to have empowered the person deputed, who was the Collectorate Nazir, and not a police-officer, to search the premises of the prisoner, with a view to procure evidence against Doorga Churn Dutt. I very much doubt whether Section 114, Criminal Procedure Code, was ever intended to be used in this manner, or to vest officers with such undefined and extraordinary powers.

That Section is as follows: "When a Magistrate shall consider that the production of *any thing* is essential to the conduct of an enquiry into an offence known or suspected to have been committed, he may grant his warrant to search for *such thing;* and it shall be lawful to the officer charged with the execution of such warrant to search for *such thing* in any house or place within the jurisdiction of such Magistrate. In such case, the Magistrate may specify in his warrant the house or place or part thereof to which only such search shall extend."

It rather seems to me that this Section ontemplates the production of some speci-ed or distinct thing or object which may be eemed essential to the conduct of any en-uiry, and to the conviction of the accused arty, such, for instance, as a bloody knife, a essel containing poison, a forged document, piece of stolen property, and so on; but it an scarcely have been the intention of the egislature to empower police officers or ther underlings to make harassing domicili-ry visits, to enquire minutely into the private oncerns of individuals, and to seize any part f their papers under the bare chance that *omething* might therein be found tending o the conviction of any accused parties.

Next, I find that the prisoner was arrested y a warrant at Chittagong, was conveyed o the house of the Magistrate, and, on the 5th June, was examined at night, when the vidence was taken down, which he is now harged as having falsely given.

It is strongly objected by Mr. Doyne that he accused clerk, Doorga Churn Dutt, was ot present when this evidence was taken, s he is required to be by Section 194, Code of Criminal Procedure, and that the evidence ould not be strictly termed "evidence aken in the course of a judicial proceeding," nd that, therefore, the foundation of the resent commitment and conviction is bsolutely wanting.

I incline to think, however, that the ecurity provided by that Section was intend-d more for the interest of the accused erson, who, in this instance, would be the Collectorate clerk, and not the prisoner before us; and, although the whole conduct of the Magistrate seems to have been characterised by great haste, indiscretion, and undue zeal, I am not warranted in saying that the prisoner before us was prejudiced by any error or defect in this particular part of the investigation which led to his commitment. It may often be necessary for the interests of justice that a Magistrate should take a deposition by night or day at once; in his camp or at his own dwelling-house.

At that very time, the Collectorate clerk had actually been made over by the Collector to the Magistrate for a criminal investigation. Though it would have been obviously desirable that the prisoner before us should have been examined in the presence of the clerk, it is not necessary to declare, in this trial, that the proceeding was so illegal and irregular that, on this point alone, the conviction should be set aside. It will obviously be more satisfactory to the accused, and more conducive to the interests of justice, if the prisoner can be acquitted, not on a technicality, nor even on a valid point of law, but on the broad facts and merits of the case.

We have gone through the evidence, and have heard the Government Pleader in support of the prosecution, and have no hesitation in declaring that, on the whole evidence, the conviction should never have taken place.

When I come to examine the case on the merits, there is absolutely no conflict of evidence whatever, not to say that there is no proof of false evidence. The gist of the offence charged against the prisoner is that he had borrowed 1,000 rupees from one Golam Ahia, a vakeel, who, it would seem, also practised mohajunee under another name.

The prisoner stated that the loan had been re-paid, a few days afterwards, in two instalments of 500 each.

Now, the only thing to set against this deposition, which we are asked to believe is false, is a memorandum found in the house of Golam Ahia, and sworn to be in his handwriting.

This memorandum purports to show that the loan was re-paid, not in two instalments of 500 rupees each, but in two instalments of rupees 700 and rupees 300. The persons who made the re-payments are *not* summoned to give evidence. The evidence of one Minhut shows that he was not present, and even a deposition of a khansamah of the deceased vakeel only states that the money was re-paid in two instalments, but by persons whose names the witness forgets.

There can be no conviction for false evidence on a mere comparison of the notes or memoranda of a deceased person with the evidence of a living witness. For aught

that appears to the contrary, the statement of the prisoner that he had paid the money in two instalments of rupees 500 each may be perfectly true, and that of the single witness, the khansamah, as far as it goes, which is but a little way, may be true also. The instalments may perfectly well have been sent to the prisoner's agent by sums of rupees 500, and the agents may have paid them in the instalments of rupees 700 and rupees 300, of which an entry is found in the paper of the deceased vakeel. There is not a tittle of evidence that the loan was diverted into any other channel, or was used improperly; and there is, consequently, nothing to show that, in speaking of his loan as one which was repaid in two instalments, the prisoner was not speaking in perfect honesty and perfect good faith.

A conviction of the prisoner on such evidence peremptorily excludes all supposition of the possibility of an error in the memory of the prisoner, presumes every thing against him, assumes that the money which the prisoner sent was actually sent on in two sums of rupees 700 and rupees 300, of which there is not a tittle of proof; and practically the Judge sentences this prisoner for making a deposition against which no other direct evidence or deposition to the contrary has been given by any one. The utmost that could be said against the prisoner is that, while he spoke to a re-payment in one way, the servant of the deceased lender believed that the re-payment had taken place in another way. The Judge himself admits that "there is a "scarcity of evidence in some point of this "case which makes it difficult to show that "the statement was intentionally false, but "I am satisfied that it is false." The trial, it is recorded, occupied one day and a half. In my opinion, if this length of time was indispensible to the guilt or innocence of the prisoner, which I can hardly think it was, there was the more reason why the trial should terminate in the way in which it must now terminate, *viz.*, a complete and full acquittal.

I cannot help expressing my regret that a person, in the position of the prisoner, or that any other person, should have been put upon his trial, and should have been thus convicted; that the Judge should have failed to notice the irregularities of the search-warrant, and should not have seen that the evidence might either be perfectly true, or at worst that it was only liable to the suspicion of inaccuracy, while, in any view, a conviction on such a state of things before either Judge, Jury, or Assessors, was simply out of the question. Therefore, on the whole case, finding that there is nothing to show that the prisoner ever delivered any false evidence whatever, I would annul his conviction, and direct his immediate discharge.

Hobhouse, J.—The appellant in this case was charged in the Court below with the offence of intentionally giving false evidence in a stage of a judicial proceeding, was found guilty by the Court and the Assessors, and was sentenced by the Court to three years' rigorous imprisonment.

The facts out of which the charge arose are these: One Doorga Churn, an officer of the Tipperah Collectorate, was suspected of having committed an offence under Chapter IX., Indian Penal Code, and was, under Section 179, Code of Criminal Procedure, apprehended and put upon his trial.

Hossain Ali, the appellant in this case, was believed to be the person in concert with whom Doorga Churn had committed the offence above alluded to, and whilst a search-warrant under Sections 114-115 was directed against his premises, a warrant to bring him up as a witness was also directed against his person, and, on the night of the 25th June, he was brought up from Chittagong to Tipperah, and was, then and there, examined on solemen affirmation before the Magistrate on the charge against Doorga Churn.

Meantime, his premises had been searched, and in them was discovered a letter purporting to have been written by a certain person to Hossain Ali, and to acknowledge the receipt of Rs. 500 from Hossain Ali.

Hossain Ali was asked to whom, and for what purpose, these Rs. 500 had been paid, and he explained that he had borrowed a sum of Rs. 1,000 from one Golam Ahia, and that he believed that these Rs. 500 had been paid away as one of two equal sums of Rs. 500 in which the Rs. 1,000 had been re-paid.

This statement the Magistrate, on enquiry, believed to be false, and for making it Hossain Ali was committed to, and has been punished at, the Sessions under Section 193, Indian Penal Code.

To constitute an offence under Section 193, the statement on which the false evidence is charged must be false; it must also be intentionally false, and it must have been given in some one or other legally constituted stage of a judicial proceeding.

I agree with my brother Seton-Karr that there is no sufficient evidence in this case to show that the statement in question was false.

The only evidence is the testimony of one witness and extract of the accounts of Golam Ahia. The witness says that he saw rupees 700 on an occasion, and rupees 300 on another occasion, paid to Golam Ahia; and that Golam told him that these sums were received from Hossain Ali.

Golam is dead; and the only material part of the witness's evidence is hearsay and inadmissible.

The accounts say that rupees 700 on one day, and rupees 300 in another, were paid in by two certain persons on behalf of Hossain Ali, in satisfaction of the debt of rupees 1,000.

Hossain Ali was not present when these payments are said to have been made. He was miles away at his own house; the money to make them was admittedly sent from that house. The persons who made the payments are not shown even to have been Hossain Ali's agents; the payments were not shown to have been made with Hossain Ali's knowledge. It is clear to demonstration that Hossain Ali might well have instructed any agent to pay in two equal sums of rupees 500, whilst yet the agents paid in two other sums; and it follows that Hossain Ali, the rest of whose story as to the rupees 1,000 was found to be true in very minute detail, might truly have believed (and that is all that he says) that the rupees 1,000 was re-paid in two equal sums of rupees 500, whilst yet, as a matter of fact (not established in this case, I would again remark), the rupees 1,000 was re-paid in two unequal sums of rupees 700 and rupees 300.

I agree, then, in finding that Hossain Ali is not guilty of the charge of which he has been convicted, and in directing that he be forthwith discharged.

But I cannot leave the case here, for I think that the Magistrate in the Court below has committed illegalities and indiscretions of the gravest kind, and that the Judge has erred in not noticing such.

I would, first of all, remark that Hossain Ali was believed to be implicated in Doorga Churn's alleged rascalities; hence the search-warrant, and the personal warrant, against him. If, then, he was believed to be an accomplice in crime, he should rather have been treated as such, than as a witness to give evidence of that crime.

And, then, as to the search-warrant. It seems to me in regard to this that almost every provision of the Code of Criminal Procedure has been entirely overlooked.

When the Magistrate (the law, Section 114, says) shall consider that the production of *any thing* is essential to the conduct of an enquiry into an offence suspected to have been committed, he may grant his warrant to search for such thing; and it shall be lawful for the officer charged with the warrant to search for such thing, &c.; and in such case the Magistrate may (shall) specify in his warrant the house or place to which *only* the search shall extend.

It is essential, then, to the legality of a search warrant, *first*, that the production of a particular thing is essential; *secondly*, that the Magistrate, and he alone, shall determine that such production is essential; and, *thirdly*, that a specified house or place is that to which only the search shall extend; and it is not lawful for the searching officer to conduct the search in the absence of these essentials to it.

But here the warrant was not for the production of any particular thing, but generally for the production of anything that might by any possibility be considered to bear upon the charge against Doorga Churn; and the person to whom the warrant was directed was instructed in it to search, not only the house of Hossain Ali, but that house, and also another, and anybody else's house that he thought fit, to find whatever he thought essential to the conduct of the enquiry into the offence charged on Doorga Churn.

So the warrant was not for a particular thing. The Magistrate was not the person to determine the essentiality of any particular thing, and the house or place to be searched was not a specified house or place, and such only, and it was not lawful, therefore, to the searching officer to conduct the search.

Again, Section 115 declares that a search-warrant "shall ordinarily be directed to a "police officer;" but "if immediate search "is necessary, and no police officer be "immediately available, the Magistrate may "then direct the warrant to any other "person."

Now, in the case of this warrant, a police officer was "immediately available," for such a person accompanied the warrant officer, and yet, in direct violation of the express terms of the law, the Magistrate

directed the warrant to his Collectorate Nazir.

Every provision, therefore, in Sections 114-115 against the oppressive exercise of the right of search in property was here directly disregarded; and, when it is considered that houses may be broken open, female apartments entered, female apartments searched, and so on, under such warrants, the evil results of such a total disregard of the safeguards placed by law upon the right of search can hardly be aggravated.

Again, in the mode in which Hossain Ali was examined on solemn affirmation, there was an absence of discretion and a disregard of the plainest provisions of the law which are most reprehensible.

Hossain Ali was brought upon warrant from Chittagong to Tipperah—no light journey; and he was then and there at night time, and just arrived off this journey, taken to the Magistrate's private residence, put upon solemn affirmation there in the absence of the accused, and examined.

That a man under such circumstances should be caught tripping in his evidence, would surprise no one; and there was, therefore, a serious want of discretion on the Magistrate's part in thus examining Hossain Ali—but more than that, there was a direct breach of the law.

Doorga Churn was under arrest on a charge of an offence; and in such a case Section 194 distinctly lays it down "that "the witnesses for the prosecution *shall* "be examined in the presence of the "accused."

To have examined Hossain Ali, therefore, in the absence of the accused, was in direct opposition to the law; and it is questionable—though the point is not before us, and we do not therefore decide it—whether the evidence given at such an examination is evidence given in any legal stage of a judicial proceeding within the meaning of Section 193 of the Indian Penal Code.

I regret very much to have to make the above remarks; but I think that the interests of the public imperatively require that I should do so.

The 29th October 1867.

Present:

The Hon'ble F. A. Glover, *Judge.*

Murder—Killing other than the person intended to be killed.

Queen *versus* Phomonee Ahum.

Committed by the Deputy Commissioner, and tried by the Judicial Commissioner of Assam, on a charge of murder, &c.

Where an accused killed *A*, whom he had no intention of killing, by a blow with a highly lethal weapon like a sharp *dao* intended to kill *B*, he was held guilty of the murder of *A*.

THE facts of this case have been very clearly laid before the Jury, and no point of law is involved in the appeal.

The question of provocation was one of fact; and it appears to me that the Jury were quite right in holding the alleged provocation to be altogether insufficient to warrant the prisoner's violent conduct.

A person striking another with a highly lethal weapon like a sharp *dao*, and inflicting such dangerous injuries as the medical report shows there to have been, must be considered to have known that such injuries were likely to cause death; and, therefore, although the prisoner had probably no intention of striking his child, his killing the child by a blow intended for the mother would be culpable homicide amounting to murder, and punishable under Section 301, Penal Code.

There is no ground for interference in this case, and the appeal must be rejected.

The 30th October 1867.

Present:

The Hon'ble F. A. Glover, *Judge.*

Abetment—Conspiring—Presence at commission of offence after resiling—Clauses 2 and 3, Section 107, and Section 109, Penal Code.

Queen *versus* Boodhun Mussaur

Committed by the Assistant Magistrate and tried by the Sessions Judge of Cuttack on a charge of abetment of commission of theft and theft.

A prisoner, who consented to form one of a party who committed theft, and resiled from his agreement, but was present at the commission of theft, does not come within Clause 2, Section 107, Penal Code, and ought not to

ave been convicted of the theft, but of the abetment hereof under Clause 3, Section 107, and Section 109, 'enal Code, read together.

I HAVE no doubt of the prisoner's guilt in his case, and do not therefore interfere with he sentence.

But it appears to me that the Sessions udge was in error in bringing the case nder Section 114 of the Penal Code, for it s manifest on the evidence that, had the risoner not been present at the theft, he ould not have been guilty of any offence t all, so far as the theft itself was concerned. His having at one time agreed to form one f the party, a position from which he afterards resiled, would not bring him under he term "conspiring" as explained in Clause 3, Section 107, Penal Code.

The prisoner should, I think, have been convicted of abetment of the substantive offence under Clause 3, Section 107, and Section 109, Penal Code, read together, he having intentionally aided in the commission of the theft.

The 4th November 1867.

Present:

The Hon'ble F. A. Glover and C. P. Hobhouse, *Judges.*

Commitment on alternative charge—Civil Court—Procedure—Section 169, Code of Criminal Procedure.

Reference from the Sessions Judge of Sarun under Section 434, Code of Criminal Procedure.

The Queen *versus* Oottur Narain Singh.

Where a person makes one statement before the Magistrate, and a directly different statement before the Civil Court, his commitment on an alternative charge, after the consent of the Civil Court has been obtained under Section 169 of the Code of Criminal Procedure, is strictly legal.

Hobhouse, J.—FROM the Judge's statement on this reference, it would seem that the person committed for trial before him made one statement before the Magistrate, and a directly different statement before the Civil Court.

The Magistrate committed on an alternative charge, having, so far as regards the statement made before the Civil Court, first obtained the sanction of that Court to the institution of the charge connected with that statement.

In so proceeding, we think the Magistrate acted in strict legality.

Section 169 is apparently the only Section under which the Magistrate could have prayed the Civil Court to sanction proceedings, and under which the Civil Court could have accorded such sanction or could have acted at all.

And when such sanction had once been given (and the law says it may be given at any time), all that was left was for the Magistrate to proceed to commit or not, as he thought fit.

The 13th November 1867.

Present:

The Hon'ble F. A. Glover and C. P. Hobhouse, *Judges.*

Confronting of accuser and accused—Breach of the peace (sufficiency of evidence as to)—Recognizances.

Revisional Jurisdiction.

Tarinee Kant Lahoory Chowdhry, *Petitioner.*

There is nothing in the Criminal Procedure Code which makes it imperative on a Magistrate to confront the accused and the accused in a case under Section 282 of the Penal Code; and if a Magistrate considers a statement on oath of a complainant to be "credible information" under that Section, there is no reason why he should not call on the accused to give security, the sufficiency of such "credible information" being ordinarily left to the Magistrate to determine.

Glover, J.—THIS application is in the nature of a special appeal, and the only thing to be considered is whether the Magistrate was wrong in law in calling upon the zemindar to give security.

The appellant contends that, inasmuch as he had no opportunity of cross-examining Doorga Churn, the party on whose statement the Magistrate proceeded, that statement cannot be considered "credible information" in the spirit of Section 282, Penal Code.

He further contends that, if the information were "credible," it did not involve a likelihood of breach of the peace.

Neither of these objections appear to me valid.

The words of the law are—Whenever a Magistrate shall receive "credible informa-

tion;" and it is left for him to decide what is "credible information." Undoubtedly cases might occur in which this Court would be justified in interfering, where the information on which a Magistrate acted was palpably absurd and incredible, but ordinarily the Magistrate's opinion would be final.

In the present case there was Doorga Churn's deposition, on oath, that he believed his life to be in danger from the ill-feeling of the zemindars, of whom the appellant was the principal.

Tarinee Kant Lahoory had certainly no opportunity of cross-examining Doorga Churn at the time he made this statement; but he had every opportunity, afterwards, of clearing himself of the accusation, and tried ineffectually to do so by examining several of the principal zemindars of his district. Their evidence is very peculiar, and by no means establishes the appellant's innocence; to my mind it goes rather the other way.

There is nothing, moreover, in the law which makes it imperative on a Magistrate to confront the accuser and the accused together in a case under Section 282; and, if he considers the sworn deposition of a complainant to be "credible information," there is no reason why he should not proceed upon it. The late Sudder Court have, I observe, recorded a similar opinion (12th September 1862).

With regard to the second objection, the words of the Section are "or to do any act which may probably occasion a breach of the peace." And, as the Magistrate believed Doorga Churn's statement that he went in fear of his life by reason of the appellant's enmity to him, he was undoubtedly justified in considering that there was a likelihood of a breach of the peace.

I think, therefore, that there has been no error in law in the Magistrate's proceedings, and that this Court cannot interfere.

Hobhouse, J.—The information given on solemn affirmation by the complainant in this case was believed by the Magistrate, and was, therefore, in my judgment, "credible information" sufficient, under Section 282, to entitle the Magistrate to call on the present appellant to show cause why he should not enter into recognizances under that Section.

And there was, I consider, sufficient legal evidence to satisfy the Magistrate under Section 287, that there was occasion to bind over the appellant to keep the peace.

I agree, therefore, with my brother Glover in considering that there is no ground shown for interference with the Magistrate's order.

The 13th November 1867.

Present:

The Hon'ble F. A. Glover and C. P. Hobhouse, *Judges.*

False personation—Section 205, Penal Code.

Queen *versus* Narain Acharj.

Committed by the Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of false personation.

It is necessary to a conviction for false personation under Section 205 of the Penal Code that the accused should have assumed the name and character of the person he is charged with having personated. The fact that he presented a petition in Court in the name of that individual held, under the circumstances of this case, to be insufficient to show any intention of falsely personating such person.

Glover, J.—I AM of opinion that this conviction cannot be sustained.

The words of the Section (205, Penal Code) are—"Whoever falsely personates "another, and in such assumed charac- "ter," &c., &c. Now, the prisoner did not, as it appears to me, at any time assume the name or character of his uncle Bhugwan Acharj. The clerk of the Small Cause Court, witness No. 1, does, no doubt, depose that the prisoner first gave his name as Bhugwan, and afterwards as Narain; but the decree-holder, who was present at the time, asserts most distinctly that the name of Bhugwan Acharj was not mentioned, but that the prisoner from the first admitted that his name was Narain Acharj.

The decree-holder was a hostile witness, and not likely to make a mistake in favor of the prisoner. I prefer his evidence to that of the clerk.

And, if it be credible, it is clear that the prisoner never, by any thing he said, assumed to be Bhugwan Acharj.

Then, did he do so by presenting the petition in the name of Bhugwan with the intention of "falsely personating" that individual?

It has been satisfactorily proved that the prisoner and Bhugwan are nephew and uncle; that they hold all their property in common; and that both had the same interest in saving the land attached by the decree-holder from sale.

It is proved, moreover, that the uncle was at the time in question suffering from illness, and had deputed his nephew to file the petition.

Taking all the evidence as well as the peculiar circumstance of the case into consideration, I do not think that the prisoner had any intention of "falsely personating" his uncle in the spirit of Section 205, Penal Code, and would therefore direct his acquittal.

Hobhouse, J.—I am of the same opinion. The question is, did the prisoner "falsely personate" Bhugwan Acharj, and in such assumed character make any statement or do any act in any suit.

It is in evidence that, when the property, as of a certain judgment-debtor, was advertised for sale in execution of a decree of a Civil Court, a petition was presented, as of one Bhugwan Acharj, to the said Court, claiming the said property as his, Bhugwan's.

When the petition was being heard, some one informed the Court that the person presenting the petition was not Bhugwan, but Narain, the prisoner; and therefore the Court asked the prisoner if he was Bhugwan, and he answered "no," and explained that he and Bhugwan were in one family, and that he had presented the petition because Bhugwan was ill.

It is alleged, however, that, before prisoner appeared before the Court, he had appeared before the sherishtadar of the Court, and had told that officer that he was Bhugwan. I observe that this allegation is contradicted by the very best evidence, as pointed out by my brother Glover; and, even if it were not so contradicted, I should doubt if the statement had been made falsely, *i. e.*, with intent to deceive or defraud, for there is no such intent apparent in any part of the prisoner's actions. He merely presented a true petition signed by, and proceeding from, another person, assigning a very good and true reason for doing so, and the moment he was called on by the only legal authority, the Court, whose duty it was to entertain the petitioner, to say if he was or was not that person, he at once admitted he was not, and explained why he had presented a petition bearing that person's name and emanating from him. If, by doing such an act, a person were to be held "falsely to personate," no one would be safe.

The 19th November 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Forgery—Fraudulent using of document as genuine—Section 471, Penal Code.

Queen *versus* Jaha Bux.

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Dacca, on a charge of forgery, &c.

There must be a fraudulent and dishonest using of a document as genuine before a conviction can be had under Section 471 of the Penal Code.

Kemp, J.—This prisoner has been convicted under Section 471 of the Indian Penal Code, and sentenced to two years' imprisonment and to pay a fine of 100 rupees.

The trial was by Jury. After hearing the pleader for the prisoner, and carefully considering the charge to the Jury, we are clearly of opinion that the Judge has wholly misconceived the real features of the case, and has omitted to submit for the consideration of the Jury the salient, we may say the turning, point of the case.

It is clear that in the plaint of the prisoner filed in the Civil Court he stated that, as the Court was closed for five days on account of the Mohurrum vacation, he was unable to file the plaint before the 16th of May, on which date the Court re-opened. The plaint, which had been originally dated the 10th May, is altered to the 16th, and the vakeel presenting it endorses this alteration with his signature. The plaint was filed on the 16th May, and formally registered on the 17th idem without objection or comment. This much is manifest on the face of the plaint. The dates of the endorsement of purchase of some of the blank stamps, which were appended to the plaint to make up the institution stamp, have certainly been

altered to the 10th of May, but it is difficult to understand with what motive; for the prisoner had already committed himself to the statement so clearly made in his plaint that it was filed on the 16th May, and that is the date of institution of suit. The alteration of the endorsements on the blank stamps to the 10th, thus putting back the date of filing the plaint, is, therefore, utterly irreconcilable with such statement, and cannot, we conceive, have been made to escape the Statute of Limitations. There must be a fraudulent and dishonest using of a document as genuine before a conviction can be had under Section 471. The Judge ought to have directed the attention of the Jury to the above apparent want of motive, and have left it to them to decide whether, under the circumstances, a fraudulent or dishonest intention could be fairly inferred or presumed; but, instead of doing so, he directed them to consider whether the prisoner was interested in making the alterations, and, if so, to infer a dishonest motive.

The charge is so faulty that we can have no hesitation in holding that the prisoner has been materially prejudiced by it, and we therefore direct a new trial.

The charge, upon which the prisoner has been formally acquitted, cannot of course be re-opened. The Judge will charge the Jury properly on the indictment under Section 471, receive their verdict, and then pass a proper sentence.

The case must be returned.

The 13th November 1867.

Present:

The Hon'ble F. A. Glover and C. P. Hobhouse, *Judges.*

Dismissing a case—An offence different from the one charged—Sections 250 and 256, Code of Criminal Procedure.

Reference under Section 434, Code of Criminal Procedure, from the Sessions Judge of Hooghly.

Degumber Paul *versus* Kally Doss Dutt.

A Magistrate is not authorised to dismiss a case, because he finds, in course of investigation, that the facts disclose an offence other than, or in addition to, that complained of; but is bound to adjudicate on the original charge.

Letter from the Magistrate of Howrah to the Sessions Judge of Hooghly.

You will observe that, on the 17th May, the complaint was instituted, charging the accused with criminal breach of trust, in that, having been entrusted with money and a stamped paper by the complainant for the purpose of instituting a suit on his behalf in a Moonsiff's Court, he misappropriated the money, and sold the stamps to another party.

The case having been made over for trial to the Deputy Magistrate, he, on the 22nd of May, recorded the deposition of the complainant, and issued a warrant for the accused. He subsequently examined the witnesses for the prosecution, and recorded a full examination of the prisoner: and, finally, on the 28th of August, more than three months after the complaint had been made and deposed to, he dismissed the case. not under Section 225 or 250 of the Code, because no offence was proved against the accused, but because, in the Deputy Magistrate's opinion, the facts alleged disclosed, not only the offence of criminal breach of trust, but also those of forgery and cheating. He held that, because the complainant in the first petition had prayed only for an investigation of a charge of criminal breach of trust, the Court had no power to enquire into any other offence disclosed; and that it could not dispose of the charge of criminal breach of trust without, at the same time, enquiring into such other offences simultaneously.

He conceived that his only way of escape from the dilemma, which he had created for himself, was to dismiss the case with leave to the prosecutor to institute a fresh and more comprehensive complaint.

Now, even if it were the case, which it is not, that this complaint involved forgery and cheating according to the definitions of those offences adopted in the Penal Code, still it appears to me that the Deputy Magistrate's order was, on the one hand, not authorized by any provision contained in the Code of Criminal Procedure, and that, on the other hand, it was directly opposed to the procedure laid down in Sections 250 and 256 of that Code. The former Section

provides that, "if the Magistrate finds that an offence is apparently proved against the accused person," he shall prepare, in writing, a charge, &c.; and the last-mentioned Section directs that, "in any trial before a "Magistrate in which it may appear at any "stage of the proceedings that from any "cause the case is one which the Magistrate "is not competent to try, the Magistrate "shall proceed in accordance with Chapter "XII.," &c. The Magistrate is by no Section authorized to dismiss a case, because the evidence discloses an offence other than, or in addition to, that complained of. Nor, as it appears to me, can a Magistrate, when, even on legal grounds, dismissing a complaint, authorize the complainant to renew it. In the present instance, the complainant has petitioned me again; but I do not think that I can legally entertain his renewed complaint, the original one having been dismissed, albeit illegally. I, therefore, submit the papers for the orders of the High Court.

I have not thought it necessary to call for any further written explanation from the Deputy Magistrate, as the grounds of his order are set forth in his decision. I have personally discussed the question with him, and find that he still considers his procedure to be correct.

Reference to the High Court by the Sessions Judge of Hooghly.

I would state that, in my opinion, the order of the Deputy Magistrate, dismissing the case for the reasons assigned, was incorrect, and that the petitioner had full right to have the charge preferred against the defendant fully adjudicated upon, without any reference whatever to any other charges which the Deputy Magistrate might have considered to have been arrived at from the proceedings.

Judgment of the High Court.

Glover, J.—Under the circumstances stated by the Magistrate and Sessions Judge, we have no doubt that the Deputy Magistrate was wrong in refusing to adjudicate on the charge of criminal breach of trust, originally brought by the complainant. We direct that he be required to do so now.

The 18th November 1867.

Present:

The Hon'ble F. B. Kemp and F. S. Glover, *Judges.*

Fines—Assessors—Section 354, Code of Criminal Procedure.

Miscellaneous Case.

Gour Surun Dass, *Petitioner.*

The order of a Sessions Judge under Section 354 of the Code of Criminal Procedure, fining an Assessor, is not appealable, nor liable to be interfered with by the High Court under Section 404 of that Code.

Glover, J.—This application must be rejected.

By Section 354 of the Code of Criminal Procedure the Sessions Judge was authorized to fine the Assessor for non-attendance, and his order is not appealable.

Nor can we interfere under Section 404, as there was nothing illegal in his order.

We must, however, record our opinion that the Sessions Judge's order appears to have been harsh. The petitioner *was* ill on the day on which he was summoned to sit as an Assessor, as appears from the certificate of the Civil Surgeon; and, although that certificate was not filed till an hour or two after his order recording the fine was passed, there was no reason why it should not have been received and favorably considered when it was presented.

The effect of the Judge's order has been to fine, for non-attendance, a man who is found to have been incapacitated from attending as Assessor by sickness.

The 26th November 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Breach of the Peace—Section 318, Code of Criminal Procedure.

Revision of Proceedings under Section 404, Code of Criminal Procedure.

Bisseshur Narain Mahtah, *Petitioner.*

The provisions of Section 318 of the Code of Criminal Procedure are substantially complied with when the Magistrate states that he is satisfied that the disputes

between the parties was likely to induce a breach of the peace, and records his opinion that the only way of bringing those disputes to a satisfactory settlement was by proceeding under the Section quoted.

Kemp, J.—THIS case has come before us on an application under Section 404 of the Code of Criminal Procedure.

It is urged that no preliminary proceeding, such as is required under Section 318 of the Code of Criminal Procedure, has been recorded in the case; and that the proceedings of the Magistrate are consequently illegal, and ought to be quashed.

We have read the proceedings of the Magistrate, and are of opinion that he has substantially complied with the requirements of Section 318. He was satisfied that the long standing dispute between the parties brought about by that most fruitful of causes, a boundary dispute, was likely to induce a breach of the peace; and he recorded that, in his opinion, the only way of bringing that dispute to a satisfactory settlement was by proceeding under the above quoted Section. We, therefore, are unable to see how the Magistrate's proceedings can in any way be said to be illegal or irregular. The application to us to act as a Court of Revision, and quash those proceedings, is therefore rejected.

A decision of a Divisional Bench, dated 27th August 1866, published in Volume VI., Weekly Reporter, page 61, Criminal Rulings, was quoted during the argument; but that case, in our opinion, is not similar to the case before us. The learned Judges in that case held that the Magistrate had not stated why he was satisfied that the dispute was likely to produce a breach of the peace; in this case, the Magistrate has done so.

The 30th November 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Separate sentences—Sections 369 and 382, Penal Code.

Queen *versus* Kashee Nath Chungo.

Committed by the Magistrate, and tried by the Officiating Sessions Judge of Dacca, on a charge of abducting a child under ten years of age, with the intention of dishonestly taking the ornaments from his person, &c.

Separate sentences cannot be awarded in one case for abducting a child in order to take property from its person (Section 369), and theft after preparation to cause death, &c. (Section 382), where the evidence shows that the act was one and the same. The sentence under the latter Section was cancelled, there being no evidence of any preparation having been made to cause death, &c., within the meaning of that Section.

Seton-Karr, J.—THERE can be no doubt of the substantial justice of this conviction, but the sentences seem to me to require revision.

The prisoner has been sentenced to seven years' rigorous imprisonment for one offence, and to a further period of seven years for another offence.

The first offence found is that, under Section 369, Penal Code, *i. e.*, kidnapping or abducting a child under ten years old, with intent to take property from the person of such child; the second offence is that described under Section 382, *i. e.*, theft after preparation made for causing death or hurt, &c.

Of the offences described in Sections 364 and 307, *viz.*, kidnapping or abducting in order to murder and "attempt to murder," the prisoner has been acquitted.

I concur with the Sessions Judge in thinking that the prisoner ought not to have been acquitted on the fourth count; and that the evidence, which the Jury obviously credited, was sufficient to bear out this charge also.

But, as the case stands, the convictions on the first and second counts are substantially for one and the same act; and the prisoner ought not to have had awarded to him separate punishments for both these counts.

I would annul the punishment on the second count, and leave the sentence to stand of seven years' rigorous imprisonment on the first count.

Macpherson, J.—I agree in thinking that the convictions on the first and second counts are substantially convictions for one and the same act, and that no separate punishment ought to have been awarded on the latter count. I may add that, in my opinion, the conviction under Section 382 is bad, as there is no evidence of any preparation made for causing death, &c., within the meaning of that Section. The sentence under Section 382 will be set aside; the other sentence under Section 369 of seven years' rigorous imprisonment will stand good.

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The 2nd December 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,

Judges.

Security—Breach of the Peace—Unsupported petition—Credible information—Section 282, Code of Criminal Procedure.

Reference under Section 434, Code of Criminal Procedure, from the Sessions Judge of Tipperah.

Chamaro Malo and others

versus

Kashi Chunder Lalla and others.

A petition, unsupported by any complaint or deposition on solemn affirmation, cannot be considered "credible information" within Section 282 of the Code of Criminal Procedure, on which to warrant a Magistrate to demand security to keep the peace.

Glover, J.—We think that there was no such "credible information" as the law requires before the Deputy Magistrate, and that he was not justified in calling upon the parties to furnish security under Section 282, Code of Criminal Procedure.

The only ground for his proceedings appears to have been a petition, in which it was stated that the Tipperah Rajah's people were intimidating the ryots.

This petition was not backed by any complaint or deposition on solemn affirmation, nor even did it go the length of saying that there was any probability of a breach of the peace. We do not consider that an unsupported petition like this (a petition, by the way, which was declared after a police-enquiry to be false) can be considered credible information under the Section of the law above quoted; and we therefore annul the Deputy Magistrate's order, and direct him, if he still thinks interference necessary, to proceed according to law.

The 2nd December 1867.

Present :

The Hon'ble F. B. Kemp and F. A. Glover,

Judges.

Punishment—Escape from lawful custody—Section 224, Penal Code.

Queen *versus* Dhoonda Bhooya.

Committed by the Assistant Magistrate of Raneegunge, and tried by the Sessions Judge of West Burdwan, on a charge of dacoity, and escaping from lawful custody

The punishment for escape from lawful custody (Section 224) in a case in which that is *one* of the offences of which the prisoner is convicted must be "*in addition*" to any punishment awarded for the substantive offence.

Glover, J.—I see no reason to interfere with these convictions. The evidence that the prisoner was one of the dacoits, and took a leading part in the attack, appears to me sufficient and satisfactory.

But I observe that, for the second offence of which the prisoner has been found guilty on his own confession, *viz.*, escaping from lawful custody under Section 224, Penal Code, the Sessions Judge has awarded no legal punishment.

The explanation to Section 224 provides, as pointed out by Mr. Justice Jackson in his review of the Bancoorah Criminal statements, that the punishment for escape from lawful custody must be "in addition" to any punishment awarded for the substantive offence.

The Sessions Judge has recorded a sentence of two years' rigorous imprisonment for the "escape," but has made it, what he calls, "conterminous" with the sentence of ten years' transportation for the dacoity, so that, if the prisoner had been acquitted on appeal on the charge of dacoity, he must have been released at once, notwithstanding the sentence for "escape" recorded against him.

It has been ruled by this Court on more than one occasion that contemporaneous sentences are not legal; and I would, therefore, under Section 404 of the Code of Criminal Procedure, amend the Sessions Judge's order, and direct that the sentence of two years' rigorous imprisonment under Section 224, Penal Code, be in addition to the punishment awarded for the dacoity, and commence after the expiry of that sentence.

Kemp, J.—I concur.

The 13th December 1867.

Present:

The Hon'ble W. S. Seton-Karr and A. G. Macpherson, *Judges.*

Section 211, Indian Penal Code—Sections 154 and 379, Code of Criminal Procedure—Presumption of innocence—Evidence—Summing up.

Queen *versus* Nobokisto Ghose.

Committed by the Magistrate, and tried by the Sessions Judge of Patna, on a charge of instituting a false criminal charge with intent to injure, &c.

Under Section 211, Indian Penal Code, "instituting a criminal proceeding" may be treated as an offence in itself apart from "falsely charging" a person with having committed an offence.

Where a person is charged with instituting a criminal proceeding with intent to cause injury, knowing that there was no just or lawful ground for such proceeding, it is for the prosecution to make out a distinct case against him; not for the prisoner in the first instance to show that he had just or lawful grounds.

The deposition of a witness in a former case is not evidence in a subsequent case in which he is examined, except when put in to contradict him.

Where certain portions of a police-officer's diary are used as evidence against him, Section 154 of the Code of Criminal Procedure does not bar the admission of other portions of the diary, as explaining the portions so used.

Where facts are as consistent with a prisoner's innocence as with his guilt, innocence must be presumed: and criminal intent or knowledge is not necessarily imputable to every man who acts contrary to the provisions of the law.

A Judge should not discuss points of law in summing up to the Jury, and he should avoid all extraneous and unnecessary argument, merely summing up the evidence, and shewing how the law applies to it.

Macpherson, J.—THE prisoner Nobokisto Ghose was tried before Mr. Ainslie, the Sessions Judge of Patna, upon the three following charges:—

First.—Under Section 211 of the Indian Penal Code, that he, on or about the 5th June 1867, instituted or caused to be instituted, against one Tiluck Singh, a false charge of an offence punishable with transportation for life, with intent to cause injury to the said Tiluck Singh, knowing that there was no just or lawful ground for such charge;

Second.—Under the same Section, that he, on or about the 5th June 1867, instituted or caused to be instituted a criminal proceeding against Tiluck Singh, with intent to cause injury to Tiluck Singh, knowing that there was no just or lawful ground for such proceeding; and

Third.—Under Section 167, that he, on or about the 5th June 1867, being a public servant, and as such charged with the preparation of a document, prepared that document in a manner which he knew or believed to be incorrect, intending thereby to cause, or knowing it to be likely that he might thereby cause, injury to Tiluck Singh.

He was acquitted on the first charge, but convicted on the second and third, and sentenced to a year's rigorous imprisonment and to fine.

He appeals to this Court, and the points taken by his Counsel are substantially that Section 211 of the Penal Code cannot be split up as it has been, so as to treat "falsely charging" a person as a distinct offence from "instituting a criminal proceeding," &c.; that a police officer acting, as the prisoner did, under orders of his superior officer, cannot legally be prosecuted under Section 211; that the prisoner did not "institute" the proceedings which are the subject of this prosecution; that the Judge misdirected the Jury in a manner highly prejudicial to the prisoner; that there was no evidence that the prisoner knew that there was no just or lawful ground for the proceedings which he instituted; that there was no evidence that the prisoner framed the entry referred to in the third count in a manner which he knew to be incorrect, or with the intent or knowledge required to constitute an offence under Section 167.

I think there was nothing wrong in charging the prisoner as he has been charged in the 1st and 2nd counts. For it appears to me to be clear that, under Section 211, "instituting a criminal proceeding," may be treated as an offence in itself, apart from "falsely charging" a person with having committed an offence.

I think also that, supposing the case for the prosecution to be proved, the prisoner would be legally responsible for what he did, notwithstanding that he was a police-officer, and in one sense instituted the proceedings by order of his superior officer; for the case for the prosecution practically is that the prisoner, in bad faith, and knowing that he had no just or lawful grounds for instituting the proceedings, led his superior officer to believe that he had just and lawful grounds, and so induced the latter to direct the institution of the proceedings.

Further, I think there is no doubt that the prisoner did "institute" these proceedings. Of course, he acted on the information of Lekha, but Lekha did not charge any one,

whereas the prisoner did (by signing the charge-sheet), and was in fact the sole mover in the matter of making the charge against Tiluck Singh.

The important and difficult questions in this appeal are those as to evidence and misdirection.

The Judge's charge to the Jury is of extraordinary length, and discusses many questions with which the Jury had nothing to do, and which it ought to have been the object of the Judge to keep from them as far as it was possible. The first part of the charge argues and disposes of certain legal objections which had been raised by the prisoner's Counsel. With these objections the Jury had nothing whatever to do. All that the Judge had a right to do was simply to state how the law stood, and to "sum up the evidence on both sides." That portion of the Judge's charge which extends from the beginning down to the words, "Having disposed of these points of law, I have now to take the case on its merits," ought never to have been put to the Jury as part of the summing up; and, were there no other fault to be found with the Judge's charge, I should say (considering the nature of the discussion and of the Judge's remarks in the course of it) that this would amount to a substantial misdirection vitiating the trial. There is much in this part of the charge which was greatly calculated to prejudice the Jury unfavorably against the prisoner; and, as the Judge should not have put any portion of it before a Jury, I think this amounts to a substantial misdirection. It is all important that Judges in charging Juries should avoid all extraneous and unnecessary discussion and argument, and should confine themselves, as directed by Section 379 of the Code of Criminal Procedure, to a mere summing up of the evidence on both sides, shewing how the law applies to it.

Discussion and argument, however careful and learned, as to what the law is, invariably tend to confuse and mislead a Jury. And, considering that, in the present case, a period of three days was allowed to elapse between the close of the prisoner's defence and the Judge's summing up (the Judge having adjourned the Court from Saturday till the following Wednesday in order to prepare his summing up), it was all the more necessary that the evidence on both sides should be carefully sifted, and put distinctly before the Jury.

As to the charge, so far as it deals with the case on its merits, I think there has also been a misdirection, and that there was *no* evidence to support a conviction on either the 2nd or 3rd count—for, as the prisoner has been found *not guilty* on the first count, I shall look at the case exclusively with reference to the second and third. I think there is much that is both correct and acute in many of the remarks made by the Judge in his summing up. But the misdirection is general, and pervades the whole charge, resulting from a total misconception, or losing sight on the part of the Judge, of what had or had not to be proved, and of what was or was not proved.

The case for the prosecution is shortly this. One Lekha Dosad, a dacoit and poisoner, having been convicted and sentenced (by the Bhaugulpore Court) to a long period of imprisonment, made certain confessions, the result of which was that he received a conditional pardon, and was made over to the Detective Police as an approver. The prisoner was an Assistant Inspector of the Detective Police, of which Mr. Reily is the head. Mr. Reily, having himself had interviews with Lekha Dosad at Patna, returned to Calcutta, leaving the prisoner at Patna, for the express purpose of prosecuting inquiries based on the information given by Lekha Dosad. The prisoner then, on information given him, as he says by Lekha, searched the house of one Tiluck Singh, where certain *thalees* were found, which Lekha said had been taken from one Tokhun Roy, who had been robbed by him and other dacoits some time previously. Tokhun Roy was produced from his house in Zillah Sarun, and identified the *thalees:* he stated that, when robbed, he was on his way to his house in Sarun from Midnapore, and that he had got the *thalees* at Midnapore, where they had been delivered to him by the police as part of the property of his deceased son Roshun, who had himself been a constable. The prisoner reported these facts to his superior officer, Mr. Reily, who was in Calcutta, and asked that the necessary witnesses should be sent for from Midnapore to identify the *thalees*. Mr. Reily said that it would save expense if the *thalees* were sent down to him in Calcutta, where he would find out whether the Midnapore people really could identify them or not. This was in the end of March, or beginning of April. About the 1st of June, Mr. Reily returned the *thalees* to the prisoner, sending up certain witnesses from Midnapore, and directing the

prisoner to proceed at once against Tiluck Singh. He did so, and the case, in the opinion of the Magistrate, broke down, and Tiluck Singh was discharged. The search of Tiluck Singh's house was made by the prisoner on the 16th March. On that day the prisoner reported to the Magistrate that he had arrested Tiluck Singh on another charge (one of murder), and he also stated in his report that he had searched his house and found certain stolen property, but he did not give the details of the stolen property said to be found. Tiluck Singh was charged before the Magistrate of Patna with being concerned in the murder of one Heeramun, but he was discharged by the Magistrate on the 4th of April. As he was leaving Court, Tiluck was stopped by the order of the prisoner, and was made to give bail to appear when required, to answer any charge that might be made against him for being in possession of stolen property (that is to say, in connection with the *thalees*). Mr. Worsley, the Magistrate, who had just discharged Tiluck, saw him stopped by the prisoner's orders, and enquired into the reason, when the prisoner explained what he was doing. At that time (*i. e.*, the beginning of April) certain other persons (Imrit and Dharee) had been charged before the Magistrate of Sarun with committing the robbery on Tokhun Roy, in the course of which the *thalees* found in Tiluck Singh's house were said to have been carried off. On the 8th of April, the prisoner, in writing to the Magistrate of Sarun, mentioned that he had a charge of *receiving* against Tiluck Singh, and that he would send him for trial as soon as he had sufficient evidence. The prisoners Imrit and Dharee were discharged at Chupra on the 1st June. On the 2nd June the Midnapore witnesses arrived with the *thalees*, and Mr. Reily's direction to proceed; whereupon, on the 3rd, Tiluck was arrested, and on the 4th a charge was made against him in Court by the prisoner—but in the Court of the Magistrate of Patna, and not in the Court of the Magistrate of Sarun. The prisoner's diary contains an entry of Tiluck Singh's arrest on the 4th of June, but contains no notice of what occurred as to his giving bail on April 4th.

These are the general facts which the prosecution proposed to prove. I shall now enquire what was the evidence put before the Court in support of the second count.

What had to be proved was that the prisoner—

(*a*) with intent to cause injury to Tiluck Singh,

(*b*) instituted or caused to be instituted a criminal proceeding against Tiluck Singh,

(*c*) knowing that there was no just or lawful ground for such proceeding.

The last of these three points, the guilty knowledge, is the most difficult to prove; but that it should be proved substantively by the prosecution, is absolutely essential. The prisoner being put on his trial as for a criminal offence, it is for the prosecution to make out a distinct case against him, not for the prisoner in the first instance to justify himself, and show that he had "just and lawful grounds." What has the Crown proved, looking at the evidence for the prosecution apart from that for the defence? The Judge, although he told the Jury that the guilty knowledge must be proved, practically himself wholly lost sight of the question; he never seems to have stopped for a moment to enquire what the case made by the prosecution against the prisoner really amounted to; much less did he attempt to show the Jury what it was. The case for the Crown, as laid before the Court, in truth proved nothing whatever as to the prisoner's knowledge, or otherwise, that there were no just or lawful grounds for the proceedings; and, had the trial been properly conducted, the Judge, on the close of the case for the Crown, would have directed the Jury that there was no evidence to support a conviction, and that they must return a verdict of not guilty, without calling upon the prisoner to enter upon his defence.

The witnesses for the Crown are Mr. Worsley, Mr. Reily, Issuree Pershad, Tiluck Singh, and Enayet Hossein, of whom I may almost say that no one proves anything that is material against the prisoner.

Then the prosecution put in a mass of papers, consisting chiefly of the records in various cases more or less connected with Tiluck Singh, or the gang of dacoits to which Lekha belonged. These records, although I find them lying before me as part of the exhibits filed in the present case, are said by the Sessions Judge not to have been admitted, except so far as they go to prove certain matters only. But they should not have been admitted as they have been. They were either admissible or inadmissible. If they were not admissible, they should have been excluded altogether.

The Judge says of the record in the case against Tiluck Singh for receiving (Section 412), that it was "read excluding judgment and depositions: admitted so far as proof of the acts and proceedings of the Court are concerned, and depositions admitted of witnesses now examined in this Court." What is supposed to be the meaning of "reading," and admitting after this fashion, I do not understand. The acts and proceedings of the Courts which it was necessary to prove should have been proved in the regular manner: that is to say, such particular documents as were necessary to that end, and as were admissible, should have been put in. The depositions of witnesses examined in the other cases, who were also examined in this case, are not evidence, except when at the trial in this case the witness was expressly examined as to his former deposition, and it was put in to contradict him.

And here I may remark (although the observation would perhaps come in more regularly in dealing with the third count) on the exclusion by the Judge of certain extracts from the prisoner's diary, which were tendered with a view of explaining certain other extracts which were admitted as evidence against him. It is quite true that, by Section 154 of the Criminal Procedure Code, a police-officer's "diary shall not be evi- "dence of the facts stated therein, except "against the police-officer who made it." But the present was not a case in which it was wished to use the diary against any third person. Certain portions of the diary were put in as evidence against the prisoner, and he had a perfect right to place before the Jury any other portions which explained those which were admitted. The diary as a whole (so far as it bore on the matters at issue) ought to have gone to the Jury, or it ought not to have been placed before them at all. The whole diary might properly be used against the prisoner; but not mere extracts or garbled portions of it.

The prosecution has been conducted in a very extraordinary way altogether. Lekha, the person on whose information the prisoner alleged he acted, and on whose information indeed it was known that the prisoner said he acted, was not called by the prosecution, nor was Tokhun Roy, nor were the Midnapore witnesses—no body, in fact, who could have shewn really what the prisoner's grounds or supposed grounds for proceeding were.

Such a mode of conducting a prosecution is most improper. It was the distinct duty of the Crown, in common ordinary fairness to the prisoner, to have put into the witness-box every one of the persons on whose testimony the prisoner avowedly relied in sending up the case. What these persons said before Mr. Worsley when the charges against Tiluck Singh, under Section 412, came on to be heard, in no degree shows that the prisoner had not just and lawful grounds for sending the case up. The question is not to whom the *thalees* in truth belonged, or what the witnesses said before Mr. Worsley; the question is what the witnesses had previously said to the prisoner, and what he, at the time he instituted the proceedings, had reason to believe they knew and could prove. It may very well be (and indeed probably is the case whether he was acting *bonâ fide* or *malâ fide*) that no one was more surprised than the prisoner himself when his witnesses declined before Mr. Worsley to speak positively to the *thalees*. It seems to me that, if the prisoner had been acting *malâ fide*, he would have been more certain of his instruments, and would not have gone into Court with witnesses who were to break down at the very threshold. As it is, the prosecution left the case without a scrap of what is even supposed to be direct evidence as to the prisoner's grounds, except so far as the grounds may be gathered from the prisoner's written defence before the Magistrate—from Lekha Dosad's general confession in February 1867 (Exhibit 12 admitted by the prisoner's Counsel)—and from Mr. Worsley's evidence (if indeed it can be construed against the prisoner) that Lekha Dosad in the prisoner's presence told him (Mr. Worsley) that he had told the prisoner that he had given *thalees* of this kind (*i. e.*, I presume, *thalees* like the ones produced in Court) to Tiluck Singh. The real case for the prosecution is rested, not on any direct evidence, but on a number of facts which are relied on as suspicious, but not one of which in itself is less consistent with the prisoner's innocence than with his guilt.

It is said that the prisoner, before arresting Tiluck Singh on the charge of receiving stolen goods, charged him with the murder of one Heeramun, upon the same evidence upon which he had previously been charged (not by the prisoner however) unsuccessfully with concealing the body of Heeramun. But the charge of murder was not made on exactly the same evidence as

that on which the charge of concealing the body rested, and the offence charged was substantially different. I do not see what connection the charge for murder has with the subsequent charge for receiving. When Tiluck Singh was sent up on the charge of murder, the prisoner mentioned in the *chalan* which accompanied him to the Magistrate, that stolen property had been found in his house; so that the suggestion, that the charge of receiving was got up when the charge of murder failed, falls to the ground.

Then it is said that Lekha in his general confession (of February 1867) did not say anything about Tiluck Singh having received the stolen property. This may be so, and is matter of comment when the value of Lekha's evidence comes to be enquired into. It is, however, but slight evidence at best that his subsequent statement was untrue, and would in no degree have justified the prisoner in not acting on the subsequent statement if he believed it on the whole to be true. The silence of the confession of February is no evidence that the prisoner knew he had no just or lawful ground for instituting the proceeding; and it was no possible reason why the prisoner should necessarily have doubted the truth of Lekha's subsequent statements.

But whereas the prisoner held Tiluck Sing to bail on April 4th, he did not enter the fact of his arrest in his diary until June 4th. This may or may not be an irregularity. But what evidence is it, on one way or other, as to whether the prisoner on the 4th of April or 4th of June, or on both these dates, believed that the man had received stolen property, or that he, the prisoner, possessed evidence to prove it? It is not even as if there had been any concealment in what was done by the prisoner on the 4th of April; what he did was done under the eyes of the Magistrate, who asked what he was doing, and, on being told, made no objection to it whatever. Furthermore, in the letter of the 8th of April, he announced to the Magistrate of Sarun that he had held Tiluck Singh to bail, and would send him up when the necessary evidence arrived.

Again, whereas the principals, Imrit and Dharee, were charged before the Magistrate of Chupra as principals in the robbery in which the *thalees* (which Tiluck was charged with receiving) were stolen, the charge against Tiluck was not made before the same Magistrate, and this fact is relied upon as shewing bad faith. I think it is no evidence of anything of the sort. It may possibly be evidence of a desire to have the matter brought before another Magistrate; but, when a person has a right to select one or other of two Courts, his selecting the one, in preference to the other, is no evidence of *mala fides*. Moreover, in the present instance, there were various very good reasons (one of them given by Tiluck Singh himself) why the case should be instituted at Patna, and not at Sarun. I may add that I doubt much whether, by reason of the letter of the 8th April, it can be correctly said that the proceedings were on that day instituted at Sarun.

That the prisoner should not have brought to the notice of Mr. Worsley that the principals, Imrit and Dharee, had just been acquitted at Chupra, was no doubt wrong. The prisoner may perhaps have been unduly anxious to secure a commitment. But this is no evidence that he knew he had not just or lawful grounds for instituting the proceedings. So, as to the defects in the reports made by the prisoner to Mr. Reily, of which defects I must add that I do not concur with the Judge in the opinion that they materially affected the sanction given by Mr. Reily to instituting the proceedings, except, possibly, so far as regards any question as to instituting the same in Patna rather than instituting them in Sarun.

Irregularities and an undue zeal on the part of a police-officer are highly blameworthy. But it by no means follows, and cannot legitimately be inferred, that he has no just grounds for proceeding, *merely* because he is guilty of irregularities, or displays undue zeal.

It is argued that, from all the various suspicious facts to which I have referred, the Jury might properly be directed that they were at liberty to infer the guilty knowledge required to justify a conviction under Section 211. I think they could not properly be so directed, because, as I have already said, there is not any one of those facts that is not as consistent with the prisoner's innocence as with his guilt, and because, under such circumstances, innocence must be presumed.

I think, moreover, that, even supposing there was *some* evidence which might be left to the Jury on this count, the summing up of the Judge was defective and wrong, in that it did not point out to the Jury the extraordinary weakness of the case as pre-

sented to them by the prosecution—the fact of its being based solely on a series of suspicions—and the fact that so many of the witnesses who ought to have been called were not called. If there was any case at all for the Jury (which, as I have already said, I think there was not), that case was not fairly presented to them without their attention being most particularly called to these points.

In the third count the prisoner is charged, for that he—

(*a*) as a public servant, charged with the preparation of a document,
(*b*) framed that document in a manner which he knew to be incorrect,
(*c*) intending thereby to cause, or knowing it to be likely that he might thereby cause, injury to Tiluck Singh.

I shall take it for granted that the prisoner ought to have reported his arrest of Tiluck Singh on the 4th of April to the Magistrate; that he did not so report it; and that he was wrong in entering the arrest of Tiluck Singh as an arrest of the 4th of June, instead of the 4th of April. Whether he knew he was doing wrong, is a more difficult question. The prisoner says he did not know he was doing any thing wrong, and that he did not look upon the taking bail on the 4th of April as an arrest. Has the Crown proved substantively that he had a guilty knowledge? The Sessions Judge says, every man must be presumed to know the law. So he must, in a certain sense. But it does not follow that a criminal intent or knowledge is necessarily to be imputed to every man who acts contrary to the provisions of the law. It appears to me that the natural, if not necessary, inference to draw from the prisoner's conduct is that he did not know that there was anything wrong in his omission. For on the 8th of April (only four days after the arrest and holding to bail of the 4th of April) he wrote to the Magistrate of Sarun that he had Tiluck Singh on bail, and was only waiting for certain witnesses to send the man up before the Court. This fact, coupled with what occurred in Mr. Worsley's Court on the arrest of Tiluck Singh on the 4th of April, seems to show conclusively that the prisoner, in making no entry on the 4th April, did not know he was doing wrong, and did not intend to injure Tiluck Singh, or know that he was likely to injure him. The whole matter was done most openly, as we have seen: he on the 8th wrote of it to the Sarun Magistrate, and on the 4th he, at the moment of the arrest, explained his reason for making it to Mr. Worsley. Mr. Worsley says, "I asked why he had arrested him. He replied that there was a case or cases against him for the possession of stolen property."

Mr. Worsley himself was the very Magistrate before whom the prisoner brought on his case upon the 4th of June. What possible injury did ensue, or was likely to have ensued, to Tiluck Singh from the report not having been made on the 4th of April? None whatever, upon the evidence. And as the not making the report is not *per se* an offence—not unless the guilty intent of knowledge is established—there is no evidence upon which the verdict of the Jury upon the third count can be supported.

The Jury ought to have been directed that the evidence would not support a conviction on the third count. They were not so directed, and in my opinion the verdict ought to be set aside, and a verdict of *not guilty* ought to be entered on that, as also on the second count.

I form this opinion without looking at the evidence for the defence; but it is right to add that the evidence for the defence satisfies me that, whatever may be the irregularities of which the prisoner was guilty, he had ample grounds for instituting the proceedings against Tiluck Singh, and leaving it to the Magistrate to dispose of the charge upon such evidence as was available.

The sentence passed upon the prisoner must be set aside, and he must instantly be released. The fine imposed, if it has been paid, must be refunded to him.

Seton-Karr, J.—I hold with my brother Macpherson that there has been a general misdirection in this important case; and that the prisoner has been illegally convicted, and I concur generally in the remarks which he has made on the trial of Nobokisto Ghose.

There was an attempt made before us by Mr. Read, who ably defended the prisoner, both at the Sessions and in appeal, to make out that the prisoner should not have been put on his trial at all, and that he was simply carrying out the orders of his superior officers, and as such that he was not criminally responsible. Now, I can conceive many cases in which such a plea might be successfully urged in bar of an action, and indeed,

if every subordinate police-officer who charged, or assisted to charge, a householder with the receipt of stolen property, were liable to be put on his trial, because the identification of the property by the party robbed was not credited, it is easy to see that the operations of the police, whether of the regular or the detective force, would very soon come to a complete stand-still. But in this case, as my brother Macpherson observes, the prisoner, and not the approver Lekha, did institute the proceedings, and it was not therefore illegal or wrong to look on him as responsible, and to put him on his trial. I hold, too, that there was no illegality in the division of the charge under Section 211 into two parts; a man may be said to institute an offence punishable with transportation, and also to institute, or cause to be instituted, a criminal proceeding with intent to injure. The intent of the law, however, and the whole gist of the offence, lies in this, that it must be clearly and satisfactorily shown that the person making the charge knew "that there was no just or lawful ground for such proceedings or charge," and the Judge's charge is marked by a want of attention to this most essential and necessary ingredient in the conviction.

My own reasons for releasing the prisoner may be thus stated *seriatim*. The facts have been so clearly given by my brother Macpherson that I need not recapitulate them :—

(1.) It was irregular for the Judge to discuss in his charge to the Jury the various points of law, some of them minute and difficult, which were raised by the prisoner's Counsel, and this introduction into the charge of matters foreign to it was only calculated to puzzle and mislead the Jury.

(2.) The Judge nowhere puts before the Jury any clear statement of the main facts which it was for the prosecution to prove, and which were essential to a conviction. He does certainly refer to portions of the evidence, but he nowhere states the case lucidly and properly to the Jury. He does not constantly keep before them what had to be proved, what might be taken to be proved beyond question, and what inferences of guilt or innocence they might or might not draw from the facts if they credited the evidence. In fact, he does not insist on the guilty knowledge, that is, on the knowledge that there was no cause for instituting the charge at all. Again, when the Judge told the Jury that the principal thing to be considered in such a case was whether, "in fact, the act said to have been committed by the accused were actually committed, and whether they were committed injuriously without warrant of law," he misapprehended the real point of the case, and quite misdirected the Jury; warrant of law, it is obvious there was, for the arrest of Tiluck. What, as I have already observed, was essential to the conviction of Nobokisto, was that it should be shown that he was well aware that he was bringing a false and malicious accusation.

(3.) The greater part of the Judge's remarks on the evidence as to the identifica-

tion and recognition of the *thalees* out of which the prosecution arose seems to me to be entirely out of place. They might have been very pertinent on the trial of a receiver, at which the Judge was charging a Jury on the identification of certain articles of property claimed by a prosecutor on the one hand, and by the thief or receiver on the other. In this trial they were mainly irrelevant, and it is impossible to gather from them from what facts *mala fides* was to be imputed to the prisoner, and how it could be said, from anything which any witness discloses, that the prisoner was perfectly well aware that there were absolutely no grounds whatever for his instituting the prosecution against Tiluck. But this knowledge to be proved directly, or to be legitimately inferred from circumstances, was all important to conviction; and, unless the prisoner was shown to have conspired with Tokun Roy, or to have known that the *thalees*, which originally came from Midnapore, never belonged to Tokun at all, it is not easy to see how guilty knowledge was to be inferred.

(4.) Records of other cases in which the prisoner was not concerned have been improperly admitted, and this admission told unfairly against the prisoner.

(5.) On the last charge, that of "framing an incorrect document with intent to injure," there is an utter failure, on the part of the Judge, to show in what way the omission of the date of April and the simple insertion of the date of arrest as two months later or in June was calculated to injure Tiluck. The Judge tells the Jury that they are to consider whether the omission was likely to injure the accused, or whether he was likely to be worse for the concealment; but how or in what way Tiluck was to be injured, the Judge does not state. It is quite clear, on the other hand, that the Magistrate was well aware of what had taken place in April; that there had been no real concealment of any material transactions; that the institution of the other case in Chupra was made known as the inquiry proceeded; and that on this point the evidence was a failure. The Judge should have so directed the Jury in clear terms.

(6.) The prisoner was prejudiced, and could not but have been prejudiced, in the eyes of a native Jury, by the remarks of the Judge scattered through his charge.

The trial, it is obvious from the record, was one in which local feeling and local jealousy were much excited. Rivalry or jealousy between the regular and the detective police is admitted to exist. And though there was nothing illegal in the appearance in Court of the Magistrate, both as prosecutor and witness, yet I cannot regard this part of the trial as one which we can dwell on with any satisfaction.

But whatever may be said in favor of the zeal of any Magistrate anxious to put down false complaints and false arrests, it is certain that, as there was this local excitement on the trial, the Judge ought to

have risen superior to any such feelings ; he should have placed before the Jury a clear and dispassionate statement of the facts. and then have pointed out to them the inferences which the facts might warrant them in drawing ; he should have particularly warned them against being led away by jealousy or pique ; and he should have carefully abstained from any remarks in the least calculated to mislead, inflame, or prejudice.

I regret to say that the reverse of this has been the case. No one can read the Judge's charge without feeling that there are passages in which the language is neither grave nor temperate, and which, as those who know natives must admit, could only have the effect of inducing the Jury to think that a conviction would be a safe termination to the trial. The prisoner too was a native of Bengal tried in a strange province. I allude particularly to such a passage as the following, which ought not to have been uttered : " It is very material that "the Detective Police department, the head "of which, Mr. Reily, had in open Court "professed utter ignorance of their duties "and powers, should know that they cannot "shelter themselves *behind a wretched* "*convict*, a dacoit and prisoner, a man liable "at any moment to be relegated to prison "for the crimes of which he stands convict-"ed, and to be convicted of other crimes for "which he has not yet been prosecuted. "*A pretty shield truly for the officers* "*of the department charged with the most* "*delicate and most responsible branch of* "*the duties of the Police of Bengal.*" As the Judge took three days to consider his charge, and as the prisoner was defended by Counsel, who put before the Court every point that could be favorable to the interests of his client, it is much to be regretted that such remarks should have been made. That the Judge took very great pains with the case, I am most ready to admit ; but there was therefore the greater reason that the long labor so spent should have terminated in that acquittal, at which, after a very full and patient hearing, we have both unanimously arrived, and which it now becomes our duty to pronounce.

The 14th December 1867.

Present :

The Hon'ble F. B. Kemp and W. S. Seton-Karr, *Judges.*

Charge—False evidence—Section 193, Penal Code.

(Miscellaneous Case.)

Dowlut Moonshee, *Appellant.*

In charges of false evidence under Section 193, Penal Code, the charge should specifically state what words or expressions the accused is charged with having uttered, and in what respect they are supposed to be false.

Kemp, J.—THIS prisoner has been convicted under Section 193 of the Penal Code, and sentenced to three years' imprisonment.

The charge is framed in very general terms, and the prisoner was not called upon to plead to any specific charge.

It appears that the prisoner and his brother Haneef were coolie recruiters in the sub-district of Puroolia, in Chota Nagpore. Haneef was deprived of his licence: why, does not appear on the record. It was alleged that he was still carrying on his recruiting operations without licence, and, during the course of an enquiry into this fact, the prisoner, his brother, was examined. He deposed that all advances made by Andrew Hendry and Co. through their cashier, Deno Nath Babou, on account of coolies, were made to him, the prisoner, direct, and not through his brother, Haneef. Before the Deputy Commissioner, when [illegible]

intention, and [illegible] will be able to clear himself [illegible] giving false evidence when arraigned [illegible] a charge properly framed and after evide[illegible] has been duly recorded.

The papers must go before [illegible] as I think there ought to be [illegible] the prisoner having been [illegible] [illegible]

Evidence in a case of kidnapping a girl—Jurisdiction of Magistrate in a case of Grievous Hurt.

Extract (paras. 7 and 8) of Letter No. 634, from the Registrar of the High Court, to the Sessions Judge of Tirhoot, dated the 30th May 1867.

7. WITH reference to your judgment in the case of Gunga Muhto, Case 4, Statement 5, that there is no evidence for the prosecution, but complainant's statement on oath unsupported, that the prisoner kidnapped Mussamut Rajnee, I am to point out that the evidence is quite sufficient if you believed it; and, as the girl was found with the prisoner, it remained for the prisoner to prove his alleged marriage with the girl.

8. Adverting to the remark of your judgment in the case of Ramchurn and others, Case 19, Statement 5, that, "as the hurt inflicted on Tuhul was not technically grievous, the case might have been disposed of by the Magistrate himself," I am directed to state that, if the hurt had been *technically grievous*, the Magistrate might still have disposed of the case as you may see from the Schedule to the Code of Criminal Procedure as modified *in loco* by Section 1, Act VIII. of 1866.

Charge to state the kind of weapon with which a deceased was struck.

Extract (para. 4) of Letter No. 644, from the Registrar of the High Court, to the Additional Sessions Judge of Hooghly, dated the 1st June 1867.

4. I AM to point out that the wording of the third head of the charge against Roostum Mundul (Case 13, Statement 4) is incorrect, the words "dangerous weapon" taken apparently from the margin of Section 326, Code of Criminal Procedure, being no part of the language of the law, while the descriptive terms of the Code itself are altogether omitted. Such omission renders it impossible for the Court to know from the statement what kind of weapon it was with which the deceased was struck, and I am to request that this information may be supplied. The framer of the charge has also disregarded the instructions of Circular Order No. 6, dated 11th March 1863, as modified by Circular Order No. 5, dated 28th March 1866.

Form of statement in cases in which some prisoners are convicted, and others acquitted.

Extract (para. 8) of Letter No. 645, from the Resistrar of the High Court, to the Sessions Judge of Cuttack, dated the 1st June 1867.

8. IN conclusion, I am to point out to you that, in those cases in which some prisoners have been convicted, and others acquitted, it is unnecessary to give a detailed statement of facts in No. 5 Statement as well as in No. 4. All that is necessary is to make a reference to the case entered in Statement No. 4, and add the grounds of release.

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The proceedings appear to me to be faulty. The charge is not drawn up in precise terms, but in a general and vague manner. Denoo Baboo has not been examined, and the account books simply show payments "marfut" or through Haneef; but whether these advances were actually received by Haneef and with the knowledge of the prisoner can only be cleared up by examining Denoo Baboo. The gist of the offence is intention, and it may be that the prisoner will be able to clear himself of intentionally giving false evidence when arraigned on a charge properly framed and after evidence has been duly recorded.

The papers must go before another Judge, as I think there ought to be a new trial, the prisoner having been materially prejudiced by the present proceedings. The prisoner may be permitted to adduce any evidence in support of his defence in his power.

Seton-Karr, J.—The prisoner in his written appeal expressly takes up the ground that no charge was formally drawn out, and I think that he may have been really prejudiced by this omission. In charges of false evidence under Section 193, it is most important that the accused should know exactly what words or expressions he is charged with having uttered, and in what respect they are supposed to be false.

I think therefore that he is entitled to a new trial.

In the event of a second conviction, the Judicial Commissioner will take into consideration the sentence which the prisoner has already undergone.

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The proceedings appear to me to be faulty. The charge is not drawn up in precise terms, but in a general and vague manner. Denoo Baboo has not been examined, and the account books simply show payments "marfut" or through Haneef; but whether these advances were actually received by Haneef and with the knowledge of the prisoner can only be cleared up by examining Denoo Baboo. The gist of the offence is intention, and it may be that the prisoner will be able to clear himself of intentionally giving false evidence when arraigned on a charge properly framed and after evidence has been duly recorded.

The papers must go before another Judge, as I think there ought to be a new trial, the prisoner having been materially prejudiced by the present proceedings. The prisoner may be permitted to adduce any evidence in support of his defence in his power.

Seton-Karr, J.—The prisoner in his written appeal expressly takes up the ground that no charge was formally drawn out, and I think that he may have been really prejudiced by this omission. In charges of false evidence under Section 193, it is most important that the accused should know exactly what words or expressions he is charged with having uttered, and in what respect they are supposed to be false.

I think therefore that he is entitled to a new trial.

In the event of a second conviction, the Judicial Commissioner will take into consideration the sentence which the prisoner has already undergone.

Evidence in a case of kidnapping a girl—Jurisdiction of Magistrate in a case of Grievous Hurt.

Extract (paras. 7 and 8) of Letter No. 634, from the Registrar of the High Court, to the Sessions Judge of Tirhoot, dated the 30th May 1867.

7. With reference to your judgment in the case of Gunga Muhto, Case 4, Statement 5, that there is no evidence for the prosecution, but complainant's statement on oath unsupported, that the prisoner kidnapped Mussamut Rajnee, I am to point out that the evidence is quite sufficient if you believed it; and, as the girl was found with the prisoner, it remained for the prisoner to prove his alleged marriage with the girl.

8. Adverting to the remark of your judgment in the case of Ramchurn and others, Case 19, Statement 5, that, "as the hurt inflicted on Tuhul was not technically grievous, the case might have been disposed of by the Magistrate himself," I am directed to state that, if the hurt had been *technically grievous*, the Magistrate might still have disposed of the case as you may see from the Schedule to the Code of Criminal Procedure as modified *in loco* by Section 1, Act VIII. of 1866.

Charge to state the kind of weapon with which a deceased was struck.

Extract (para. 4) of Letter No. 644, from the Registrar of the High Court, to the Additional Sessions Judge of Hooghly, dated the 1st June 1867.

4. I am to point out that the wording of the third head of the charge against Roostum Mundul (Case 13, Statement 4) is incorrect, the words "dangerous weapon" taken apparently from the margin of Section 326, Code of Criminal Procedure, being no part of the language of the law, while the descriptive terms of the Code itself are altogether omitted. Such omission renders it impossible for the Court to know from the statement what kind of weapon it was with which the deceased was struck, and I am to request that this information may be supplied. The framer of the charge has also disregarded the instructions of Circular Order No. 6, dated 11th March 1863, as modified by Circular Order No. 5, dated 28th March 1866.

Form of statement in cases in which some prisoners are convicted, and others acquitted.

Extract (para. 8) of Letter No. 645, from the Resistrar of the High Court, to the Sessions Judge of Cuttack, dated the 1st June 1867.

8. In conclusion, I am to point out to you that, in those cases in which some prisoners have been convicted, and others acquitted, it is unnecessary to give a detailed statement of facts in No. 5 Statement as well as in No. 4. All that is necessary is to make a reference to the case entered in Statement No. 4, and add the grounds of release.

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Form of charge in denying that grievous hurt was caused on grave or sudden provocation.

Extract (para. 2) of Letter No. 646, from the Registrar of the High Court, to the Sessions Judge of Backergunge, dated the 3rd June 1867.

2. THE Court observes that there is an irregularity in the second head of charge against Modun Howlader and others (Case No. 4, Statement 4). It purports to deny the existence of any of the provisos under Exception 1, Section 300 of the Penal Code; but it is not *these provisos* nor this Exception, the existence of which must, under the provisions of Section 237 of the Code of Criminal Procedure, be denied. All that need in this case be denied is, that the grievous hurt was caused, in the terms of Section 335, "on grave and sudden provocation," and the charge should have been somewhat in the following manner, *viz.*: "That they, on or about, &c., without grave or sudden provocation, voluntarily caused, &c, and that they have thereby," &c. These remarks apply equally to the second head of the charge against Jeawollah and others (Case 5, Statement 4).

Diaries containing letters written by Police Officers are not evidence—Omission of "grave and sudden" before "provocation" in charge for grievous hurt.

Extract (paras. 4 and 5) of Letter No. 617, from the Registrar of the High Court, to the Sessions Judge of Dinagepore, dated the 3rd June 1867.

4. IN the case of Durbaree and others (Case 5 of Statement 4 for Maldah), the Court observe that the Diary containing letters written by the police-officer, which were put into Court and sworn to by him, to which allusion is made in two portions of the remarks of your judgment, was not evidence, Section 154 of the Code of Criminal Procedure especially providing to that effect.

5. In the charge against Sobrun Singh and others (Case 8, Statement 4) the Court observe that denial should have been made of the existence of circumstances constituting the exception made under Section 325 of the Penal Code as pointed out in Section 237 of the Code of Criminal Procedure. It is not sufficient in a charge of this kind simply to insert the word "provocation." Provocation to mitigate the offence or excuse it must, in the words of the law, be "grave and sudden;" provocation, that is, not "grave and sudden" does not mitigate or excuse. Hence the words "grave and sudden" should not have been omitted in the charge. This remark applies equally to the case of Kally Churn and others (Case 8, Statement 5, for Maldah.

Form of conviction in a case of rioting with deadly weapons.

Extract (para. 2) of Letter No. 650, from the Registrar of the High Court, to the Officiating Sessions Judge of Midnapore, dated the 3rd June 1867.

2. THE Court observe that there is an error in the second head of the charge against Mooktaram Manna and others (Case 2, Statement 4). It was found by your predecessor, Mr. Bright, that there was an unlawful assembly; it was also found that violence was used by a member of that assembly; and it is lastly found that the prisoners, armed with lethal weapons, were members of that assembly. It follows that the offence was rioting under Section 146, and rioting with lethal weapons under Section 148, and that the punishment should have been awarded under Section 148, and not Section 144. But prisoners have not been prejudiced, and justice has been satisfied, and the Court will not, therefore, interfere with the sentence, but you will be so good as to amend the conviction accordingly.

Subject of breach of trust to be distinctly stated—Conviction of graver offence; acquittal of minor—Accumulated sentence for separate offences, irregular.

Extract (paras. 2 and 4) of Letter No. 656, from the Registrar of the High Court, to the Sessions Judge of Shahabad, dated the 4th June 1867.

2. WITH reference to the charge under Section 409, Indian Penal Code, against Shew Purtab Singh (Case 1, Statement 4), I am directed to point out that the property in respect of which the breach of trust was alleged should have been distinctly stated.

4. With reference to your finding and sentence in the case of Shew Blauk Singh (No. 7 of Statement 4), I am to point out that, if the prisoner was convicted of culpable homicide, he should have been acquitted of the minor offence of causing grievous hurt, as laid down in Rule 1st of the Rules prescribed by Circular Order No. 16, dated 20th August 1864; and that where a prisoner is convicted of separate offences, an "amalgamated" sentence of imprisonment is irregular, the proper course as laid down in Section 46 of the Code of Criminal Procedure being to sentence him to successive periods of imprisonment, the one commencing after the expiration of the other.

Form of charge in a case of presentation of false verified statement—Improper acquittal—Prisoner's admission.

Extract (paras, 6 and 9) of Letter No. 662, from the Registrar of the High Court, to the Sessions Judge of Mymensing, dated the 5th June 1867.

6. I AM to point out that the charge against Shabuz Shaikh (Case 3, Statement 5) is not sufficiently in the language of the Penal Code, and should rather have been stated somewhat in the following manner: "That he, being bound by an express provision of the law, *viz.*, the provision of Section 36, Act X. of 1859, to state the truth, did, on or about the 8th day of December 1866, at Mymensing, present to the Collector a verified statement that he had been in possession of 2½ *koos* of land in the village of Shootarpara, Pergunnah Sherepore, for a space of twenty years, and had regularly paid the rent thereof. That this statement is false, and that, in making it, he intentionally gave false evidence in a judicial proceeding, and that he has thereby committed an offence," &c.

9. The Court remark that the grounds of acquittal in the case of Bulee Bewa (Case 7, Statement 4) are not altogether satisfactary. When you say in the course of your judgment that there was no evidence before you against the prisoner, the Court suppose you mean no sufficient evidence to bring home the particular offences charged. But when you say that the prisoner stated before the Magistrate that she five or six times struck and twice kicked the deceased, you should have remembered that this statement of the prisoner was evidence against her in your Court, and that you might, on this statement, if you believed it, have charged her for a common assault.

Form of charge in a case of secret burial of infant child.

Extract (para. 3) of Letter No. 672, from the Registrar of the High Court, to the Sessions Judge of Sarun, dated the 8th June 1867.

3. THE charge against Moonesree (Case 3, Statement 4) is not stated in exact accordance with the terms of Section 318 of the Penal Code. It should have been drawn up somewhat in the manner marginally shewn. The Court remark that the concealment, or attempt at concealment, by means of burial or otherwise, constitutes the offence.

That she ——— on or about ——— at ——— by secretly burying the dead body of her infant child intentionally concealed the birth of such child, and that she has thereby committed an offence punishable, &c.

Circular Order No. 1, dated 12th February 1867, regarding insane prisoners, to what cases applicable.

Extract (para. 4) of Letter No. 676, from the Registrar of the High Court, to the Officiating Sessions Judge of Moorshedabad, dated the 10th June 1867.

4. WITH advertence to your finding in the case of Sabuk Sheik (Case 1, Statement 5), the Court think that you are mistaken in supposing that Circular Order No. 1, dated the 12th February 1867, refers to cases of this kind. In this case, the facts were such that, but for the prisoner's insanity, he must have been convicted; and the question of his sanity or otherwise at the time of the commission of the offence was one in which it was necessary to have the decision of a competent Court. The Circular Order was only intended to refer to cases in which the prisoner would probably be acquitted for want of evidence, or from his manifest innocence, or from the existence of exceptions. These remarks should be communicated to the Magistrate who may otherwise be misled.

Evidence of the man beaten—Charge to Jury to convict on prosecutor's testimony.

Extract (para. 4) of Letter No. 715, from the Registrar of the High Court, to the Sessions Judge of Nuddea, dated the 17th June 1867.

4. THE remark in your charge to the Jury in the case of Budderuddeen Chowkeedar and another (Case 4, Statement 5), that "in law the evidence of one witness is, under certain circumstances, sufficient; but, in the present case, it would be very unsafe to convict upon the evidence of the man who was beaten," appears to the Court, judging of the case by your own observation, to be uncalled for, as it tends unfairly to take away from the witness, credit. Again you say in the case that "the Assistant Magistrate *was wrong*, because he argues that he saw no reason to discredit the complainant's story, or to believe that he would charge the accused, if not the real offender. This remark, the Court observe, is very unreasonable. It would apply to every case in which a violent assault was committed without witnesses where there had been a previous quarrel; and it follows that, in Nuddea, a man may beat another, with whom he is at enmity, and may do it with impunity, provided there are no actual eye-witnesses. The Court think that you should have told the Jury that they might safely convict on the prosecutor's testimony unless there was some other reason for thinking it false than the fact of a previous quarrel, for that was, at least, as good a reason for the conclusion that the accused had beaten the prosecutor as for the opinion that he had committed perjury in order to bring them into trouble.

How Judge should charge Jury in a case of Theft under Section 381, Penal Code—Imprisonment of persons sentenced to transportation.

Extract (paras. 2 and 3) of Letter No. 716, from the Registrar of the High Court, to the Sessions Judge of Dacca, dated the 17th June 1867.

2. In the case of Sreenath Balo (Case 3, Statement 4) charged with theft of property under Section 381, and with receiving and retaining stolen property under Section 411 of the Indian Penal Code, the Court remark that very little was left to the Jury. You tell them that it is proved that the property belonged to Chunder Nath (the charge says Chunder Nath's widow), and that it had been stolen. You then tell them to consider whether, in such circumstances, they ought to receive the prisoner's unsupported statement that he had received the property from his uncle, or whether the fact of possession was sufficient to convict him of the theft. Not a word more was said by you, and the prisoner has been found guilty of stealing the property of his mistress, and sentenced to 5 years' rigorous imprisonment. Your direction to the Jury appears to the Court to be very meagre and unsatisfactory. You ought to have set out in your summing up with more or less fulness what evidence there was to support every ingredient of the charge. Of course, the degree of minuteness with which this need be done will depend on the circumstances of each case; but it should at least appear that there was something which proved, or tended to prove, everything that made up the charge, the weight or credit to be given to such evidence being usually left to the Jury, though it is quite proper for a Judge to assist them with his advice.

3. I am to observe that the order in the case of Topasheeram Kopalee and others (Case 4, Statement 4), that the sentence of imprisonment for life in transportation is to commence after time for appeal, is not warranted. Section 58 of the Indian Penal Code provides that they are to be imprisoned till transported.

House-breaking by night in order to committing Theft, how punishable—Form of charge in cases of Adultery and Criminal Breach of Trust, respectively—Assessors' opinions to be recorded.

Extract (paras. 4, 6, and 7) of Letter No. 720, from the Registrar of the High Court, to the Deputy Commissioner of Cachar, dated the 17th June 1867.

4. The Court remark that there is an error in the first head of the charge against Mogul Sheikh (Case 3, Statement 4). The offence charged is house-breaking by night in order to committing theft. This is an offence punishable under Section 457, and not Section 454 of the Penal Code as charged. But, further, as the Court understand the facts found, the prisoner has been illegally convicted and punished as for two offences. The house-breaking and the theft seem to constitute but one offence, and that the first and the major offence. The prisoner therefore cannot be separately dealt with for the same offence, the intention to commit which is involved in the first count upon which he has been convicted. Under these circumstances, the conviction on the second head of the charge is set aside. On this point, your attention is called to Circular Order No. 16, dated 20th August 1864.

6. I am to point out that the charge against Sadoo Chong (Case 4, Statement 5) should have been drawn in the manner following, *viz.*: "That he ———, on or about the ———, at ———, committed adultery with ———, knowing or having reason to believe her to be the wife of ———, and without consent or connivance of the said ———, and that he has thereby committed an offence punishable," &c. I am also to point out that the grounds of the Assessors' opinions in the case should have been recorded conformably to the instructions contained in Circular Order No. 4, dated the 23rd June 1865.

7. The Court observe that the charge against Dhonee Ram Nath (Case 5, Statement 5) has been badly drawn up. It should have been somewhat in this form: "That he, being a servant (cooly, watchman, churundar) in the employ of ———, and having

been in such capacity entrusted with ————, committed criminal breach of trust by dishonestly converting such ———— to his own use, and thereby," &c. The Assessors' opinions in this case also should have been recorded conformably to the instructions in the Circular Order above alluded to,

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Form of charge in a case of giving false evidence—Directions as to alternative charges—Taking of further evidence by Sessions Court.

Extract (paras. 4, 5, and 8) of Letter No. 732, from the Registrar of the High Court, to the Sessions Judge of East Burdwan, dated the 19th June 1867.

4. THE Court doubt whether the charge against Thako Chokree (Case 10. Statement 4) is drawn up in the correct form. The prisoner is not directly charged with giving false evidence (Section 193 of the Penal Code), but with doing that which, by Section 191, will constitute false evidence. This, it is true, is the form of charge given under this head in Mayne's Penal Code; but it appears to the Court that, under Sections 233 and 234 of the Code of Criminal Procedure, the charge ought to declare the offence, and not give that which is merely the definition of the offence. It may be added that the specimen charges in Sections 239 and 243 follow the wording of the penalty, and not of the definition clauses. Again, in this case, there were three points in which the accused had contradicted, in the Court of Session, the evidence which she had given before the Magistrate. These have been made into six heads of charge. the two contradictory statements in each point being charged as separate instances of giving false evidence; whereas, in fact, there were properly three heads of charge, and the two statements ought to have been set out in an accurate form————*e. g.* That she intentionally gave false evidence in a stage of a judicial proceeding:—1st.—Either in that———before———she knowingly and falsely stated ———, or that———before the ———she knowingly, &c. The 2nd and 3rd heads should also be in the same form.

5. Then the Court observe that the accused is said to have pleaded guilty in one set of alternative charges, and not guilty as to the other. Thereupon you instructed the Jury to bring in verdicts of guilty and not guilty, respectively, in accordance with the plea. The accused, as already remarked in the cases previously noticed, may be convicted on a plea of guilty, and the verdict is therefore superfluous. But it does not by any means follow that a verdict of not guilty is to be recorded in the other alternative matter of charge. It might have been that both statements were false, although, doubtless, the intention was to convict her upon the contradiction in the two statements. But, looking to the very special nature of such charges as the present, the Court incline to think that, in such cases, the prisoner ought not, in fact, to be allowed to elect which statement he shall admit to be false; but that the fact should be tried, which, apparently, by the terms of Section 362 of the Code of Criminal Procedure, it is optional with the Court to do. Indeed, the Court think that the interests of justice require that in such cases there should be some attempt to *prove one* or other of the *statements* to be false. Upon this point your attention is drawn to para. 2 of the Court's No. 427 A, circulated with Memorandum No. 10A, dated 18th April 1863. The age of the girl is not stated, and at least one of the contradictory statements that contained instances 1 and 2 might well have arisen from a defective memory, and it would be hard to assume a corrupt intention. Upon the whole, however, the Court think it apparent that false evidence was given; and, looking at the lenient sentence passed, they do not think it can be said that the prisoner has been prejudiced. Under these circumstances the Court are unwilling to call for the record; but I am desired to communicate these observations to you for information and future guidance.

8. With advertence to your remark in the above case, that you concurred in the verdict of "not guilty" brought in by the Jurors, as the evidence was very *unsatisfactory* in every way, the Court observe that it may be that the taking of further evidence would have thrown additional light on the case, and the Court of Session should not be slow in such circumstances to use the power vested in it by Section 367 of the Code of Criminal Procedure.

Form of charge in cases of abetting murder and causing disappearance of evidence respectively—Exposition of provisoes no part of charge under Section 325, Penal Code.

Extract (paras. 2 and 6) of Letter No. 734, from the Registrar of the High Court, to the Sessions Judge of Backergunge, dated the 20th June 1867.

4. THE Court observe that the charge against Sheik Umur and others (Case 1, Statement 5) has been irregularly drawn up, and should rather have been stated somewhat in the following manner: *first*, "that they, on or about———, at———, have committed the offence of abetting murder, *and that they have thereby committed an offence* punishable," &c.; *secondly*, that they, at the time and place aforesaid, believing, or having reason *to believe, that an offence punishable with death* had been committed, *caused* evidence of the commission of that offence to disappear with the intention of screening the offender from legal punishment, *and that they have thereby* committed an offence punishable," &c.

6. In the charge against Gopee Chamar (Case 5, Statement 5), the words from "provided" to "defence," as marginally shown,* should have been omitted. The sentence would then read "without grave or sudden provocation with a cutting instrument," &c. The Court observe that the words in question indicate circumstances which, if proved, would nullify special exceptions proved or admitted, and that, consequently, it is only when the existence of exceptional facts is admitted, but it is sought to get rid of their effect, that it is necessary to resort to the provisoes; and, if they are used, it must be in quite a different form. I am to add that the law nowhere requires that the exposition of provisoes should be made a part of the charge which, when under Section 325, Indian Penal Code, should be drawn up according to the model prescribed in Clause 6, Section 239, Code of Criminal Procedure.

* "Provided that the provocation was not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person, or was not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant, or was not given by anything done in the lawful exercise of the right of private defence."

Framing of charge in cases of attempting to commit dacoity and fraudulently using as genuine a forged document.

Extract (paras. 6 and 8) of Letter No. 737, from the Registrar of the High Court, to the Sessions Judge of Bhaugulpore, dated the 21st June 1867.

6. THE prisoners Huzoom and Monnooa (Case No. 7) are charged with having attempted to commit dacoity, and to have thereby committed an offence punishable under Sections 395 and 511 of the Penal Code. But, under the definition given in Section 391, where five or more persons conjointly *attempt* to commit a robbery, every such person is said to have committed dacoity. It follows, therefore, that an attempt to commit dacoity is punishable under Section 395, and the charge should, therefore, have been under that Section alone. In the 2nd and 3rd heads of the charge, Section 511 of the Indian Penal Code should be read with Sections 399 and 398 respectively of that Code.

8. In the case of Sheikh Bhekaree, No. 11, against whom the charge (fraudulently using as genuine a forged document) has been arranged under five distinct heads, the Court desire me to remark that the terms of Section 234, read with Sections 239 and 243 of the Code of Criminal Procedure, are plain, *viz.*, that the charge must follow, as nearly as possible, the language of the penalty Section. That Section is in this case 465, and the charge is, therefore, simply one of forgery. To import into it all the definitions of forgery is only to confound the accused, to disregard the law, and to give unnecessary trouble to the Court. In your amendment of that charge, the Section (probably Section 467) which prescribes the penalty should have been inserted.

Onus probandi as to guilt or innocence of accused—Service of summons and proclamation for attendance of witnesses.

Extract (paras. 2, 3, and 4) of Letter No. 743, from the Registrar of the High Court, to the Sessions Judge of Moorshedabad, dated the 22nd June 1867.

2. WITH advertence to your charge to the Jury in the case of Ramrutton Roy (No. 4 of Statement 5), reminding them that, as remarked by the prisoner's vakeel, the fact that he has entered into no defence should not be considered against him as *it is always incumbent on the prosecution to establish the guilt of an accused*, the Court observes that it is quite possible to state or to understand this proposition rather too broadly. Frequently, the prosecution is able not to establish directly the guilt of the accused, but to prove circumstances which, unless explained, leave no other conclusion possible, but that he is the guilty person. In such a case, it lies on the accused person to afford that explanation, and this, perhaps, is what you had in your mind. There may be in the other circumstances which are not so conclusive, but are equally consistent with the guilt or innocence of accused. These alone would not put the burthen of proof on him.

3. As you state in your charge to the Jury in the case above mentioned, that "*a summons is never fixed on a house*," the Court desire me to observe that you should have told the Jury that a summons *to a witness* is never attached to a house, as under Section 55 of the Code of Civil Procedure a summons to the defendant may be fixed on the outer door of the house in which the defendant is dwelling. The Court believes that mistakes are frequently made, and that a mode of service only applicable to defendants in certain circumstances is applied to witnesses.

4. Further, with reference to your charge to the Jury in the case above alluded to, that Gunesh, the peon of the Moonsiff's Court, served the ishtahar on Benode, the Court remark that an *ishtahar* or *proclamation* for the attendance of a witness *would* be properly affixed upon his house as pointed out in Section 159 of the Code of Civil Procedure.

Framing of charge in cases of delivery of altered coin, of public servant causing escape from confinement, of making false charge, and of offences under the Registration Act and other Penal Laws than the Penal Code.

Extract (paras. 4, 8, 12, and 17) of Letter No. 744, from the Registrar of the High Court, to the Sessions Judge of Cuttack, dated the 22nd June 1867.

4. FROM the evidence as given in the judgment of the Additional Sessions Judge in the case of Purkhit Mohunt (Case 3, Statement 4), the offence with which the prisoner was charged was rather that of the aggravated nature described in Section 251 of the Indian Penal Code, than that of the less heinous nature described in Section 254. But, whether this be so or not, the charge has been incorrectly framed, "fraudulently or dishonestly used" being no part of the offence as described in Section 254, while the words "any coin in respect of which he knows that any such operation as that mentioned in Section 249 has been performed, but in respect of which he did not, at the time when he took it into his possession, know that such operation had been performed" have been entirely omitted.

8. The Court observe that the charge under Section 221, Indian Penal Code, against Gopee Nath Sahee (Case 6, Statement 4) has not been drawn up in the language of the Penal Code. It should have been to this effect:—

"That he, being a public servant, legally bound as such public servant to keep in confinement a certain person, *viz.*, *A. B.*, charged with the offence of house-breaking by night in order to commit theft, an offence punishable with imprisonment which may extend to 14 years, intentionally suffered such person to escape, and that," &c. This remark applies equally to the charge against Sheikh Nigami (Case 10, Statement 5) which also has been incorrectly drawn up.

12. The charge against Kelu Boral (Case 3, Statement 5) under Section 211, Indian Penal Code, is not in the language of the Penal Code, though required to be so, as nearly as possible, by Section 234, Code of Criminal Procedure. The Court would have presumed, from the evidence and the charge,

that the prisoner falsely charged some one with the commission of an offence; but the judgment speaks only of the institution of criminal proceedings. Whether, however, it was these proceedings which were instituted, or whether it was a false complaint that was made, the charge should have gone on to declare that the prisoner acted, "knowing that there was no just nor lawful ground for acting."

17. The second head of the charge against Punkuj Churn Mohunt (Case 9, Statement 5) is defective in an essential point: it should, in the language of the Penal Code, have stated that prisoners "knew, or had reason to believe, the document to be forged," and should have quoted the abetment Section 109 of the Penal Code. So also the charges under Sections 93 and 94, Act XX. of 1866, should have set forth, not only the alleged false personation, but also the presentation of the document in the assumed form. This should be pointed out to the Committing Officer, whose attention should be drawn to Section 234 of the Code of Criminal Procedure, which applies, *mutatis mutandis*, to charges under other penal laws than the Penal Code.

Sessions Judge to set forth the evidence with reasonable fulness.

Extract (para. 2) of Letter No. 746, from the Registrar of the High Court, to the Sessions Judge of Dacca, dated the 22nd June 1867.

2. I AM further to observe that you ought to set forth with reasonable fulness what the evidence was, whether that of witnesses for the prosecution, or that derived from the confessions of the accused, and give the reasons which weigh for or against the credibility of each point of the evidence. Unless you do this, the submission of a statement of trials is useless, as this Court is unable to judge of the sufficiency of the evidence, your mode of dealing with it, and the correctness of the finding or verdict. On this point, I am to call your attention to Circular Order No. 19, dated 31st December 1861.

Second Marriages during lifetime of first husband.

Extract (para. 3) of Letter No. 747, from the Registrar of the High Court, to the Sessions Judge of Cuttack, dated the 24th June 1867.

3. THE Court observe that the first head of the amended charge against Mussamut Munnee (Case 4, Statement 4) has been incorrectly drawn up. The charge is that "she, on or about at——*having a husband living married again——in a case in which the marriage was void by reason of its taking place during the lifetime of such husband.*" I am to remark that it does not follow that every second marriage is void in this country, because it is contracted during the lifetime of the first husband, and that no insertion, therefore, of the words italicized is very material.

Procedure in cases of prisoners already sufficiently punished—Kidnapping.

Extract (paras. 5 and 6) of Letter No. 748, from the Registrar of the High Court, to the Sessions Judge of Rajshahye, dated the 24th June 1867.

5. THE Court desire me to point out that in the case of Pubun Sheik (No. 1 of Statement 5) your judgment and finding are in effect this, that you considered that the accused was guilty of simple assault, perhaps under Section 352 of the Indian Penal Code, but, inasmuch as the prisoner had already been in custody for nearly three months, you seem to have thought it useless to charge him with assault, and so discharged him. This, as a matter of procedure, was, strictly speaking, an error. The accused should have been duly convicted upon the amended charge setting forth the offence of which you considered that the evidence showed him to be guilty, when, if convicted, you could then have passed any such merely nominal sentence as the case seemed to require.

6. If the Court have rightly understood your observations in the case of Brohmo Peshagir (Case 4 of Statement 5), who was accused of taking by force a female minor under 16 years of age out of the

keeping of her lawful guardian, then the finding recorded by you is not in accordance therewith. It is clear that the child in question was a minor under 16 years of age, and that the accused took her out of the keeping of her lawful guardian, her mother, without that guardian's consent, for it cannot be said that the consent of the mother to allow the girl to remain with the accused, apparently with an unlawful intent, was a consent so binding upon the mother as that she could not, as in fact she did, retract it, and so bring the child again under her lawful guardianship. You, therefore, were right in judging that the accused was guilty of the offence specified in the 2nd head of the charge, but you were wrong in proceeding to find the accused not guilty, on the ground, apparently, that the confinement in custody which she had already undergone was sufficient punishment for her offence. Your duty was to have found the accused guilty of the 2nd offence, and then, if you considered, as you very discreetly considered, that she had been punished sufficiently already, you might have passed a merely nominal sentence. It is also doubtful whether the accused might not have been convicted under the 373rd Section of the Indian Penal Code. The evidence appeared to show that she had obtained possession of the girl for the immoral purpose specified, and the circumstance that the mother had been induced to part with the child on account of the difficulty of supporting her would not affect the prisoner's guilt.

Framing of charge in cases of Abetment.

Extract (para. 3) of Letter No. 749, from Registrar of the High Court, to the Sessions Judge of Dinagepore, dated the 24th June 1867.

3. TURNING to Statement No. 5, I am directed to point out that, in the 2nd head of the charge itself, the word "duly" should have appeared between "been" and "issued," and the 3rd head has not been drawn up in the terms of Section 346 of the Penal Code. The parties in this case are further charged under Section 109 of the Indian Penal Code with abetment of illegal confinement. I am to observe that the Section in question specifies no penalty, and as the charge should (under Section 234, Code of Criminal Procedure) refer to the Section under which the offence is "punishable," Section 109, Indian Penal Code, should have been coupled in the charge with each of the Sections (Sections 344, 345, and 346, Penal Code), providing specific penalties for the several offences with abetting each of which it was your intention to charge the accused. I am to add that the finding, too, is not in accordance with the terms of Section 382, Code of Criminal Procedure.

Columns 10 and 12 of Statement how to be filled up.

Extract (para. 2) of Letter No. 750, from the Registrar of the High Court, to the Sessions Judge of Jessore, dated the 24th June 1867.

2. IN connection with the 1st case in Statement No. 4 (Madoo Sheikh, Edratoollah Sheikh, and Feloo Sheikh), I am desired by the Court to request that you will be good enough in future to state in Columns 10 and 12 the result of the finding in the case, and also the means by which you arrived at it. Thus, Column 10 in this case need contain only these words, *viz.*, against Madoo Sheikh "kidnapping from lawful guardianship," and against Edratoollah and Feloo Sheik, the "being present and abetting kidnapping from lawful guardianship;" and Column 12 should only show these words, "rigorous imprisonment for one month each, 2nd May 1867."

Weight of testimony how to be judged—Reasons to be given for crediting the same witnesses as to certain persons and discrediting them as to others.

Extract (para. 3) of Letter No. 753, from the Registrar of the High Court, to the Sessions Judge of West Burdwan, dated the 24th June 1867.

3. THE Court observe that the reasons given by you for the acquittal of Ram Churn Kamar and others (Case 4, Statement 5) are quite insufficient. Only one witness, it is said, recognized two of the accused, and "only two witnesses" recognized other two of the accused. The question, in judg-

ing of the weight of testimony, is not a question of numbers, but of credibility, and, on turning to Statement No. 4 of convictions, the Court finds that, whilst an Assessor would have convicted all but Makoondo, the other would have released Ram Churn; and, on the other hand, you, whilst crediting the witnesses for the prosecution against certain persons accused, discredited them against the persons released, and that without any reason assigned. Under these circumstances, the Court cannot but characterize the order of acquittal in the case as most unsatisfactory.

Procedure in cases of Insane offenders.

No. 759.

From the Officiating Registrar of the High Court, to the Officiating Sessions Judge of Moorshedabad, dated Calcutta, the 25th June 1867.

(Criminal Side.)

Present:

The Hon'ble L. S. Jackson and C. P. Hobhouse, *Judges.*

SIR,—In reply to your letter No. 122, dated the 17th instant, I am directed to state that the Court are of opinion, as already intimated * to you, that you were in error in the direction which you gave the Magistrate under authority, as you conceived, of Circular Order No. 1†, dated the 12th of February 1867, although your error is perfectly excused by the language of that Circular.

2. I am to point out that insanity, at the time of committing an offence, is undoubtedly among the general exceptions of which the existence in any case will negative crime; but there is this difference in the case of this particular exception, that while it bars punishment, yet the establishment of it combined with proof that the act was committed, authorizes the detention of the prisoner under certain rules. A specific procedure has, therefore, been laid down to be followed in such cases in Chapter XXVII. of the Code of Criminal Procedure.

3. Section 393 of the Code above cited provides, not for the *discharge*, but for the acquittal, of persons upon the ground of insanity, and it is expressly directed that the finding shall state specially whether the accused person committed the act or not. Such finding and acquittal alone warrant the detention of the lunatic under the succeeding Sections; and in the case of offences triable exclusively by the Court of Session, such finding and acquittal can only be recorded by that Court. It is, therefore, necessary that the Magistrate shall commit in such cases, if or when the accused is capable of making his defence.

Framing of charge in a case of kidnapping.

Extract (para. 4) of Letter No. 776, from the Registrar of the High Court, to the Sessions Judge of Nuddea, dated the 28th June 1867.

4. THE Court also observe that the charge against Shakhadu Koomarnee and others (Case 5, Statement 8) was not stated with sufficient fulness, and as to the abettors was, on the face of it, insufficient. The following would have been a suitable form of charge:

That she, on or about the ——— at ———, kidnapped A. B., being a female minor, under the age of 16 years, from the lawful guardianship of her father, and thereby, &c.

The offence of kidnapping from lawful guardianship, as defined in Section 361 of the Indian Penal Code, can be committed only in respect of either a *minor* or *a person of unsound mind*. To kidnap *a person*, therefore, would not be the offence in question. The act of forcibly compelling or deceitfully inducing a person to go from any place is called "abduction" (Section 362 of the Penal Code); but any *person* may be kidnapped from British India (Section 360). You are requested to call the Magistrate's attention to the exact words of the law.

* *See* Criminal Letter No. 676, *ante*, page 4.

† *See* Criminal Circular No. 7, dated 18th July 1867, in modification of Circular No. 1.

Procedure on complaint triable under Chapter XIV. of the Code of Criminal Procedure when complainant does not appear on day fixed for hearing.

No. 778.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Sessions Judge of the 24-Pergunnahs, dated the 28th June 1867.

(Civil Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

SIR,—I am directed to acknowledge the receipt of the reference made by you on the 29th ultimo, under Circular Order No. 17, dated 17th June 1863, relative to the question raised by the Deputy Magistrate of Barripore, as to the procedure to be followed in a complaint triable under Chapter XIV. of the Code of Procedure, when the complainant does not appear on the day fixed for hearing.

You appear to the Court to have taken a correct view of the case.

On a complaint being made under Chapter XII. or XIV., the Magistrate would ascertain from the complainant the names of his witnesses, and would summon them to attend; and, though the complainant was absent, the examination of the witnesses might proceed, if the Magistrate thought it necessary to prosecute the enquiry; if the evidence of the complainant was considered essential, the Magistrate could, under the provisions of Section 201, summon him at any time for examination. If, on the other hand, the Magistrate thought it unnecessary to carry on the enquiry in the absence of the complainant, he might discharge the accused person.

It is clear to the Court that the non-attendance of the complainant, on the day of hearing, does not put an end to the case; for if, after making a complaint cognizable, under Chapter XIV., he were to die, the case might proceed nevertheless. The meaning of Sections 193 and 194, as the Court reads them, is that it shall be the duty of the Magistrate to take the evidence of the complainant, and the persons mentioned if present; and that the complainant and witnesses, if examined, shall be examined in presence of the accused. If, therefore, the complainant is absent at this stage of the proceedings, the effect will be that his evidence against the accused will be wanting.

Framing of additional charge—Proof of deposition before Magistrate.

Extract (paras. 2 and 6) of Letter No. 789, from the Registrar of the High Court, to the Sessions Judge of Shahabad, dated the 1st July 1867.

2. THE Court observe that, instead of altering the charge against Seo Sunker Aheer (Case 1, Statement 4), the proper course would have been to frame an *additional* charge when it is necessary, letting the original charge stand, and taking a verdict of acquittal upon it.

6. The Court observe that it was quite irregular in the above-mentioned case to examine the chuprassee as to the contents of the depositions, and certainly superfluous to prove in that way that the prisoner actually deposed what the Magistrate wrote down. The deposition itself is incontrovertible proof on the point, and the consequences would be most serious, if, instead of taking the recorded deposition, the Courts were to resort to oral testimony as to what a witness deposed on a particular occasion. It is only necessary to prove the identity of the accused as the person who made solemn affirmation, and was examined on that occasion, if that was denied. Under these circumstances, the Court observe that your direction to the Magistrate must be withdrawn.

Magistrate bound to commit when in doubt.

Extract (para. 4) of Letter No. 799, from the Registrar of the High Court, to the Judicial Commissioner of Chota Nagpore, dated the 2nd July 1867.

4. WITH advertence to the remarks of your judgment in the case of Goober Dhul and another (Case 3, Statement 5), the Court observe that it was out of the question to call the act, which the accused have committed, forgery. If the purchaser was not satisfied with the deed, he should have refused to accept it. But the Court do not think it a correct opinion that a commitment should not be made when the evidence for the defence is as strong, or nearly so, as that for the prosecution. Of course, if the evidence for the prosecution is manifestly *false*, there should be no commitment; but, if the Magistrate is in doubt, the Court think he is bound to commit.

Tender of Conditional Pardon—Queen's Evidence.

Resolution No. 805 of the High Court of Judicature at Fort William in Bengal, under date the 4th July 1867.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,

Judges.

READ a letter from the Sessions Judge of Tirhoot, No. 156, dated 22nd June 1867, in reply to the remarks of the Court recorded in the case of Dhurum Dutt Ojha and others on the 13th ultimo.

The Court think that the Sessions Judge is mistaken in supposing that a conditional pardon cannot be tendered to an accused person after the evidence for the prosecution has been closed. Section 372 of the Code of Criminal Procedure, quoted by the Sessions Judge, refers generally to the procedure of a trial, but does not, in any way, interfere with Section 210, which distinctly empowers a Court of Session at "the time of trial" to instruct a Magistrate to tender pardon. The words "time of trial" must be taken in their natural sense, and they mean undoubtedly, "any time during the trial;" and, as a trial is not over until the defence has been taken, and evidence (if need be) in support of it recorded, it follows that, in this case, a pardon might have been tendered by the Sessions Judge through the Magistrate to the prisoner Lalloo after he had repeated the confession previously made to the Magistrate. Under these circumstances the Court see no reason to alter the opinion formerly expressed by them.

With regard to the Sessions Judge's remarks as to the improbability of the prisoners, Lalloo and Buddoree Koormee, consenting to turn Queen's evidence, the Court observe that such improbability would form no rule; for many a man who would deny persistently all knowledge of a fact when his admissions would tell against himself, might naturally enough see matters in a different light when a confession would change him from a prisoner into a witness.

Ordered

That a copy of this resolution be forwarded to the Officiating Sessions Judge of Tirhoot for his information and guidance.

Form of charge in a case of False Evidence.

Extract (para. 4) of Letter No. 807, from the Officiating Registrar of the High Court, to the Sessions Judge of Purneah, dated the 5th July 1867.

4. THE Court observes that the first head of the charge against Aulad Ali (Case 7, Statement 5) has been incorrectly drawn up. It should have been to this effect: "That he verified a plaint which contained an averment that (the false averment should be set out here) which averment he knew or believed to be false, or did not know or believe to be true, and that he thereby intentionally gave false evidence in a stage of a judicial proceeding, and that he has thereby committed an offence punishable under Section 24 of Act VIII. of 1859 read with Section 193 of the Indian Penal Code, and within the cognizance of the Court of Session."

Trial and acquittal of an Idiot—Form of charge in a case of Dacoity.

Extract (paras. 12 and 13) of Letter No. 808, from the Registrar of the High Court, to the Sessions Judge of Tirhoot, dated the 6th July 1867.

12. IN the same case I am directed to observe that the provisions of Chapter XXVIII. (of Lunatics), Code of Criminal Procedure, have been entirely disregarded. The prisoner is stated to be an "*idiot*" which, in the usual acceptation of the word, means a person whose understanding is deficient from his birth, and who does not usually enjoy any lucid intervals. The Court do not understand how such a person could have been *tried* and *acquitted*. If the Magistrate was of opinion that the accused person was of unsound mind, he should have stayed further proceedings (Section 388), and proceeded under Section 390. If the Sessions Judge was of opinion that the prisoner was an idiot and of unsound mind at the time of the trial, he should have proceeded under Section 389 *in the first instance to try the fact of such unsoundness of mind*; and, if this issue were found in the affirmative, he could not have *acquitted* the prisoner; nor could *the case have fallen to the ground on the plea of the prisoner's idiotcy* (as put by you), for the man would have been declared incapable of making his defence, and could not have been tried. Your attention and that of the Magistrate

is called to Criminal Circular No. 14, dated the 15th August 1864.

13. In the case of Nanki Geer (No. 13 of Statement No. 5), I am directed to point that Section 397 is simply declaratory of the penalty, and the charge should, therefore, have been under Section 395 taken with Section 397.

Punishment for Mischief by Fire.

Extract (para. 2) of Letter No. 812, from the Officiating Registrar of the High Court, to the Sessions Judge of Sylhet, dated the 8th July 1867.

2. In the case of Deeboo Nath Jogee (Case 18, Statement 4) the Court observe that the amount of mischief done is not altogether in a charge under Section 436 of the Indian Penal Code, to be the measure of the penalty to be inflicted. A person, who mischievously sets fire to a human dwelling, may put in jeopardy the lives and the property, not only of those dwelling therein, but of others dwelling in adjoining houses, of persons assisting to put out the fire, and so on. These remarks probably do not apply to this case, for you have not stated all the circumstances of it; but the Court make them in order to lay down the principle by which the Court consider that the severe penalties of Section 436 of the Penal Code are justified.

Statement of a witness under promise of pardon not admissible as evidence against him.

Extract (para. 3) of Letter No. 822, from the Officiating Registrar of the High Court, to the Sessions Judge of Bhaugulpore, dated the 10th July 1867.

3. With advertence to the remarks of your judgment in the case of Pudunth Dossad (Case 3, Statement 4), the Court observe that there appears to be no provision of law making admissible as evidence against an accused person, a statement previously made by the same person when he was examined as a witness under a promise of pardon. To admit such a statement would be contrary to the policy of the rule laid down in Section 203 of the Code of Criminal Procedure, relating to the examination of accused persons, which directs that no influence by means of *promise* or threat, or otherwise, is to be used to induce such person to disclose any matter within his knowledge. You were, therefore, the Court think, wrong in taking the statement into your consideration; and, if this were the sole evidence against the accused, it would have been necessary to set aside the conviction.

Power of Magistrate to try or commit persons charged with offences punishable under Section 93 of the Registration Act, XX. of 1866.

No. 836.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to the Judge of East Burdwan, dated Calcutta, the 18th July 1867.

Present:

The Hon'ble the *Chief Justice*, and the Hon'ble G. Loch, L. S. Jackson, and A. G. Macpherson, *Judges*.

Sir,—I am directed to acknowledge the receipt of your letter No. 62, dated the 20th May 1867, submitting a reference for the decision of the High Court under the provisions of Circular Order No. 17 of the 17th June 1863 on the following point, *viz.*—"Has an officer, vested with the full powers of a Magistrate, jurisdiction to try offences punishable under Section 93, Act XX. of 1866."

2nd.—I am to communicate to you the following opinion of the High Court: The offence in question is punishable under a *special law, viz.*, the Registration Act. By Section 21, Act XXV. of 1861, "the Criminal Courts of the several grades, according to *the powers vested in them respectively by this Act*, shall have jurisdiction in respect of offences punishable under the Indian Penal Code or under any special or local law, except offences which are by any such law made punishable by some other authority therein specially mentioned."

3rd.—As the offences created by Section 93 of the special law known as the Registration Act are not made punishable by any other authority therein specially mentioned, the Court think that the Criminal Courts of the several grades, mentioned in the Code of Criminal Procedure, have jurisdiction in respect thereto, but only to the extent of the powers vested in them by Section 22 of that law.

4th.—In this view the Court believe that the Magistrate has jurisdiction to try these offences. If that Officer, however, considers that a more severe punishment is requisite than he is competent, to inflict under the powers conferred upon him by Section 22, Act XXV. of 1867, he should proceed, under Section 226 of the Code, to commit to the Sessions.

5th.—I am to add that all prosecutions ought clearly to be instituted before the Magistrate who will then use his discretion to try or commit, and that this is the evident meaning of the latter part of Section 95. The words "instituted before" are not synonymous with "triable by."

Whipping to be awarded only by the Magistrate who has tried the case—Cattle-trespass on the Railway.

No. 837.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to the Sessions Judge of Beerbhoom, dated Calcutta, the 18th July 1867.

(Criminal Side.)

Present:

The Hon'ble the *Chief Justice*, and the Hon'ble G. Loch, L. S. Jackson, and A. G. Macpherson, *Judges*.

SIR,—I AM directed to acknowledge the receipt of your letter No. 48 of the 6th ultimo, bringing to the notice of the High Court the proceedings of the Magistrate of the District, *first*, in respect of whipping inflicted by him in cases referred by his subordinates under Section 277, Code of Criminal Procedure, who, though having jurisdiction, were yet not empowered by law to inflict this particular punishment; and, *secondly*, in respect of certain cases of cattle-trespass on the railway.

2nd.—With reference to the *first* class of cases, I am to state, for the direction of the Magistrate, that the Court agree with you in thinking that whipping should be awarded only by the Magistrate who has tried the case. It has very possibly, the Court surmise, been supposed by the Magistrates of your district that the case is met by the provisions of Section 277, Code of Criminal Procedure; but the words "*call for a more severe punishment*" in that Section refer, in the opinion of the Court, to a greater amount of the *same kind* of punishment, and not to a wholly different species of punishment, in respect of which it cannot be said with certainty that it is either a more or a less severe punishment.

3rd.—With respect to the *second* class of cases, I am to observe that the proceedings of the Magistrate were evidently taken under Section 21 of the Railway Act (XVIII. of 1854), which enacts that the owner of any animal trespassing on the Railway shall be liable to a fine not exceeding ten rupees for each animal, and that "it shall be lawful for the Company, or any of their servants, to take or drive every animal which shall be found so trespassing to the nearest Police Station, there to be detained until the highest amount of fine incurred by such trespass, and the expense of feeding and keeping the animal, be paid, or until a Magistrate shall otherwise order."

4th.—In order to legalize the penalty provided by the Section, it is not necessary that a formal complaint should be preferred before, and that evidence should be taken down by a Magistrate. The exaction of the penalty, therefore, from persons who admitted the trespass was not illegal; but the Magistrate acted improperly in directing the Police to send the owners of the cattle into the station.

Power of Sessions Judge to re-open a case before judgment.

No. 863.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to the Officiating Sessions Judge of Jessore, dated Calcutta, the 25th July 1867.

(Criminal Side.)

Present:

The Hon'ble L. S. Jackson, *Judge*.

SIR,—IN reply to your letter No. 122, dated the 22nd instant, I am directed to observe that the High Court has not apparently the power to "permit" you to re-open the proceedings in the case of Jeebun Mundle.

2. I am to point out, however, that, as in trials not by Jury the decision is vested exclusively in the Court, and as in this case you yourself do not appear to have given judgment, so that the trial is *not* concluded,

there seems to be no reason why you should not summon the Assessors, re-open the proceedings, take such further evidence as you think necessary, and call upon the Assessors for a new opinion, after which you can proceed to give judgment. The Court has not adverted to the merits of the case.

Distinction between conviction on confession and on plea of guilty—Form of conviction in a case of attempt to cheat—Proof of deposition before Magistrate—Commitment for False Evidence restrained.

Extract (paras. 5, 12, 13, and 14) of Letter No. 864, from the Officiating Registrar of the High Court, to the Sessions Judge of Patna, dated the 25th July 1867.

5. THE entry in Columns 11 and 12, case of Kunhaee and others (Case 10, Statement 4), "convicted on their own confession," should have been worded "convicted on their own plea of guilty" (which is the language used in Section 362, Code of Criminal Procedure), to avoid confusion between a plea at the trial and a confession previously recorded.

12. The Court observe that the prisoner Ramsurum Lal (Case 16, Statement 4) was sentenced to three years' rigorous imprisonment under Sections 511, 419, and 420 of the Penal Code. Section 419 was superfluous, as the conviction was legal under Sections 511 and 420.

13. With reference to the opening Clause of your charge to the Jury in the case of Gunesh Goala (Case 2, Statement 5), the Court observe that it is not necessary, and would not be proper, to send up evidence to show that the deposition contained the exact words of the prisoner. It should be proved that the accused is the person who, on solemn affirmation, gives the deposition, and then, the deposition being put in, the signature of the Magistrate should be proved, but not the contents of the deposition.

14. The Court observe in the case of Bysakhee Geer (Case 3, Statement 5) that it certainly is important that Magistrates should learn to abstain from committing on charges of giving false evidence, every witness who happens to contradict himself on immaterial points. Although the *materiality* is not essential, there must be a corrupt intention.

Proof of deposition before Magistrate in a case of False Evidence.

Extract (paras. 1, 2, and 3) of Letter No. 866, from the Officiating Registrar of the High Court, to the Officiating Sessions Judge of Shahabad, dated the 25th July 1867.

1. IN reply to your letter No. 145, dated the 8th instant, I am directed to inform you that, when a person is charged with giving false evidence upon a deposition made before a Magistrate, it is necessary first to prove that he is the person who gave such evidence; that it was given in a judicial proceeding (*e. g.*, on the complaint of *A. B.* against *C. D.*) on or about a certain day; and that he gave it on oath or affirmation (Section 43 of the Code of Criminal Procedure).

2. When the deposition is accompanied by the memorandum prescribed by Section 199 of the Code, signed by the Magistrate, and the Magistrate's signature thereto is proved (there being no provision as to depositions of witnesses analogous to that in Section 365, which makes the Magistrate's attestation without proof of signature *prima-facie* proof of the examination of an accused person), then the deposition is proof of what the person charged with perjury stated, and he is concluded by it.

3. It is, therefore, as you have already been instructed, unnecessary and irregular to take parol evidence of the matter contained in the deposition, though it may be admissible to give parol evidence of statements not contained in the deposition; and it may also, though on this point the Court express no final opinion, be allowable to show on the part of the accused that he added afterwards statements explanatory of the evidence which he had given.

Admissibility in evidence of admissions leading to the discovery of property taken in dacoity.

Extract (para. 4) of Letter No. 868, from the Officiating Registrar of the High Court, to the Sessions Judge of the 24-Pergunnahs, dated the 26th July 1867.

4. With advertence to your remark in the case of Nyan Mistree and others (Case 15, Statement 4), that the confession of the prisoners to the police of participation in the dacoity "would not be admitted as legal evidence," the Court do not see why it should not be admitted if the prisoner made admissions leading to the discovery of property. Such admissions are receivable under Section 150, Code of Criminal Procedure, when the discovery is deposed to in support of a charge of receiving, *e. g.*, suppose the accused to have said to the policeman: "I concealed the articles which I got in the dacoity *A* under my stack of straw, and those which I got in dacoity *B* under the floor of my cow house;" as long as the information relates distinctly to the fact discovered in consequence of it, it may be received.

Form of charges in cases of Grievous Hurt and Rioting with deadly weapons by a Member of an unlawful assembly.

No. 887.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Sessions Judge of Tirhoot, dated Calcutta, the 31st July 1867.

(Criminal Side.)

Present:

The Hon'ble C. P. Hobhouse, *Judge.*

Sir,—With reference to your Jail Delivery Statements for June last, I am directed to observe that the charges against Seeta Ram and others (Case 2, Statement 4), and Degumber Rai (Case 2, Statement 5), have been incorrectly drawn up. They should have set forth—

"*1st.*—That he, on or about the————, at ————, was a member of an unlawful assembly, and did, in the prosecution of a common object, voluntarily cause grievous hurt otherwise than on grave or sudden provocation to——, and that he has thereby committed an offence punishable under Section 149, read with Section 325, of the Indian Penal Code, and within the cognizance of the Court of Session.

2ndly.—That he, on or about the——, at ——, was a member of an unlawful assembly, and did, in prosecution of a common object of such assembly, commit the offence of rioting, armed with a deadly weapon, or with something which, used as a weapon of offence, was likely to cause death, to wit, a————, and has committed an offence punishable," &c.

Forms of charges in case of false personation, and abetment thereof.

Extract (para. 2) from Letter No. 908, dated 2nd August 1867, from the Registrar of the High Court, to the Sessions Judge of Backergunge.

THE charges against Ram Chunder Doss and Prosonno Coomar Gangooly (Case 1, Statement 4) have been incorrectly drawn up. They should have set forth. Against Ram Chunder Doss. "*Firstly*, that he, on or about the———, at———, falsely personated one Gooroochurn Dutt, and in such assumed character made a statement, *viz.* (here the statement should be set forth), in a proceeding under Act XX. of 1866, and that he has thereby," &c. In the *second* head the words "on oath was not recorded" should have been omitted.

Against Prosonno Coomar Gangooly. "*Firstly*, that he, on the said date, at the said place, abetted Ram Chunder Doss in falsely personating one Gooroochurn Dutt, a witness, and in making in such assumed character a statement testifying to the identity of Jumaldy, Opaguddy, Nyzuddy, and Arman, in a proceeding under Act XX. of 1866, and that he has thereby committed an offence punishable under Section 94, read with Section 93, of Act XX. of 1866, and within the cognizance of the Court of Session; *Secondly*, that he, on the said date, and at the said place, abetted Ram Chunder Doss in intentionally making a false statement, by stating before the Sub-Registrar of Midnapore, who was acting in execution of Act XX. of 1866, in a proceeding under the said Act, that he is Gooroochurn Dutt and a witness to the instrument *A*, and by testifying to the identity of Jumaldy, Opaguddy, Nyzuddy, and Arman, and that he has thereby committed an offence punishable under Section 91 of Act XX. of 1866, and within the cognizance of the Court of Session."

Cancelment of a second case against the same prisoner convicted in a previous case.

Extract (para. 10) from Letter No. 937, dated 10th August 1867, from the Registrar of the High Court, to the Sessions Judge of Rungpore.

THE Court observe, with reference to your remark in the case of Cheekoo Noshyo (Case 15, Statement 4), that "this case has been cancelled as regards the prisoner Kuncheea, No. 16, he having been sentenced to seven years' transportation in case 14," that you had no power to cancel this case. You should have tried Kuncheea in due form, and come to some finding, and, if the man required no further punishment, you should so have found, as you have found in other cases against Kuncheea. This remark also applies to Case 16, Statement 4.

Form of finding in case in which the accused was found to have committed the act charged while unsound in mind.

Extract (para. 4) from letter No. 955, dated 17th August 1867, from the Registrar of the High Court, to the Sessions Judge of Rajshahye.

THE finding in the case of Gazee Peer should have been drawn up in the manner shown below, and you will be so good as to amend it accordingly, as you had no authority to inflict the penalty of labor of any kind:—

"The Court, therefore, concurring with the Assessors, finds that Gazee Peer did kill Babon Mundul by striking him on the head with a club; but that, by reason of unsoundness of mind, he was incapable of knowing that he was doing an act which was wrong or contrary to law, and that he is not, therefore, guilty of the offence specified in the charge, *viz.*, that he has committed culpable homicide not amounting to murder by causing the death of Babon Mundul, and has thereby committed an offence punishable under Section 304 of the Indian Penal Code, and the Court directs that the said Gazee Peer be acquitted, and that, under the provisions of Section 394 of the Code of Criminal Procedure, the said Gazee Peer be kept in safe custody in the —— pending the orders of the Local Government."

Witness to prove a document becomes a witness for all purposes—Examination of accused to be given in evidence at proper time as part of case for the prosecution—Medical evidence when to be read.

Extracts (paras. 4, 5, and 9), from Letter No. 960, dated 21st August 1867, from the Registrar of the High Court, to the Officiating Sessions Judge of Moorshedabad.

4. WITH advertence to your charge to the Jury in the above-mentioned case, *viz.*: "that when Dwarkanath Moitro, Inspector of Police, was examined for the prosecution to attest the map produced, I refused to allow in cross-examination that he should be examined on other points connected with the local enquiry held by him and unconnected with this map," the Court observe that you were clearly wrong in doing so. The prisoner was entitled to prove by cross-examination any facts which made in his favor, out of the mouth of the witnesses for the Crown, when they had been examined. This is an advantage of no trifling importance to the prisoners, as it is admissible to put leading questions in cross-examination. *Vide* Starkie, page 196, and Roscoe on Evidence in Criminal Cases, page 133. It is the rule in both civil and criminal cases in England that a witness sworn and examined, though even for the formal proof of a document, becomes a witness for all purposes.

5. With advertence also to your charge to the Jury in the case of Ichha Ghosani (Case 6, Statement 4), I am to state that, in a recent case, the Court observed that the examination of the accused before the Magistrate, instead of being given in evidence at a proper time as part of the case for the prosecution, was read for the first time when the Judge was summing up. In the present

case you tell the Jury it has "just been read to you." The Court are about issuing* a Circular Order on this subject, directing that the examination should be put in at the right time, and made part of the Sessions record, which should also be done in the case of examinations received under Sections 368 and 369 of the Code of Criminal Procedure.

9. From what you state in your charge to the Jury in the case of Brojo Lall Halda and others (Case 3, Statement 5), it appears that the medical evidence was read for the first time when you were summing up. This is such an irregularity that, if the accused had been convicted, it would probably have been necessary to order a new trial. All the evidence for the prosecution must be given before the accused is called on for his defence, Section 372 of the Code of Criminal Procedure, and the accused is clearly entitled to observe upon or to rebut the *primâ-facie* evidence afforded by the "examination of a medical witness" received under Section 368 of the Code of Criminal Procedure.

A petition not a "declaration" and, therefore, not evidence of a fact.

Extract (para. 7) from Letter No. 991, dated 28th August 1867, from the Registrar of the High Court, to the Sessions Judge of Sarun.

WITH advertence to the charge, under Sections 199 and 193, Indian Penal Code, in the case of Ahlok Lall and another (Case 8, Statement 4), the Court do not understand how a man's petition, on which he makes an allegation, can be taken as evidence of a fact, not being a "declaration" which by law may be verified, and then received by a Court in support of cause shown. (*See* Sections 118 and 164 of the Code of Civil Procedure.) I am to request that you will be so good as to forward the records of the case for the Court's consideration and orders.

* *See* Circular No. 11, dated 2nd September; *infra*, Criminal Circulars, p. 6.

Murder and Culpable Homicide not amounting to murder—Injury not intended to cause death.

Extract (para. 2) from Letter No. 1006, dated 31st August 1867, from the Registrar of the High Court, to the Sessions Judge of Hooghly.

WITH reference to the observation quoted in the margin from the Additional Sessions Judge's charge to the Jury in the case of Hurra Kisto Manjee and others (Case 5, Statement 4), the Court understand the Additional Judge to have meant that the prisoner committed murder if he intentionally used a weapon which he knew was likely to cause death. This, in the Court's opinion, is not the law as laid down in Section 300 (nor apparently would an act so done be even culpable homicide under Section 299), otherwise, if a man having a sledge hammer in his hand were to drop it on the toe of another intending to inflict slight hurt in the way of a pinch, and an injury were thereby caused and mortification supervened so that the injured person died, the person who inflicted the hurt would be guilty of murder. There was, therefore, a serious inaccuracy in the direction of the Additional Sessions Judge to the Jury; but, as the facts would apparently bear out the charge according to the true meaning of the law, inasmuch as it seems to have been proved that the act was done with the knowledge that the accused was likely by his act to cause death, it does not seem necessary to call for the proceedings with a view to revision.

"That it is evident, from the definition of Sections 299 and 300 of the Indian Penal Code, that, if the prisoner knew that the club now in Court was likely to cause some injury likely to cause death, and, if he intentionally used the weapon, even if he had no intention of causing Hurradun's death, still he is guilty of murder."

Police Diaries not evidence, except against officers who write them.

Extract (para. 2) from Letter No. 1050, dated 7th September 1867, from the Registrar of the High Court, to the Sessions Judge of Rungpore.

THE Court further observes in this case that, at the special request of the Counsel for the prisoner, the police-papers were sent for and read over by the Police Inspector. These reports were, the Court presume, the diaries, and such diaries are not evidence, except against the officers who write them (Section 154 of the Code of Criminal Procedure).

Offences under Chapter XII. of Penal Code not triable by Jury—No summing-up necessary in a case in which prisoner pleads guilty—Form of finding in such a case.

Extracts (paras. 6 and 9) from Letter No. 1058, dated 9th September 1867, from the Registrar of the High Court, to the Sessions Judge of Nuddea.

6. THE Court observe that you tried the case of Nobind Mali (Case 5, Statement 4) with the aid of a Jury having overlooked the fact that the offence with which the prisoner has been convicted, coming within Chapter XII. of the Indian Penal Code, was an offence to which that system of trial had not been extended by Government. It is only for offences under Chapters * VIII., XI., XVI., XVII., and Chapter XVIII. † of the Indian Penal Code and for attempts or abetments thereof that this mode of trial has been sanctioned. Under these circumstances, the proceedings in the case are invalid, and the finding and sentence must be set aside, and a new trial held before the Court of Session with the aid of Assessors.

* Government Notification, 7th January 1862.
† Government Notification, 27th May 1862.
Do., 13th October 1862.

9. The Court observe that the prisoner Katooboollah Kholloo (Case 7, Statement 4) having pleaded guilty, and the Judge having thought proper to convict him upon that plea, it was needless and, indeed, irregular to charge the Jury; and, if any summing up had been required, as the accused was not charged with culpable homicide, it was needless for you to have stated in your charge to the Jury that "there is nothing to prove nor even to lead one to suspect that any blow was given either with the intent to kill or with the knowledge that it was likely to cause death, but without any intention of causing death, or to cause such bodily injury as is likely to cause death." I am also to remark that, in such cases the forms contained in Chapter XXVI. are not strictly applicable, as they are prescribed in cases where there has been a *trial* (Section 381), as distinguished from cases where the plea of guilt has been recorded, and conviction has followed thereon. A comparison of Sections 362 and 363 will make this clear. For this reason, the Court are of opinion that the better form would be "the Court convicts," &c., or "the accused pleads guilty of——, and the Court directs," &c., instead of the words "the Court finds."

Mere bringing of charge not to be referred to in summing up to Jury—Complainant's Statement regarding stolen property not evidence unless properly authenticated by oath of Police Officer.

Extracts (paras. 3 and 7) from Letter No. 1060, dated 10th September 1867, from the Registrar of the High Court to the Sessions Judge of Cuttack.

3. WITH advertence to the remarks of your judgment in the case of Basoodeb Dhopal (Case 8, Statement 4), that from the evidence of witness No. 1, it appears that this is the third false charge the prisoner has brought against him since he obtained his decree for rent, the Court observe that, if the accused not only brought the second charge, but if it was also proved to be false, then you were right to dwell on this circumstance as a ground for an additional penalty; but, if no second charge was before proved to have been falsely brought, then you were wrong in dwelling on the circumstance simply of a charge having been brought to the prejudice of the accused.

7. I am to point out, with advertence to your judgment in the case of Kishore Ghose, that, unless authenticated by the deposition, on oath, of a police-officer cognizant of the

facts, the complainant's statement regarding the stolen property made to the police is no evidence (Section 154 of the Code of Criminal Procedure), and that you should not have perused it on the trial so as to give it the weight of legal evidence.

Magistrate's attestation of the written examination of the prisoner before him is in itself legal evidence thereof, unless rebutted.

Extract (para. 3) from Letter No. 1114, dated 18th September 1867, from the Registrar of the High Court, to the Sessions Judge of Hooghly.

WITH reference to your remark to the Jury in the case of Sushee Sontal and another (Case 8, Statement 4), informing them that *they* must consider whether the attestation by the Deputy Magistrate was or was not sufficient proof of the genuineness of the confessions, the Court have to observe that the proper question was not by any means submitted to the Jury. Section 366 makes the attestation of the Magistrate sufficient *primâ-facie* proof of the prisoner's examination. In other words, there is a rebuttable or disputable presumption of law in favor of the genuineness of that examination, which may be rebutted or disputed by evidence for the defence, and, in default of such evidence (unless you saw reason to doubt the genuineness of the Magistrate's signature), you should have directed the Jury to conclusively presume that the prisoner's written examination taken and attested as required by law (Section 205), was a correct record of his statement before the Magistrate.

Object of Circular No. 5, dated 12th July last, explained.

Extract (para. 7) from Letter No. 1118, dated 19th September 1867, from the Registrar of the High Court, to the Sessions Judge of Bhaugulpore.

THE Court must express their disappointment at the mode in which the directions of Circular Order No. 5,* dated the 12th July last, in respect to the preparation of Statements have been carried out by you. Instead of the abstract statement contained on the reverse of the leaf, a lengthy narrative, and even argument covering several pages, has been sent up in almost every case entered in Statement 4, the return being thus swollen to even larger dimensions than under the previous form, and the object of the Circular Order being thus entirely defeated. As the *mode* of trial, the *charges*, and the result, are exhibited in the first page, it is wholly unnecessary to repeat them as you have done in every case. The purpose of the statement is merely to explain concisely what does *not* appear from the Tabular Forms, not to repeat it, or part of it, in another shape. You have also omitted something which you were specially required to do, *viz.*, to give the opinion of the Assessors *seriatim* and separately, of course stating their names. On this point, your attention is drawn to Circular Order No. 4,* dated 23rd June 1865.

Evidence of a child under Section 14, Act II. of 1855—Charge in a case of forging a document should set forth the document said to have been forged.

Extracts (paras. 2 and 3) from Letter No. 1136, dated 21st September 1867, from the Registrar of the High Court, to the Sessions Judge of Tipperah.

2. WITH advertence to your charge to the Jury in the case of Mussamut Shubratee (Case 1, Statement 4), I am to observe that the child Biste, in this instance, was either competent, within the meaning of Section 14, Act II. of 1855, in the manner described in Section 15, to give evidence, or incompetent. If she was incompetent, she should not have been examined at all. If competent, then her evidence was good for whatever it was worth, not simply as corroborative, but as direct evidence.

3. The Court find it impossible to understand from your charge to the Jury, in the case of Jaha Bux Munshi (Case 9, Statement 4), what the specific offence was with which the prisoner was charged, and of which he was found guilty. The charge does not set forth the document said to have been forged and found to have been used fraudulently with a guilty knowledge, and the Section (471) quoted is not a penalty-section standing by itself, and the Court cannot discover with what Section it should have been coupled, whether Section 467 or some other. The prisoner, however, has appealed, and the papers have been sent for.

* See *ante*, Criminal Circulars, p. 1.

* *See* 3 W. R., Criminal Circulars, p. 1.

Remand by Sessions Judge—Case postponed—Sections 361, 367, and 377, Code of Criminal Procedure.

Letter No. 1430, dated the 14th December 1867, from the Registrar of the High Court, Appellate Side, to the Sessions Judge of Tirhoot.

Present:

The Hon'ble L. S. Jackson and

A. G. Macpherson, *Judges.*

With advertence to your letter No. 276, dated the 29th ultimo, forwarding the Officiating Sessions Judge's memo., remanding the case of Seetadhur Opadhea and others to the Magistrate, I am directed to state that the Court consider the order of Mr. —— to have been made irregularly and without authority. Sections 361 and 377 of the Code of Criminal Procedure empower a Court of Session to *postpone* or to *adjourn* a trial when it may be necessary, and by Section 367 the Court is empowered to summon and examine witnesses. But there is no provision of the Code which authorizes the Court of Session to remand to a Magistrate for re-investigation the cases of accused persons who have been committed for trial.

2. The Officiating Sessions Judge declares "the trial is *postponed* for next Sessions in November, when it will be *re-tried.*" The meaning of this is not very clear; but if, on the re-trial or postponed trial, any accused person should be convicted, and an appeal or revision should follow, it will be for the High Court to determine whether any failure of justice has been occasioned by the irregularity above noticed.

CIVIL CIRCULAR ORDERS OF THE HIGH COURT.

CIRCULAR No. 17.

Nil-Criminal Circular No. 4 was issued by mistake as Civil Circular No. 17.

Increase in the Salaries of Peons.

CIRCULAR No. 18.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 28th June 1867.

(Civil Side.)

Present:

The Hon'ble G. Loch, *Judge*.

I AM desired by the Court to forward, for your information and guidance, copy of an extract, as per margin, from a letter No. 2247 of the 12th instant, from the Junior Secretary to the Government of Bengal, authorizing an increase in the salaries of the Peons in the Civil Department, and of the Nazirs of the Civil Courts. This increase will, in the case of the former, commence from the 1st July, when Peons of the first grade will draw Rs. 7 per month, and those of the second grade Rs. 6 per month, the additional charge being met from the Fee Fund.

"I am directed to acknowledge the receipt of your letter No. 213, dated 24th April last, and in reply to state that the Lieutenant-Governor authorizes an increase to the salaries of the Peons, in both the Civil and Revenue Departments, and of the Nazirs of the Civil Courts, to the extent recommended by the Hon'ble Judges."

2. You will be addressed on the subject of the sanctioned increase in the allowances of Nazirs, when the Court has determined in which districts that increase shall be given.

Working of the Stamp Law to be watched.

CIRCULAR No. 19.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 8th July 1867.

(Civil Side.)

Present:

The Hon'ble the *Chief Justice*, G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges*.

THE High Court directs all Judges to watch the working of the Stamp Laws, and especially of the recent Act XXVI. of 1867, and to pay particular attention to the procedure followed by their Subordinates with regard to it.

Return and destruction of records of Lower Courts called up in appeal before Act VIII. of 1859.

CIRCULAR No. 20.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges in the Lower Provinces, dated Calcutta, the 18th July 1867.

(Civil Side.)

Present:

The Hon'ble Sir B. Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, L. S. Jackson, and A. G. Macpherson, *Judges*.

THE Court, having experienced much inconvenience from the retention of the

records of the Lower Courts called up in appeal prior to the promulgation of Act VIII. of 1859, have resolved to return such records to the Zillah Courts to which they belong.

2. All Zillah Judges are requested, immediately on such records reaching their office, to cause a notice to be hung up in their own Court-houses and in those of the subordinate Courts of the district, containing a list of the number and names of the parties to the cases with which they are connected, and notifying to the parties concerned that, unless they apply within three months from the date of such notice for the return of any documents or exhibits, &c., that they may have filed in their cases, applications for the return of such documents or exhibits, &c., will not be attended to afterwards, as the records will be destroyed.

3. The Judges will then, after the expiry of the time allowed for the presentation of applications for the return of such documents or exhibits, &c., proceed to destroy the records or parts of them in accordance with the existing rules.

Exemption of Syud Humayoon Kuddi Mahomed Ali Mirza from personal attendance in the Civil Courts.

CIRCULAR No. 21.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to the Civil Authorities in the Lower Provinces, dated Calcutta, the 18th July 1867.

(Civil Side.)

Present:

The Hon'ble G. Loch, *Judge.*

I AM desired to inform you that the Government of Bengal* has been pleased to exempt Syud Humayoon Kuddi Mahomed Ali Mirza, the third son of the Nawab Nazim of Moorshedabad, from personal attendance in the Civil Courts under the provisions of Section 22, Act VIII. of 1859.

* *Vide* Government letter No. 4173, dated 6th July 1867.

Directions regarding the drawing-up of decrees.

CIRCULAR No. 22.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, Lower and Extra Regulation Provinces, dated Calcutta, the 19th July 1867.

(Civil Side.)

Present:

The Hon'ble Sir B. Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, L. S. Jackson, and A. G. Macpherson, *Judges.*

THE attention of the Zillah and other subordinate Courts is directed to the necessity of strict adherence to the provisions of the Civil Procedure Code in drawing up their decrees.

2. It has frequently come under the observation of the High Court of Judicature that the decrees of the Mofussil Courts are very far from "specifying clearly the relief granted, or other determination of the suit," as prescribed in the 189th Section of the Code.

3. Very frequently the Court is found to have ordered "that the suit be decreed in favor of the plaintiff with costs and interest," or "that the plaintiff obtain possession of the property mentioned in the plaint," while the commencement of the decree, instead of containing (as directed) the *particulars of the claim* as stated in the register of the suit, contains merely a vague description of the *nature* of the claim, such as "a claim for possession of lakheraj land with wassilat," &c.

4. And unfortunately the plaint itself in many cases is not as explicit as the law requires it to be, and thus it is occasionally necessary to look at the evidence or at the written statements in order to ascertain precisely what was the subject-matter of the suit.

Clauses 3, 4, and 5, Section 25, Act VIII. of 1859.

5. It is doubtless for this reason that the inferior Courts, when called upon to execute decrees, are in the habit of referring to the records of the original suits,

and for this purpose the records are sent backwards and forwards, to the great detriment of the papers, and to the serious inconvenience of the Appellate Court.

6. The High Court, therefore, desires to impress upon the Lower Civil Courts generally the necessity of drawing up their decrees in such a manner that, in order to the understanding and execution of them, it may not be necessary to refer to any other document or paper whatever.

7. Attentive study of the Sections 190 to 197 of the Code will, in most cases, supply the Judges with the precise direction required in framing their decrees; and, even where the case does not seem to be expressly provided for, the principles there given will apply.

8. Accuracy in this respect would be very materially promoted if the parties to the suit, and more especially their pleaders, would attend to the preparation of the decrees before they are finally recorded, and see that they contain all requisite particulars, and also that they do not go beyond the judgment.

9. Errors and omissions may be detected by the parties interested, which escape the observation of the officers and even of the Court, and it is obviously better that such imperfections should be corrected before signature of the decree than upon application of weeks, months, or years afterwards.

10. For this reason the Court thinks fit to order and direct that, after the promulgation of these rules, the pleaders on both sides shall be required to affix their signatures to the decrees of the Mofussil Courts, before they are signed by the Judges, and that, where any pleader shall not have signed the decree, the cause of his failing or refusing to sign shall be certified on the decree.

11. The High Court will expect that each Subordinate and Zillah Judge will read and explain this order to the pleaders of his Court and to the Ministerial officers concerned, and the decrees hereafter emanating from those Courts will be scrutinized, and all instances of inattention to the law will be adequately noticed, while, on the other hand, a careful and intelligent mode of drawing up decrees will be looked upon as a circumstance indicating very plainly the efficiency of the Court so distinguished.

Costs (in respect of pleaders' fees) in Miscellaneous cases.

CIRCULAR ORDER No. 23.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 29th July 1867.

(Civil Side.)

Present:

The Hon'ble the *Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges*.

THE High Court, observing in many Miscellaneous Appeals that the subordinate Courts have not awarded costs in respect of pleaders' fees in accordance with rule 8th laid down in the General rules* made by the High Court in pursuance of Section 37, Act XX. of 1865, and published in each issue of the *Calcutta Gazette* of July 1866, or that the fees, if awarded, have not been stated in the final order of the Court, calls the attention of all Subordinate Judges to the rule in question, and directs that, except in cases where it may be ordered that each party shall pay his own costs, a specific sum be awarded as payable on account of the adversary's pleaders' fee; and that the award of such sum be distinctly recorded at the foot of the order, with the other costs, if any, incurred by the parties respectively.

**Vide* C. O. No. 22, dated 13th June 1866, and C. O. No. 28, dated 20th July 1866.

Cancels Civil Circular Order No. 20 of 1847 as inconsistent with existing Stamp Law and a recent ruling of the High Court cited.

CIRCULAR No. 24.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Civil Authorities, Lower and Extra-Regulation Provinces, dated Calcutta, the 7th August 1867.

(Civil Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

THE Civil Circular Order of the late Sudder Court, No. 20 of 1847, is hereby cancelled, being inconsistent with the existing Stamp Law and the recent ruling of the Court in the case of *Sato Bhama Dosi, plaintiff*, versus *Jamiradin Khan, defendant*, 21st December 1865, published in IV. Weekly Reporter, Small Cause Court References, page 12.

CIRCULAR ORDER No. 25,

Dated Calcutta, the 17th August 1867,

Simply altered the days on which the holidays on account of the Hindoo festival Jummo Ashtomi were to be observed in the Civil Courts this year, changing those days from 22nd and 23rd August to 23rd and 24th idem.

Quarterly, and not monthly, Civil Statements to be submitted to High Court.

CIRCULAR No. 26.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Judges of Districts, dated Calcutta, the 11th September 1867.

(Civil Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

THE High Court are pleased to direct, in modification of the instructions contained in Circular Order No. 32, dated 31st August 1861 (No. 184, printed series), that the statements of civil business now submitted by the Judges monthly be in future submitted *quarterly*, on or before the 15th of the month following.

2. It is not intended by these orders to supersede the submission of monthly statements by the subordinate Judges to the Judge as at present. The Principal Sudder Ameens, Sudder Ameens, and Moonsiffs will submit, as hitherto, their statements every month to the Zillah Judge, and the Court expect that the Judges will carefully examine those statements, and satisfy themselves that the business of the subordinate Courts is transacted with due despatch as well as with method, and with personal attention to the cases as they come before them in execution as well as before decree.

Calls for information in tabular form regarding Moonsiff's chowkees in Assam and Chota Nagpore.

CIRCULAR No. 27.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Judicial Commissioners of Assam and Chota Nagpore, dated Calcutta, 11th September 1867.

(Civil Side).

Present:

The Hon'ble G. Loch, *Judge.*

I AM directed by the Court to request you to furnish the information required in the annexed tabular form. The information, it is presumed, can be supplied without difficulty:—

ZILLAH.

Name of Moonsiff's Chowkee.	Names of Thannahs comprised in each Moonsiff's jurisdiction.	Name of Sub-Division in which each Moonsiff's jurisdiction is comprised.	Distance and direction of each Moonsiff's Court from the Sudder Station.

Forwards new form of certificate for refund of stamp-duty.

CIRCULAR No. 28.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 13th September 1867.

(Civil Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

A NEW form of certificate, for the refund of stamp-duty, is forwarded herewith for adoption by all Civil Courts in Bengal in passing for payment at the Civil Treasury the stamp-duty refunded in cases adjusted by compromise or remanded for re-trial. The form is procurable at the Alipore Jail Press.

A. G. B. No. 96.

[*The form, being unnecessary, has not been re-printed.*]

Draws attention to Circular No. 28, dated 20th September 1864, requiring copy of Judgment in appeal-cases.

CIRCULAR No. 29.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 13th September 1867.

(Civil Side.)

Present:

The Hon'ble G. Loch, *Judge.*

SEVERAL recent instances having occurred of the neglect of the provisions of Civil Circular No. 28, dated 20th September 1864, the Court again call attention to the subject. A *copy* of the judgment in the language in which it was delivered is required, and not a translation of that judgment. The Judges are requested to draw the particular attention of the Subordinate Judges to the subject.

Lays down a revised form of register of stamp-duties levied under Schedule B, Section 6, Act XXVI. of 1867.

CIRCULAR No. 30.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Civil Authorities in the Lower Provinces and Judicial Commissioners of Assam and Chota Nagpore, dated Calcutta, the 16th September 1867.

(Civil Side.)

Present:

The Hon'ble G. Loch, *Judge.*

I AM directed to forward herewith, for adoption in the Civil Courts of your district, a revised form of Register of stamp-duties levied under Schedule B, Section 6, Act XXVI. of 1867.

Return of Stamp Duty levied under Schedule B, Section 6, Act XXVI., 1867, in the Court (or Office) of the of the District of , in the Division of , in the Province of , in the Presidency of , from the 1st May to the 30th September 1867.

[*The Form of Return, being unnecessary, has not been re-printed.*]

In modification of previous Circular issues instructions as to mode of levying Tullubana for the service and execution of civil process by peons under Act V. (B. C.) of 1863.

CIRCULAR No. 31.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, Lower Provinces, dated Calcutta, the 25th September 1867.

(Civil Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

In modification of para. 3 of Circular Order No. 10A, dated the 26th April 1864, the Court are pleased, with the sanction of the Lieutenant-Governor of Bengal,* to issue the following instructions adopted with slight modification from the Rules issued by the Board of Revenue, as to the mode of levying *tullubana* for the service and execution of civil process by peons appointed under Act V. (B. C.) of 1863.

* *Vide* Government letter No. 4767T, dated 21st August 1867.

The following fees are to be levied for the service of each process, besides charges for boat-hire, ferries, postage, &c., which are to be paid separately as provided in Section 4 below :—

Levy of Fees.

1. If the distance of the place of service or execution from the Court whence the process is issued, calculated, not as the crow flies, but by the road the peon must travel, does not exceed 12 miles—eight annas. If the said distance exceeds twelve miles—one rupee.

2. As many processes as possible are to be entrusted to one peon. For every additional process after the first, *issued at the instance of the same party and in the same case, and carried by* ONE *peon over* ONE *road*, the fee is to be one-fourth of the rates above specified. In such cases the whole fees levied for all the processes so carried for one party are to be charged for the purpose of fixing costs in equal shares, upon all the processes so carried.

3. If a peon is detained at the place of service for more than one day at the request of the person at whose instance the process was issued or of his agent, such person or agent must pay, then and there, demurrage at the rate of five annas a day. Unless this demurrage be paid, the peon must not wait.

4. All sums, except those referred to in Circular Order of 11th May* 1866, No. 18, levied under the preceding Rules, are to be credited to the Government to form the fund prescribed in Section 9 of the Act.

Additional charges.

5. In addition to these fees, the actual charge, which must be incurred if it is necessary to employ boats or cross-ferries, is to be levied from and paid by the person at whose instance the process is issued, before issue of the process, to the peon who carries the process.

Prescribes form, to be submitted quarterly, of all grants of probate and letters of administration made under Part XXXI., Act X. of 1865.

CIRCULAR No. 32.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all District Judges, dated Calcutta, the 28th September 1867.

(Civil Side.)

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

THE Court direct that a quarterly return in the annexed form (contemporaneous with the quarterly civil returns) be made by all District Judges to the High Court, of all grants of probate and letters of administration made in accordance with the provisions of Part XXXI., Act X. of 1865. The return should contain the name and description of the deceased person and of the persons who have been granted letters of administration, and in probate-cases of all the executors named in the Will.

Return of Grants of Probate and Letters of Administration made under the provisions of Part XXXI., Act X. of 1865, for the quarter ending 186 by the District Judge of

Name and profession of deceased person.	Name and profession of persons to whom Probate or Letters of Administration were granted.	Names of all the executors in the Will in Probate-cases.	Date of Grant.

* *See* 5 W. R., Civil Circulars, p. 9.

Calls for rollshowing particulars regarding Nazirs of the Judge's Courts.

CIRCULAR No. 33.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Civil Judges, dated Calcutta, the 29th November 1867.

(Civil Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

In continuation of this Court's Circular No. 18 of the 28th June last, I am directed to request you will be good enough to submit, at your earliest convenience, a roll showing the name and age of the Nazir of your Court, the date of his appointment to that office, and the length of his service as Nazir, together with your opinion as to his qualifications for holding the office of Nazir.

Circulates Rules relating to the custody and preservation of Wills.

CIRCULAR No. 34.

From the Registrar of the High Court of Judicature at Fort William in Bengal, dated Calcutta, the 3rd December 1867.

(Civil Side.)

Circulated for the information and guidance of the Civil Authorities in the Lower Provinces.

RULES

Relating to the custody and preservation of Wills.

1. All original Wills presented to a District Judge in accordance with the provisions of Section 244, and Probate or Letters of Administration of which have been granted under Sections 254 and 255, Act X. of 1865, shall be committed to the care of the Head Clerk or Chief Ministerial Officer of the Judge's Court, who shall be responsible for their safe custody.

2. The said Officer shall, on the receipt of each original Will, cause a copy of the same to be carefully entered in a Register to be kept for that purpose, and shall also cause to be prepared an alphabetical index, in which the name of the testator, &c., and the number and page of the Register in which a copy of the Will is entered, shall be recorded in the annexed form :—

Name of Testator.	Residence, &c.	No. and year of Register.	Page.

3. The original Wills shall be deposited in a fire-proof safe, which shall be kept in the office-room of the Head Clerk, or other officer aforesaid, to whom the safe custody of the Wills may have been entrusted, or in

some other safe place in which the records of the Judge's Court are ordinarily kept.

Relating to the Inspection of Wills.

4. Every inspection of original Wills or the Registers thereof, as well as applications for copies of Wills, shall be made within the hours fixed by the Judge, and published by a notification posted in a conspicuous place in the Court, and shall be subject to the following conditions.

5. The inspection of an original Will shall be allowed only on the written order of the Judge previously obtained, and shall take place in the presence of the Head Clerk, or other officer who may have charge of the same, and that officer shall be responsible for the Will not being taken out of his sight during such inspection, and also that no erasures or alterations are made in it.

6. Application for a copy of an original Will shall be submitted to the Judge, and such copy shall only be granted subject to the conditions which attach to the inspection of original Wills.

7. The following fees shall be charged for the inspection of Wills, &c. :—

(i.)—For the inspection of an original Will, 1 rupee.

(ii.)—For the inspection of a copy of a Will in the Register, 8 annas.

(iii.)—For copies, the same fee as for inspection, in addition to the copying charges, which shall be at the usual rate obtaining in the Civil Courts.

8. A separate Register shall be kept for the entry of all applications for copies or inspection of Wills and Registers, in which shall be recorded the names of the applicants and the amount of fees paid by them in each case.

9. The fees shall be at the disposal of Government, who shall assign such remuneration as it shall think proper in each case to the officer entrusted with the custody of the Wills.

Power of Magistrate to release salt seized.

SPECIAL CRIMINAL CIRCULAR
No. 4.*

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Sessions Judges and Magistrates of the 24-Pergunnahs, Midnapore, Cuttack, Jessore, Backergunge, Tipperah, and Chittagong; and to the Magistrates of Howrah, Balasore, Pooree, and Noacolly.

The 12th June 1867.

(Criminal Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, J. P. Norman, and L. S. Jackson, *Judges*.

SIR,—I am directed to state, for your information, that it has been recently ruled by the High Court that a Magistrate has no authority to release salt seized under circumstances in which the seizure is found, on the trial of an offender, to have been warranted by Section 18, Act VII. of 1864 of the Bengal Council.

Laying down new forms of Sessions Statements Nos. 4 and 5.

CIRCULAR No. 5.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges in the Lower Provinces, dated Calcutta, the 12th July 1867.

(Criminal Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges*.

THE Judges of the High Court have directed me to enclose, for your information and guidance, new forms of the Sessions Statements Nos. 4 and 5, which are to be substituted for the forms in present use, the directions contained in Circular Order No. 19, dated 31st December 1861, of the late Sudder Court, being modified accordingly.

2. Copies of the new forms will be supplied to you from time to time, on your requisition, on application to the Registrar; and you are requested to take care that your supply of them may not run short, as it is the wish of the Court that no other forms should be used.

3. I am to convey to you the following instructions for the use of the forms:—

They are both, you will observe, on Europe paper of folio size and on separate leaves. It is intended that one of the forms should be used for each trial reported, the particulars indicated in the several columns being thus exhibited on the first page, and paper of the same size being pasted on where the nature of the case requires further space.

4. On the reverse or turn-over will be written an abstract statement or description of the case, setting forth briefly but clearly the circumstances, the nature of the evidence, the mode of trial, and any matter which calls for special notice, including always (in case of offences punishable with death), the explanation referred to in the concluding part of Section 380, Code of Criminal Procedure.

5. The Court will expect that these abstracts will be carefully prepared by the Judges themselves, and not entrusted to subordinates. Whenever it is necessary to add paper to the form, the additional paper must be of the same description and size as that on which the form is printed.

6. The charge as entered in Column 5 of the Abstract Statement need not contain the whole of the charge *verbatim*, but must be given with sufficient fulness and certainty, omitting merely formal parts; and it will be borne in mind that these statements are submitted with a view to enable the Court to exercise the power of revision vested in it under the XXIXth Chapter of the Code of Criminal Procedure.

7. In the 6th Column, if the accused be convicted on the charge as laid, the entry need be only "as charged;" but, if he be convicted on an amended charge, that charge should be shortly stated, and the Section of the Indian Penal Code which applies referred to.

8. In the 7th Column it should be stated whether the Jury were unanimous in their verdict, or what the majority was; also, the names of the Jurors should be given, together with any recommendation to mercy or other special matter contained in the verdict. And, in trials not by Jury, the opinion of the Assessors should be given *seriatim*.

9. The several leaves comprising the trials, at any one Jail delivery, should be made up within one outside wrapper, of

No. 4.

Abstract Statement of Prisoners convicted before the Court of Session at the Jail Delivery of Zillah _____ in _____ 18 .

1	2	3	4				5	6	7
No. of case, date of commitment, and name of Committing Officer.	No. of accused.	Names of the accused.	ACCUSED PERSONS.				CHARGE. Exhibiting Section, I. P. Code, or other penal law by which the offence is made punishable.	Offence established.	Verdict of Jury or opinion of Assessors and Sentence passed on the accused persons.
			Sex.	Age.	Religion and Caste.	Occupation.			

No. 5.

Abstract Statement of Persons acquitted before the Court of Session at the Jail Delivery of Zillah _____ in _____ 18 .

No. of case, date of commitment, and name of Committing Officer.	No. of accused.	Names of the accused.	ACCUSED PERSONS.				Charge as laid.	Finding of Jury or opinion of Assessors.
			Sex.	Age.	Religion.	Occupation.		

10. The forms in hand should be used, as far as possible, for office-copies; and you are requested to report, at the expiration of three months, the extent to which the time of clerks in your office has been economized by the plan now introduced.

Charges for murder, culpable homicide not amounting to murder, and grievous hurt, how to be framed.

CIRCULAR No. 6.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Criminal Authorities in the Lower and Extra-Regulation Provinces, dated Calcutta, the 18th July 1867.

(Criminal Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

THE Court are pleased to cancel their Circular Orders—

No. 6, dated 11th March 1863,
„ 16, „ 16th June „
„ 5, „ 28th March 1866,

and to issue the following instructions which are to be observed in framing charges under the Indian Penal Code.

2. In drawing up charges for offences falling under any of the Sections of the Indian Penal Code which contain special exceptions, the provisions of Section 237 of the Code of Criminal Procedure must be strictly attended to, except when the charge is for—

(*a.*) Murder (punishable under Section 302 of the Penal Code), or

(*b.*) Culpable homicide not amounting to murder (punishable under Section 304 of the Penal Code), or

(*c.*) Voluntarily causing grievous hurt (punishable under Section 325 of the Penal Code).

3. In drawing up charges for murder, the form given in Section 243 of the Criminal Procedure Code is to be followed; and, in drawing up charges for culpable homicide not amounting to murder, the form given in Section 239, and, in drawing up charges for voluntarily causing grievous hurt, the form given in Section 239 of that Code.

4. In cases where exceptions (of which provocation is an instance) are negatived, it is not necessary to negative provisoes which can exist only where the exceptions exist.

Procedure in regard to insane prisoners.

CIRCULAR No. 7.

From the Officiating Registrar of the High Court of Judicature at Fort William in Bengal, to all Criminal Authorities in the Lower and Extra-Regulation Provinces, dated Calcutta, the 18th July 1867.

(Criminal Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

IN modification of Circular No. 1, dated the 12th February last, the Court are pleased to issue the following instructions for the guidance of Criminal Authorities :—

2. The High Court of Judicature hereby declares that the Circular Order No. 1, dated 12th February 1867, is not to be taken as applying to cases in which, upon the preliminary enquiry relating to an offence exclusively triable by a Court of Session, the question arises whether the accused, at the time when he did the act with which he is charged, was of unsound mind. In respect of such cases, the following separate instructions are issued, and this Circular is to be read with the Circular Order cited.

3. Section 226, Code of Criminal Procedure, does not positively require the commitment of the accused in such cases, because it cannot be said that, where it clearly appears that the accused was of unsound mind at the time of committing the act in question, the evidence appears to be sufficient for conviction. This Section, however, does not provide that the accused shall not be committed in any other case.

4. Section 225 provides for the discharge of the prisoner when a Magistrate finds that there are not *sufficient grounds for committing him to take his trial*, and, in cases which fall under the other general exceptions of the Penal Code, there clearly would be no grounds for committing the accused, because, on proof of the facts, he would be entitled to an acquittal and release.

5. But, in the particular case under consideration, it is otherwise, for, when a person accused is acquitted on the ground of insanity, the Jury or Court is to find specially whether he committed the act or not; and, if he be found to have committed it, he is to be kept in safe custody (Sections 393 and 394, Code of Criminal Procedure). There are, therefore, good grounds for committing such person for trial, and his discharge is not directed by the 226th Section.

6. Commitment, therefore, seems discretional with the Magistrates in such cases, and, in the opinion of the Court, there can be no doubt as to the propriety of committing the accused, in order to the taking of proceedings under Sections 393 and 394 of the Code of Criminal Procedure.

Form of charge for cases of rape.

CIRCULAR No. 8.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges and Magistrates, dated Calcutta, the 7th August 1867.

(Criminal Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

THE Court, having taken into consideration the form of charge for cases of rape given in letter No. 876, from the Officiating Registrar, to the Sessions Judge of Moorshedabad, dated 20th September 1864, published in I. Weekly Reporter, Criminal Letters, page 2, are pleased to cancel the instructions there given, and to direct Committing Officers to draw the charge in the following words: "That , on or about , at , committed rape upon the person of , and that he has thereby committed an offence punishable under Section 376 of the Indian Penal Code."

Transmission of Appeals by prisoners against sentences or orders of Sessions Judges.

CIRCULAR No. 9.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to Officers in charge of Jails, dated Calcutta, the 7th August 1867.

(Criminal Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

IN consequence of different modes of procedure being followed in different districts, the Court are pleased to lay it down, as a general rule, that petitions of appeal against the sentences or orders of Sessions Judges, presented to officers in charge of Jails, be forwarded by such Officers direct to the High Court, intimation of the fact being at once given in each instance and in the annexed form to the Judge whose sentence or order is appealed against.

To the Sessions Judge of

The undersigned begs to report, for the information of the Sessions Judge, that an appeal by the prisoner against the Judge's sentence or order, dated , and noted at foot, has this day been presented to the Officer in charge of the Jail, and has been forwarded to the High Court, as required by Section 418 of the Code of Criminal Procedure.

Speedy disposal of cases of Murder before the commencement of Dusserah vacation.

CIRCULAR No. 10.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges, dated Calcutta, the 28th August 1867.

(Criminal Side.)

Present:

The Hon'ble G. Loch and L. S. Jackson, *Judges.*

THE Court request that, in holding their Jail deliveries for September next, Sessions Judges will make arrangements for trying, as far as possible, at the commencement of their Sessions, all cases in which murder (Section 302 of the Penal Code) is one of the offences charged, as it is important that the orders of the High Court, in all cases in which capital sentences have been passed, should be obtained and communicated to the Sessions Courts, before the commencement of the vacation.

2. The High Court expect that no Sessions Judge will close his Court for the Dusserah vacation, as long as the orders of the High Court regarding such capital sentences have not been received, or as long as any criminal business remains undisposed of which can be heard; and provision must be made for carrying out all orders of the High Court reversing or modifying sentences.

Lays down rules regarding the examination of the accused person, medical witness, and other witnesses. Such examinations to be annexed to record of the trial.

CIRCULAR No. 11.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges and Judicial Commissioners, dated Calcutta, the 2nd September 1867.

(Criminal Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

THE following rules are laid down by the High Court of Judicature for careful observance by Zillah Judges:—

I.—The "examination of the accused person," which is directed by Section 366 of the Code of Criminal Procedure, "to be given in evidence at the trial," should be put in, and read as part of, the case for the prosecution *before the accused person is called upon to enter on his defence.*

So also should be the examination of a medical witness which the Court is directed (Section 368) to "receive as *primâ-facie* evidence;" and the examination of a witness in a case in which it "may be given in evidence" under Section 369 (if it is considered desirable on the part of the prosecution to put in such examination).

But, before examinations are received as evidence under any of these three Sections, care must be taken to see that they are in proper form and duly attested, or otherwise strictly proved. And, under Section 369, the examination cannot be given as evidence, unless it is proved that the witness, whose examination it is proposed to put in, is dead, or the Court is satisfied that for sufficient cause his attendance cannot be procured. (*See* case of Bheekun Doss, Weekly Reporter, Volume VII., page 114, Criminal Rulings.)

II.—Such examinations, when so received, are to be detached from the proceedings in the preliminary enquiry and *annexed* to the *record* of the TRIAL.

III.—In the case of the Queen *versus* Mussamut Niruni and Monirooddeen (Weekly Reporter, Volume VII, page 49, Criminal Rulings), the Court held that an examination of the accused, which had not been recorded and authenticated in the mode prescribed by Section 205 of the Code of Criminal Procedure, was not admissible in evidence at the trial. Such defective examinations ought not to be placed in the record, unless the prosecution should have taken exception to the order of the Court refusing to admit it, in which case, if the proceedings be submitted to the High Court, it may be transmitted separately with a memorandum of the Judge's order of rejection.

Additional column to be added to Circulars No. 10, dated 14th November 1862, and No. 12, dated 5th June 1863.

CIRCULAR No. 12.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges and Judicial Commissioners, dated Calcutta, the 11th September 1867.

(Criminal Side.)

Present:

The Hon'ble G. Loch, *Judge.*

I AM directed to request that, in submitting to the Court the return prescribed in the Circular Orders noted on the margin, you will add a column headed "number" of prisoners sentenced to transportation for periods exceeding "14 years."

No. 10, dated 14th November 1862.
No. 12, dated 5th June 1863.

Forwards Circular to be substituted for No. 9, dated 17th August 1867, regarding transmission of appeals by prisoners.

The enclosed Circular is to be substituted for Circular No. 9,* dated 17th August 1867, previously sent.

CIRCULAR No. 9.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to Officers in Charge of Jails, dated Calcutta, the 7th August 1867.

(Criminal Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

In consequence of different modes of procedure being followed in different districts, the Court are pleased to lay it down, as a general rule, that petitions of appeal against the sentences or orders of Sessions Judges, presented to officers in charge of Jails, be forwarded by such Officers direct to the Registrar of the High Court of Judicature; intimation of the fact being at once given in each instance, and in the annexed form to the Judge whose sentence or order is appealed against.

2. Petitions of appeal must be presented within the period allowed for appeal, as provided in Section 413 of the Criminal Procedure Code, and must be accompanied by a copy of the sentence or order appealed against, as provided by Section 416.

3. Petitions not presented in time, or not accompanied as above, are not to be transmitted to the Registrar, but to be returned to the petitioner, with an endorsement by the Officer in charge of the Jail showing the date of presentation.

To the Sessions Judge of

The undersigned begs to report, for the information of the Sessions Judge, that an appeal by the prisoner against the Judge's sentence or order, dated , and noted at foot, has this day been presented to the Officer in charge of the Jail, and has been forwarded to the High Court, as required by Section 418 of the Code of Criminal Procedure.

Officer in charge of the Jail.

* See *ante*, Criminal Circulars, p. 5.

RULES OF PRACTICE OF THE HIGH COURT.

*Rules of Practice adopted by the High Court on 1st June 1867, regarding the admission of Reviews.**

I. THE existing rules relating to reviews of judgment are hereby rescinded.

II. Every Division Court shall sit one day, and, if necessary, oftener, in each month, to hear applications for review of its judgments.

III. Applications for review of judgment shall be presented to the Deputy Registrar, and shall set forth plainly and concisely the grounds on which a review is sought, and shall contain a certificate by an Advocate or Vakeel of the Court similar, *mutatis mutandis*, to that prescribed in cases of special appeal; when the application is not so certified, the Deputy Registrar shall not file the same, but return it to the party that he may present it in open Court.

IV. Every application for review shall be accompanied by a copy of the judgment or order complained of; and, when the application proceeds on the ground of a discovery of new matter or evidence, the documents, if any, relied upon, shall, if possible, be annexed to the application, and the name or names of the witness or witnesses to be examined, if any, together with a declaration setting forth the circumstances under which such discovery has been made.

V. Whenever an application for review is filed within the period of 90 days, the Deputy Registrar shall cause a notice of such application to be served on the Vakeel who appeared for the opposite party. If two or more Vakeels appeared, then such notice may be served on any one of such Vakeels.

VI. After notice has been served, the application shall be set down for hearing at the next sitting for reviews of the Division Court, whose judgment the petitioner seeks to have reviewed; and the application shall be heard and determined at such next sitting, unless, on the motion of either party, the Court think fit to appoint a later day, or unless the Court shall otherwise order.

VII. When the application is not made within 90 days, or the opposite party was not represented by a Vakeel at the hearing, or in any previous stage, of the appeal, or in any case in which the Deputy Registrar considers that any special orders may be necessary, he shall take the orders of the Division Court as to the service of notice.

VIII. When the Judges forming the Division Court which recorded the judgment are no longer sitting in the same Division Court, the Deputy Registrar shall, after the service of notice, submit the application to the senior of such Judges, or to the remaining Judge, if the senior shall have left the High Court, or shall not be present on the appellate side of the Court, in order to an arrangement being made for the hearing of the application.

IX. Applications for review of the judgments of Division Courts, or of single

* *Vide* 5 Weekly Reporter, Rules of Practice, pp. 3 and 7.

Judges, where such Judge, or both the Judges forming the Division Court, have left the High Court, shall be submitted, in the first instance, to the Chief Justice, or to the Judge whom he shall appoint to hear such applications.

X. Where the application is for a review of the judgment of a single Judge, the application shall be heard, and may be granted, by that Judge; but in no other case shall a review of the judgment of a single Judge be granted, save on a hearing by at least two Judges.

XI. No review of the judgment of two or more absent Judges shall be granted, except on a hearing by a greater number of Judges.

XII. Three clear days' notice shall be given of each intended sitting of a Division Court for the purpose of hearing applications for review; and the Court shall sit from day to day till such applications have been concluded, unless the Court shall otherwise order.

Rules of Practice adopted by the High Court on 5th August 1867, regarding the admission of Appeals under Section 15 of the Letters Patent.

I. APPEALS to the High Court under Section 15 of the Letters Patent from the judgments of a Division Court on the appellate side of the High Court shall be presented to the Deputy Registrar within thirty days after the date of the judgments appealed from, unless the Court in its discretion on good cause shown shall grant further time.

II. Such appeals shall be written on stamp-paper prescribed for plaints.

III. The petition of appeal shall be in the English language, and shall contain the grounds of appeal numbered *seriatim*, and shall be subscribed by an Advocate or Vakeel of the Court.

IV. The appellant shall not be required, as in ordinary appeals, to file with such petition of appeal a copy of the judgment appealed from.

V. Separate registers shall be opened by the Deputy Registrar for the entry of such appeals in the following form:—

No. of the appeal to the Court at large, and the date on which it is filed.	No. of the original appeal to the High Court, date of the judgments of the Division Court appealed from, and names of the presiding Judges.	Appellants.	Respondents.	Pleaders for Appellants.	Pleaders for Respondents.	Particulars of suit.	Date of issue of notice for service on the Respondent.	Date on which the appeal is heard, and date of judgment of the Court at large.	Nature of the order passed.

* *In the High Court of Judicature at Fort William in Bengal.*
APPEAL No. OF 186 .
Appeal
No. OF 186 .
Appellant,
versus
Respondent.

To
Pleader for the

Take notice that an appeal has this day, under Section 15 of the Letters Patent, been filed on behalf of the above by Vakeel, from the judgment of the Division Court (Mr. Justice and Mr. Justice) to the Court at large, and that it has been set down for hearing before the Court at large on .

Dated the day of 186 .

Signed and sealed by order of the High Court,

Deputy Registrar.

VI. Immediately after such an appeal is filed and registered, the Deputy Registrar shall prepare a notice of the appeal in the annexed form* for service on the respondent, and shall cause the notice to be served on the Vakeel who appeared for the respondent in the appeal in which the judgment was given. If two or more Vakeels shall have appeared on behalf of the respondent, such notice may be served on any one of such Vakeels; but in any case in which the respondent may not have entered appearance in the appeal in which the judgment was given, the notice shall be served in the mode provided by law for the service of a notice in ordinary appeals, that is to say, through the Local Court from whose judgment the case shall have been originally appealed.

VII. Such appeals shall be heard before a Division Court, which shall consist of at least three Judges other than the Judges of the Division Courts from whose judgments the appeals are preferred; and the Deputy Registrar shall, as soon after such appeals are filed and registered as possible, submit the papers to the Chief Justice for the necessary orders for their hearing.

The 17th November 1866.

Present:

Lord Westbury, Sir James W. Colvile, Sir E. V. Williams, and Sir Lawrence Peel.

Hindoo Law—Partition—Undivided Property.

On Appeal from the Sudder Dewanny Adawlut of Madras.

Appoovier

versus

Ramasubba Aiyan and others.

An actual partition by metes and bounds is not necessary to render a division of undivided property complete. But, when the members of an undivided family agree among themselves, with regard to particular property, that it shall henceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and each member thenceforth has, in the estate, a definite and certain share which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided.

THIS is an appeal brought from a decree of the Sudder Court at Madras, which affirmed the decree of the Zillah Court of Tinnevelly, which itself affirmed the original decree of the Sudder Ameen of that District. It is, therefore, an appeal from three decrees unanimous in rejecting the claim of the appellant.

The present appeal is founded upon an allegation that certain property, shares in which are claimed by the appellant, continues the undivided property of the family, of which the appellant was a member, and which was originally an undivided family. The foundation of the defence to the appellant's claim is an instrument which we will call, for the present purpose, a deed of division, dated 22nd of March 1831.

Certain principles, or alleged rules of law, have been strongly contended for by the appellant. One of them is that, if there be a deed of division between the members of an undivided family, which speaks of a division having been agreed upon, to be thereafter made, of the property of that family, that deed is ineffectual to convert the undivided property into divided property until it has been completed by an actual partition by metes and bounds.

Their Lordships do not find that any such doctrine has been established, and the argument appears to their Lordships to proceed upon error in confounding the division of title with the division of the subject to which the title is applied.

According to the true notion of an undivided family in Hindoo Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share. No individual of an undivided family could go to the place of the receipt of rent, and claim to take from the collector or bailiff of the rents a certain definite share. The proceeds of undivided property must be brought according to the theory of an undivided family, to the common chest or purse, and then dealt with according to the modes of enjoyment of the members of an undivided family. But, when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership, in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with; and in the estate each member has henceforth a definite and certain share which he may claim a right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided.

With reference to the cases in the inferior Courts, which have been relied upon by the appellant, we believe, upon an examination of them, that there is not to be found in any, clearly and affirmatively, the doctrine contended for with reference to an agreement for the conversion of joint-ownership into separate ownership, namely, that such agreement is of no effect to convert an undivided family into a divided family without an actual partition.

In the last case cited and relied upon by the appellant, decided in the month of February 1865, in the High Court at Madras, the Court refuses to assent to the doctrine that nothing short of an absolute partition by metes and bounds in the lifetime of the different members will make the shares of the property divided.

Undoubtedly their Lordships would be unwilling to reverse any rule of property which had been long and consistently acted upon in the Courts of the Presidency; but, it is impossible for them here to come to the conclusion that the doctrine contended for by the appellant is to be considered a

rule which has been so accepted or acted upon by those Courts. Upon an examination of the cases, it will be found that in some the deed of partition was not attended by any subsequent act, and had been repudiated by the subsequent conduct of the parties; and in another of the cases cited, where there had been a decree of partition, it seems that the decree of partition had been abandoned.

If, then, the rules derivable from the true theory of undivided family are such as we have described and are not at variance with any settled course of legal decision, let us apply those rules to the deed upon which this case, in reality, depends.

The appellant admits that the deed was operative with regard to a certain number of villages, because, he says, those were actually divided; but he contended it was not a deed which made the family a divided family with regard to the rest of the villages, because it has not been followed by actual partition.

It is necessary to bear in mind the two-fold application of the word "division." There may be a division of right, and there may be a division of property; and thus, after the execution of this instrumeut, there was a division of right in the whole property, although, in some portions, that division of right was not intended to be followed up by an actual partition by metes and bounds, that being postponed till some future time when it would be convenient to make that partition.

The deed, after dealing with the villages that were intended at once to be the subject of an actual partition, proceeds thus: "But, inasmuch as it is not intended to divide now." What is the meaning of the words "divide now"? Clearly, to make the same partition of the villages that follow as had previously been directed to be made of the villages which precede. "But, inasmuch as it is not convenient to divide now one moiety of the villages" (then follows an enumeration of the villages), "we shall divide every year in six shares the produce of them and enjoy it, after deducting the Sarkar sist and charges on the villages." Nothing can express more definitely a conversion of the tenancy, and with that conversion a change of the *status* of the family *quoad* this property. The produce is no longer to be brought to the common chest as representing the income of an undivided property, but the proceeds are to be enjoyed in six distinct equal shares by the members of the family who are thenceforth to become entitled to those definite shares. Thus—using the language of the English law merely by way of illustration—the joint-tenancy is severed, and converted into a tenancy in common.

Then, if there be a conversion of the joint-tenancy of an undivided family into a tenancy in common of the members of that undivided family, the undivided family becomes a divided family with reference to the property that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a *de-facto* actual division of the subject-matter. This may at any time be claimed by virtue of the separate right.

The words with which this instrument of the 22nd of March 1834 concludes manifest an intention to become divided; for, after expressing that they had already divided the silver, brass, utensils, the parties use these words: "We have henceforward no interest in each other's effects and debts, except friendship between us." We find, therefore, a clear intention to subject the whole of the property to a division of interest, although it was not immediately to be perfected by an actual partition.

We have examined the whole of these papers with great anxiety and care; we have been very much assisted by the argument at the bar and by the able manner in which the cases on both sides have been prepared. We have no doubt of the true principle which is applicable to the matter, or of the legal effect of this deed of March 1834. It operated in law a conversion of the character of the property and an alteration of the title of the family, converting it from a joint to separate ownership, and we think the conclusion of law is correct, *viz.*, that that is sufficient to make a divided family, and to make a divided possession of what was previously undivided, without the necessity of its being carried out into an actual partition of the subject-matter.

Upon all these grounds we concur with the decisions of the Courts below, and we think it right to advise Her Majesty to dismiss this appeal, and to dismiss it with costs.

As the appellant admitted, with great propriety, that, provided the conclusion of their Lordships was that the property was divided, then the shares which he now claims have followed a course of descent with which he has no right whatever to interfere—we say nothing upon the question of adoption. Her Majesty's order will merely confirm the decree of the Court below.

The 4th July 1867.

Present:

Sir James W. Colvile, Sir Edward Vaughan Williams, Sir Richard Torin Kindersley, and Sir Lawrence Peel.

Mahomedan Law—Onus probandi—Suit by Mahomedan wife against husband (for recovery of property)—Bona-fide purchaser—Benamee transactions (Presumptions against)—Omission to sue—Section 7, Act VIII. of 1859—Construction—Suit for conjugal rights (by Mahomedan husband)—Section 15, Regulation IV. of 1793—Section 200, Act VIII. of 1859.

On Appeal from the High Court at Calcutta.

Moonshee Buzloor Ruheem

versus

Shumsoonnissa Begum,

and

Judoonath Bose

versus

Shumsoonnissa Begum.

In a suit by a Mahomedan wife, who had left her husband's protection on account of ill-usage, for recovery, among other property, of certain securities belonging to her which had got into the husband's possession, and the detention of which he justified on the ground that he had purchased them from her, and, on their endorsement and delivery to him, had paid the full value for them, the correct principle as to the *onus* of proof is that, although the wife may have failed to establish affirmatively the precise case alleged by her, her husband, having admitted the receipt of the securities from her, was bound to show something more than mere endorsement and delivery; that, the relation of the parties being what it was, it lay upon him to prove that the transactions which he set up were *bonâ-fide* sales and purchases, and that he actually gave full value for what he received from her; and, where it was proved that the wife had the securities while under her husband's protection, and some had passed from her to him, and others to his creditors, and that the wife left her husband's house in destitution, the proof adduced by the husband as to the sale for full consideration to him must be full and clear, and such as to satisfy a Court of Justice that the transactions were conducted fairly and properly, and with a due regard to the rights and interests of the wife.

Where it was in proof that a portion of the immoveable property of the wife had passed to a *bonâ-fide* purchaser under conveyances executed by the wife to her husband or to such purchaser, the burden of proof in a suit by her to recover the property is upon her, as she seeks to be relieved from the effect of her own conveyances, the execution of which she does not dispute, against one who, if not an absolute stranger, stands in no fiduciary relation to her.

The habit of holding land benamee, though inveterate in India, does not justify the Courts in making every presumption against apparent ownership.

The words "if a plaintiff relinquish *or omit to sue* for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained" in Section 7, Act VIII. of 1859, plainly include *accidental* or involuntary omission, as well as acts of deliberate relinquishment. If the words of a law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been the reasons for enacting it.

The correct test when a second suit is brought for something omitted to be sued for in a previous suit is, whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit.

A Mahomedan husband may institute a suit in the Civil Courts of India to enforce his marital rights by compelling his wife against her will to return to cohabitation with him, and such suit must, under the imperative words of Section 15, Regulation IV. of 1793, and the nature of the thing, be determined according to the principles of Mahomedan Law. If the wife raise a defence of cruelty, she must prove violence of such a character as to endanger, or a reasonable apprehension of danger, to her personal health or safety. The *ratio decidendi* in such a case considered and laid down.

Quære.—Whether, under the present procedure, the disobedience of a wife to obey the order of the Court to return to her husband can be enforced by giving her over bodily into her husband's hands. Such disobedience would seem to fall within Section 200 of the Code, and to be enforceable only by imprisonment, or attachment of property, or both.

THE appellant, in three of the four appeals of which their Lordships have now to dispose, is Moonshee Buzloor Ruheem, a Bengal zemindar. The respondent, in all four appeals, is his wife, Shumsoonnissa Begum. Her father, Moonshee Hossain Ali, died in the year 1837, possessed of considerable wealth. His co-heirs, according to Mahomedan Law, were his three widows Ashruffnissa, Oomdatunnissa, and the respondent's mother Komerunnissa; two daughters, *viz.*, the respondent and a posthumous child, named Nujmunnissa, and his nephew Boo Ali. His estate was divisible amongst these persons in twenty-fourth parts or shares, of which the respondent and her sister each took eight. The settlement of his affairs, however, occasioned a good deal of litigation, and the respondent did not obtain full possession of her share until November 1847.

She had previously, and in the month of April or May of that year, being then a widow

with five children by her first husband, become the wife of the appellant, the Moonshee. By him she has had one daughter. In July 1853, in consequence of the death of her sister Nujmunnissa, which took place in August 1849, and of the compromise of a suit with that lady's husband, she received a large accession of fortune. Her cohabitation with the Moonshee continued until the 28th of December 1855, when, on a complaint by her of ill-usage on his part, she was allowed by the Magistrate of the 24-Pergunnahs to leave his house. They have since lived separately, and the present litigation dates from that time.

On the 8th of April 1856, she instituted against her husband a suit for the recovery of her property, which, she alleged, he had detained or made away with. On the same day he commenced against her and one of her sons-in-law a suit, of which the object was to enforce his marital rights, by compelling her return to his house and control. These suits, in the argument before us, were called respectively the "property suit" and the "restitution suit"—a nomenclature which it may be convenient to adopt.

The "property suit" was originally brought against the husband alone. By his answer it appeared that certain portions of the landed property claimed by her had got into the possession of two persons, named Judoonath Bose and Mirtonjoy Bose. They were accordingly brought before the Court by supplemental plaint, on an allegation that they were the defendants of the principal defendant, the Moonshee, and held benamee for him. The suit was tried before the Civil Judge of the 24-Pergunnahs. His decree, which bore date the 25th of July 1859, awarded to the respondent Company's papers to the amount of Rs. 2,34,800, and cash to the amount of Rs. 20,511, dismissing the suit as to the other moveable property claimed by her. It also decreed the restitution to her of the immoveable property held by Judoonath Bose, with mesne-profits to be paid by the Moonshee, but dismissed the suit as against Mirtonjoy Bose without costs. All the defendants appealed against this decree, the appeal of Mirtonjoy being for his costs. The High Court of Calcutta, by its decree, dated the 29th of November 1862, confirmed, with some slight variations, the decree as to the Company's papers, directing the Moonshee to restore the papers to the amount of Rs. 82,000, which remained in his hands; and to replace the others by the purchase of Company's papers, to an amount equal to that of the missing papers, but reversed the Judge's decree as to the Rs. 20,511 cash. It confirmed, however, the decree as to the property held by the appellant Judoonath Bose, making him also responsible for the mesne-profits. And it further decreed the reconveyance to the respondent by Mirtonjoy of the immoveable property held by him. Against this decree the appellants Moonshee Buzloor Ruheem and Judoonath Bose have severally appealed to Her Majesty. No appeal has been preferred by Mirtonjoy Bose.

The restitution suit was tried by the Principal Sudder Ameen of the 24-Pergunnahs, who, by his decree, dated the 28th of December 1860, dismissed it with costs. On appeal, the High Court of Calcutta confirmed that decision by its decree of the 25th of July 1863. The Moonshee has appealed against both these decrees.

His remaining appeal is against a decree of the High Court, made on the 13th of February 1863, in another suit instituted against him by his wife. The object of that suit was to recover from him a Company's paper for Rupees 10,000, for which, as she alleged, she had inadvertently omitted to sue in the property suit. Objections, which will be hereafter considered, were taken to the maintenance of this fresh suit, and were allowed by the Zillah Judge. But the High Court reversed his decision, and remanded the cause for trial on the merits.

Having thus stated the general history and scope of this unfortunate and complex litigation, their Lordships will proceed to deal first with the appeals in the property suit. The respondent having preferred no appeal against the decree of the High Court, her claims, in respect of the moveable property, must be taken to be now reduced to one for the Government securities to the amount of Rs. 2,34,800, which the Moonshee has been ordered to restore or replace. And their Lordships will begin by considering whether the decrees under appeal can be supported against him in that respect.

That all these securities came to her hands whilst she was an inmate of his zenanah; that they all passed from her to him; that some of them remain in his possession; and that others have been traced to his creditors—is incontestable. That she came to his house a wealthy woman, and left it almost destitute, admits of no

doubt. And it can scarcely be denied that transactions of this nature and magnitude between husband and wife, with such a result, require a full and clear explanation on the part of the former, supported by such evidence as shall satisfy a Court of Justice, that they were conducted fairly and properly, and with a due regard to the rights and interests of the wife. Her case is that the securities were intrusted to him for a particular purpose, *viz.*, that of receiving the interest on them for her; and that, though they may have been indorsed, she never meant to transfer the property in them. His case is that he purchased them from her on several occasions, and that, on their indorsement and delivery, he paid her the full value for them. The principle of the judgments of the Courts below seems to be that, although the wife may have failed to establish affirmatively the precise case alleged by her, her husband, having admitted the receipt of the securities from her, was bound to show something more than mere indorsement and delivery; that the relation of the parties being what it was, it lay upon him to prove that the transactions which he set up were *bond-fide* sales and purchases, and that he actually gave full value for what he received from her. Their Lordships are clearly of opinion that this is a sound principle, and in accordance with the long-established practice of the Courts in India. Mr. Attorney-General, indeed, argued that a distinction is to be drawn in this respect between a Mahomedan and a Hindoo woman; nay, that in all that concerns her power over her property, the former is by law more independent than an Englishwoman of her husband. It is, no doubt, true that the Mussulman woman, when married, retains dominion over her own property, and is free from the control of her husband in its disposition. But the Hindoo Law is equally indulgent in that respect to the Hindoo wife. It may also be granted that, in other respects, the Mahomedan Law is more favorable than the Hindoo Law to women and their rights, and does not insist so strongly on their necessary dependence upon, and subjection to, the stronger sex. But it would be unsafe to draw from the letter of a law, which, with the religion on which it is chiefly founded, is spread over a large portion of the globe, any inference as to the capacity for business of a woman of a particular race or country. In India the Mussulman woman of rank, like the Hindoo, is shut up in the zenanah, and has no communication, except from behind the purdah or screen, with any male persons, save a few privileged relatives or dependants; the culture of the one is not, generally speaking, higher than that of the other, and they may be taken to be equally liable to the pressure and influence which a husband may be presumed to be likely to exercise over a wife living in such a state of seclusion. Their Lordships must, therefore, hold that this lady is entitled to the protection which, according to the authorities, the law gives to a purdahnusheen, and that the burden of proving the reality and *bona fides* of the purchases pleaded by her husband was properly thrown on him. They will proceed to consider whether the Courts below were right in holding that he has failed to prove his case.

The transactions are five in number, three of them being in the year 1848. On the 20th of May in that year, she is said to have sold to her husband the two papers for Rs. 9,500 and Rs. 7,000, which she received on a compromise of a suit with her step-mother, Ashruffnissa. On the 27th of the same month, she is said to have sold to him all the papers specified at the foot of his answer, which make up the sum of Rs. 1,03,800, except a paper for Rs. 11,300, which is said to have been sold on the 12th of the following month. These exhaust all the papers claimed, which formed part of her original share of her father's estate. The papers for Rs. 1,14,500, which she received in 1853 from the estate of her sister, are said to have been sold on two occasions in 1855, *viz.*, papers for Rs. 32,500 on the 2nd March, and papers for Rs. 82,000 on the 2nd of July in that year.

These several transactions are sworn to by various witnesses, of whom most, if not all, are or have been dependants of the appellant. There may be slight discrepancies in their testimony, but its general effect is, that on each occasion money, being the full value of the papers purchased, passed in cash or notes from the appellant to the respondent. The appellant has himself deposed to the same effect, and has produced certain khatta-books in corroboration of his testimony. The evidence, if believed, is sufficient to establish his case.

Both the Courts below have, however, disbelieved these witnesses, and have cast discredit on the books as being unlike those which were likely to be kept in order to record the transactions of a person in the

appellant's position. The Zillah Judge, obviously a gentleman of experience and ability, appears to have tried the cause very carefully; and their Lordships cannot but feel the difficulty of holding against his judgment—confirmed, as it is, by that of the High Court—that either the witnesses or the books, considered by themselves, are trustworthy. In what degree, then, do the other facts and proceedings proved in the cause tend to confirm or to cast doubt upon their testimony?

The earliest in date are the applications for a certificate under Act XX. of 1841. It appears that a difficulty had arisen in the way of drawing the interest on the two Company's papers for Rs. 9,500 and Rs. 7,000, which stood in the name of Moonshee Hossein Ali, the respondent's father. The respondent applied for a certificate, which is in the nature of letters of administration, to his estate, on the 5th of May 1848. Her application was refused, but the grounds of the refusal do not appear. The transfer of these papers to the appellant took place on the 20th of May; and, on the 2nd of July, the appellant presented to the Sudder Dewanny Adawlut his petition, supported by a petition from the respondent, complaining of the Judge's order of the 5th of May, and praying that a certificate might be granted to him in her stead. The only bearing of these documents upon the present suit is that in his petition the appellant describes himself as the purchaser, and the respondent as the seller of these papers, and that the respondent in her petition says: "Owing to my having sold to Buzloor Ruheem, by an indorsement, the above-mentioned papers," etc. The importance of this as an admission is obviously very slight. We do not know—and this is an observation which applies to all the other evidence of this kind—how or by whom the proceeding in question was explained to her, or to what extent she had been informed of the significance of her acts in these Courts. And, taking the admission at its highest, it would show only that for some cause or another, possibly only in order to facilitate the receipt of interest, the apparent ownership of the notes had been transferred from her to her husband as upon a sale and purchase—the only way, in truth, in which it could be done, since the Treasury in Calcutta takes no notice of trusts. This proceeding throws little (if any) light upon the nature of the actual transactions between the man and his wife.

The proceedings next in order of date that are relied upon are those in the execution-suit, which began in September 1848, and was finally disposed of in May 1850. These relate more to part of the lands now held in the name of the appellant Judoonath, the title to which will be hereafter considered, than to the Company's paper. It may, however, be well to state their nature here. Oomdatunnissa having, in the course of the protracted litigation of this family, a decree against the respondent for the small sum of Rs. 671-13-1, took out execution against her share in one parcel of the lands inherited from her father. The appellant, the Moonshee, intervened as objector (App., p. 48), stating that the lands seized, as well as the other lands belonging to the respondent, and these Company's papers, had been, before the execution, sold and transferred to him; and that the respondent, the judgment-debtor, had no interest therein. His objection was overruled by the Judge on the 12th of January 1849 (App., p. 57). He brought a regular suit to impeach that decision, to set aside the execution, and recover the property sold under it. That suit was dismissed (App., p. 63), on the 21st of May 1850, on the ground that the alleged transfer of the respondent's properties to the appellant was collusive, and in fraud of her judgment-creditor. The chief bearing, which these proceedings have upon the title to the Company's papers, is that, in the answer filed by the respondent in the regular suit, she stated that, after her marriage with the appellant, fearing lest her properties should be wasted by her agents, she disposed of the same to her husband, and deposited the value thereof for the benefit of her children. Now, as that answer was filed long before any disagreement had arisen between the appellant and respondent, it can hardly be doubted that, if not actually prepared under his direction, it was at least filed with his concurrence. And it is to be observed that this statement is by no means consistent with the case now made by him of sales out and out to him, in order to raise money to meet the respondent's debts and other necessary expenses. It suggests a different motive for the sales, and treats the proceeds as remaining in the hands of somebody or another for the benefit of her family. The sales, too, having been found to be collusive and unreal transactions, are quite consistent with the supposition that the lady was persuaded into making them upon the sug-

gestion that she would thereby defeat her creditor, and that they were merely colorable and made for that purpose. These proceedings tend more to discredit than to support the case now made by the appellant of absolute sales of these securities to him, and of the actual payment by him, out of his own funds, to the respondent of the purchase-money at the dates of the several purchases.

That case suggests the questions so much insisted upon in the Courts below, *viz.*, *1st*, why should the appellant wish to purchase these large amounts of Company's paper, and how was he able to pay for them? and, *2ndly*, why should the respondent wish to sell her Company's paper, and how has she disposed of the proceeds of it? What answer does the evidence give to these questions?

The appellant is, no doubt, shown to be a zemindar possessed of considerable estates. But the evidence tends to show that, at the time of his marriage, and at the date of the earlier, at least, of these transactions, he was, like many landed proprietors, an embarrassed man. He and his brother owed large sums to one Ramchand Mookerjea; and to Ashootosh and Promothonauth Day. These were secured by bond and by judgments confessed, probably on warrant of attorney, in the Supreme Court, of which one bore date the 27th of March 1845, and was for Co.'s Rs. 1,48,000, and the other, dated the 30th of June 1846, was for Co.'s Rs. 1,00,000. The precise amounts due on these judgment-debts are not shown, but it is pretty clear that neither judgment at the time of the earlier transfers of the respondent's papers was satisfied. It is admitted by the appellant that most of the Company's papers, which, he says, he purchased on the 27th of May and 12th of June 1848, were, on the 6th of July, transferred by him to Ashootosh Day in payment of one of these debts. He and his brother were also, at this time, bound, under an order of the Supreme Court of the 12th of April 1848, to pay into Court the sum of Rs. 62,000. It is not credible that a person under these liabilities should be purchasing Government securities, bearing a rate of interest considerably lower than that at which his debts were running on—securities which, if the necessity for selling them existed, might have been sold through a broker in the market.

Again, the appellant's case is that the respondent, when she married him, was herself in debt; that she afterwards required large sums for the marriages of her children and other family-ceremonies; that she sold her Government securities in order to meet these necessities, and applied the proceeds in meeting them. He is driven to this allegation, because, as it is clear that she carried nothing with her out of his house, it would be still more difficult to support a theory that the money remained with her in some other form of investment. It is to be observed, however, that some of his own witnesses assign a different motive for the sales. Some of them say that she sold in order to get rid of difficulties caused by the Company's papers standing in the name of a purdanusheen. Others say, as she says herself in her answer in the execution-suit, that she was afraid of being cheated by her agents. That the respondent, during her seven or eight years of cohabitation with the appellant, must have incurred considerable expenses in respect of her children by the first marriage, and for other family-purposes, is pretty certain; but that she should have expended upwards of two lakhs of rupees, the proceeds of these Company's papers, over and above the other property, which, at one time, she unquestionably possessed, is not very credible. It is to be remembered also that, on the assumption of the Courts below, she had the interest of these Company's papers wherewith to meet her necessary expenses. It is inconceivable that, if these very large sums had been expended in the payment of debts, and for the other purposes alleged, the appellant should not have been able to give better proof of the fact. It may suit his present purpose to profess that he had little personal connection with the management of her affairs; but the evidence, and in particular his petitions of the 27th of October 1854, and the 4th of December 1855 (App., pp. 88, 91), are strong to show that this was not the case. He there represents himself as active in the management of her property and interests.

The first of these documents is, in various particulars, strangely inconsistent with the case which the appellant now sets up. He is there defending himself from a charge, made before the Magistrate, of having confined his wife, and having refused to give up to her, not merely the Company's papers derived from Nujmunnissa, which, according to his case, would then be still in her possession, but also Company's papers to the amount of 80,000 or 90,000 rupees, which, according to his present case, he had long before 1854 purchased from her; yet he does not say a

word of this purchase. He covers the whole charge with the general answer, "The entire property of Shumsoonnissa being her own property, and my entire property being mine, what ground could there exist between her and me that I should confine her?"

We have hitherto considered the evidence with reference to the alleged sales of the Government securities generally. Some parts of it, however, suggest considerations, which apply exclusively to the alleged transactions of 1855 and the transfer of the papers for Rs. 1,14,300. It may be that the means of the appellant to make these alleged purchases had then been further diminished by the litigation in which he appears to have been engaged with his first wife, and by the decree which she obtained against him. On the other hand, he may have been in more prosperous circumstances than he was in 1848. But if he, so late as the months of March and July 1855, paid to the respondent the value of these papers, it is almost incredible that he should not be able to give some better explanation how she disbursed those large sums between those dates and the following December, when she left his house destitute. Again, his petition of June 1854 discloses a state of things which is far more consistent with the respondent's case, that she made over to him these Company's papers in 1853, as soon as she received them, than with his, that they were not transferred to him until 1855. It shows that, in June 1854, a petition had been presented to the Magistrate, complaining of his ill-treatment of his wife. He, no doubt, denied the charge, and treated it as emanating, not from his wife, but from discharged servants, and the Magistrate then considered that the charge was unfounded. But when light is thrown upon this transaction by what subsequently happened, by his ill-usage of the respondent, which is proved, and by her release from the house by the Magistrate, on the subsequent petition of 1855, it is difficult to resist the conclusion that the quarrel between the husband and wife had begun in 1854 (the date to which her plaint assigns its commencement), or, at all events, that, in July 1855, there must have been a state of feeling between them, which would make a voluntary sale of her property to him a most improbable transaction. If he did, so shortly before their final separation, obtain a transfer of those securities to himself, the burden of showing that he did so righteously is assuredly made heavier.

Again, the evidence of ill-usage which has been given in this suit seems to have a further bearing upon the issue between the parties which is now under consideration. We have not now to consider whether what he did was within or in excess of the marital powers of a Mussulman husband. It is sufficient to say that very harsh treatment, and a restraint from which the Magistrate saw fit to release her, are proved, and that she left the house in circumstances to which no native woman of her rank, who was not suffering under a sense of intolerable wrong, would have exposed herself. Now, what was the cause of this grave quarrel? Her account of it is more probable than his, if indeed he has given any. It seems more likely that he should have attempted by harsh measures to frighten her out of a just demand than that he should have met, in that way, one which was without foundation. Her conduct, too, if the quarrel had begun in 1854, has ever since been consistent; his, as has been shown above, has been inconsistent.

It would doubtless have been more satisfactory if the respondent had thought fit to support her claim by her own testimony. Her abstaining from so doing certainly affords an objection to her case deserving of serious consideration: and their Lordships do not think that it is altogether removed by the suggestion of the strong repugnance felt by native females in the respondent's position to taking such a step. But the objection, though it may weaken, does not destroy the case made by the respondent; and their Lordships are of opinion that, whatever weight may be due to it, it is quite insufficient to affect the conclusions in her favor to be drawn from the facts and circumstances of the case which have been already adverted to.

The admission of the tutor, a witness produced on the part of the respondent, to the effect that, on the transfer to which he speaks, he saw money pass, is also a circumstance in the appellant's favor. But, if the witness had spoken the truth about the money, it is to be remembered that the transaction to which he speaks was that of the 27th of May 1848, when it may have been desired to make a colorable sale for the purpose of defeating the execution in the manner shortly afterwards attempted.

Their Lordships, then, after carefully weighing the evidence, and considering the able arguments addressed to them, have come to the conclusion that the burden of proving *bonâ-fide* purchases of these Company's pa-

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pers was properly thrown on the appellant; that he has failed to do so; and that no ground has been shown for disturbing the concurrent judgments of both the Courts below on this part of the case.

The next question for consideration is that raised by the appeal of Judoonath Bose, as well as by that of the Moonshee, *viz.*, whether that portion of the decree under appeal which directs the reconveyance to the respondent of the immoveable property held by Judoonath, and the payment to her of the mesne-profits by both the appellants, can be supported.

The property in question consists of certain shares in two gardens, of which the entirety formed part of the estate of Moonshee Hossein Ali. They are known as the Dum-Dum garden and the Narain Mundul gardens, and, like the rest of the estate, were divided amongst the co-heirs in twenty-four shares. Of the first, the decree gives to the respondent sixteen shares, or two-thirds of the whole, comprising both her original share and the share which she inherited from her sister. Of the other, it gives her only the eight shares inherited from her sister, her original share having passed, under an execution-sale, into the hands of a stranger to the suit.

The history of the Dum-Dum garden, after the death of Moonshee Hossein Ali, and its division amongst his heirs, is this: As early as 1843, Boalli sold his five shares, and Ashruffnissa Begum sold her one share to one Dilrus Begum for Rs. 3,000. These six shares were conveyed by one bill of sale, dated the 29th Bysack 1250. On the 22nd of May 1848, the respondent executed a bill of sale, by which she purported to convey her original eight shares of this garden to her husband, in consideration of Co.'s Rs. 2,000. On the 15th of August 1848, he, by an indenture in the English form, conveyed these eight shares to Dilrus Begum, in consideration of Co.'s Rs. 4,000. On the 20th of July 1853, Dilrus Begum, by a bill of sale, conveyed both the six shares which she had acquired from Boalli and Ashruffnissa, and the eight shares which she had acquired from the appellant, the Moonshee, to one Jegree Khanum, for Rs. 6,000. And, on the 27th of September 1853, Jegree Khanum conveyed all these fourteen shares to the appellant, Judoonath, for Rs. 4,000. On the 9th of January 1854, the respondent executed a bill of sale, purporting to convey the one-third part of this garden, which she had inherited from her sister, to Judoonath, for Rs. 2,000. The appellant Judoonath, therefore, holds twenty-two shares of this garden—eight under a direct conveyance from the respondent; eight under a title, founded on her conveyance to her husband, but strengthened by the mesne-conveyances; and six under a title, dating from 1843, and unimpeached, at least in this suit.

In May 1848, the respondent conveyed her original eight shares of the Narain Mundul gardens to her husband; this property was the subject of the seizure which gave rise to the execution-suit; and the sale having been declared fraudulent as against the judgment-creditor, these shares were purchased by the judgment-creditor, and cannot now be followed.

On the 12th of May 1855, the respondent executed a bill of sale, purporting to convey to the appellant Judoonath, in consideration of Rs. 1,500, the eight shares of this garden, which she had inherited from her sister. That transaction is impeached. He had previously acquired part of the share of Boalli in this garden having inherited it from his brother Koylas, who, in 1850, purchased it at an execution-sale. His title to this portion is not impeached.

The substantial issue on this part of the case is one between the respondent and Judoonath Bose. It is obvious, therefore, that the principle upon which, on the trial of the issue already considered, the burden of proof was shifted from the plaintiff to the defendant, is not necessarily applicable to the trial of this issue. The respondent comes into Court, seeking to be relieved from the effect of her own conveyances, the execution of which she does not dispute, against one who, if not an absolute stranger, stands in no fiduciary relation to her; and it lies upon her to establish her right to that relief. Has she done so?

She has proved that Judoonath Bose is the servant of her husband. She has produced three witnesses, Gholam Arub, Gholam Ruhman, and Sheikh Taki, to prove that her husband is the person who is really in the possession or in the receipt of the rents and profits of the property. But nothing can be less satisfactory than the testimony of these witnesses, of whom the first is her manager; the second, a tailor; and the third, a menial servant; none of them having any connection with the lands.

The evidence of possession given on the other side by ryots and others may not be

altogether trustworthy; but, such as it is, it outweighs the loose statements of these three witnesses. Some of the inferences to be drawn from the conveyances from her to her husband are also favorable to the respondent's case; but these apply only to that portion of the property claimed which consists of her original share in the Dum-Dum garden.

It may be conceded that the conveyances from her to her husband in 1848, considered with the light reflected on them from other parts of this case, and in particular from the proceedings in the execution-suit, could not stand. It may also be conceded that, if the question were between her and her husband, he ought not to be permitted to say that she is bound by her fraudulent conveyance, since she may be presumed to have executed it under his influence or pressure. And, if the property had passed directly from him to his dependant, the presumption that the latter is a mere trustee for him might be stronger than it is.

But what are the facts proved? This portion of the property in dispute passed apparently by sale from Buzloor Ruheem to Dilrus Begum. It remained with her for nearly five years; was sold, ostensibly at least, by her to Jegree Khanum, from whom two months later it passed to Judoonath. These intermediate conveyances are treated in the Courts below, and in the argument before their Lordships, as mere "circuity of fraud;" and it has been argued that we have no proof who Dilrus Begum and Jegree Khanum are, or, indeed, that there ever were such persons. But what proof, on the part of the respondent, is there to support these arguments? On the other side, there are witnesses who state that Dilrus Begum was the wife of the Nawab of Chitpore, a well-known person, and that Jegree was a wife or concubine of apparently the same person. The conveyance to Dilrus was, by English deed, prepared and executed in the office of a respectable English attorney, acting apparently for the purchaser. That circumstance afforded the means of investigating that transaction. But no attempt has been made to do so. Again, that Dilrus Begum was a real personage, not necessarily connected with the appellant, the Moonshee, is placed almost beyond a doubt by the undisputed fact that, in 1843, several years before the second marriage of the respondent, the six shares of this garden had been conveyed to her by Boalli and Ashruffnissa. What, again, was the motive for this "circuity of fraud"? If Dilrus Begum held five years' benamee from the Moonshee, why raise suspicion by transferring the property from her to his known dependant, Judoonath? Sir Roundell Palmer insisted strongly on the fluctuations in the amounts of the purchase-money for which the different instruments purported to convey the same property, as a badge of fraud. The first transaction, which we may admit to have been fictitious, expresses a consideration which, on a comparison with the price for which the six shares were sold in 1843, seems to be below the real value of the property. Tried by that test, the sum of Rs. 4,000, for which it was conveyed to Dilrus, would be about the true value. This fact, taken by itself, tends to support the reality of the sales to Dilrus. Again, if she sold for Rs. 6,000 property which had cost her Rs. 7,000, the difference is not greater than might be accounted for by the necessities of the vendor, or by a diminution in the value of the property in the period during which it remained in her hands. The further reduction of the price to Rs. 4,000 in the sale to Judoonath is certainly a more suspicious circumstance. It is not, however, one which seems to go very far to supply any defect of proof on the part of the respondent. It is not impossible that Jegree Khanum may have found that she had made a bad bargain, or that Judoonath may have made an extremely good one. On the other hand, if the transactions were fictitious, and the price cost the professed purchaser nothing, it is not easy to see why an adequate consideration was not expressed in the conveyance. There seems to have been no enquiry or cross-examination on this point in the Courts below.

Again, what is the case proved in respect of the conveyances from the respondent herself to Judoonath? She is proved to have executed these conveyances. She has not met this fact fairly in her pleadings. In the original plaint there is no mention of Judoonath's title; and on the face of the supplemental plaint, it is not very clear whether she treats the conveyances as forgeries, or admits the execution and impeaches their effect. She has certainly not stated on what grounds she impeaches them, nor has she come forward, as a witness, to explain her execution of them. It lay upon her to do so; to show by her own or other testimony under what circumstances they were procured from her, and to rebut the evidence that the consideration-money passed to her. Again, the pur-

chase of these parcels of land by Judoonath is not wholly improbable. The purchases are not beyond the means of a person in that rank of life. He already held portions of both gardens by titles not deduced from the respondent, and unimpeached. The first conveyance from the respondent was executed in January 1854, when the Moonshee was absent from home and at Singapore. The Zillah Judge treats the circumstance of his absence as indicative of fraudulent forethought and contrivance His presence probably would have afforded the inference of pressure and undue influence. The habit may be superinduced by the manifold cases of fraud with which they have to deal; but Judges in India are perhaps somewhat too apt to see fraud everywhere. The second conveyance was in May 1855. At that time the quarrel with her husband had, according to the respondent's case, begun. She is not likely to have executed this instrument voluntarily at his instigation. She has not shown that she was forced to do it. And, on the other hand, it is not improbable that, in the circumstances in which she thus stood, she may have been glad to raise the comparatively inconsiderable sum which is stated to have been the price of the property.

On the whole, then, their Lordships are of opinion that the respondent has failed to show a sufficient title to recover any of the shares in these gardens from the appellant Judoonath. The habit of holding land benamee is inveterate in India; but that does not justify the Courts in making every presumption against apparent ownership. This principle was enforced by this Committee in a recent case. Their Lordships do not deny that in the particular case the connection of Judoonath with the other appellant, the proved conduct of the latter towards his wife, and other circumstances threw some cloud of suspicion over the title to these parcels of land. But such suspicions are not proof. Their Lordships think that the Judges of both Courts below have given too much weight to them; that they have not sufficiently considered in what degree the burden of proof lay upon the respondent; and that, when the proofs which she ought to have given and might have given were defective, they have allowed the deficiency to be supplied by presumptions and inferences which the facts do not altogether warrant. Their Lordships cannot, therefore, recommend Her Majesty to confirm this portion of the decrees in the "property-suit."

Third Suit.

As the third suit also concerns property, and the point raised by the appeal in it is very short, their Lordships think it will be convenient to dispose of it before they proceed to consider the appeal in the "restitution-suit." Two objections were taken to the maintenance of this suit. It was pleaded, *first*, that the respondent's claim was barred by the Law of Limitation; and, *secondly*, that she was precluded from suing to enforce it by the 7th Section of Act VIII. of 1859, which provides that, "if a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained." From the plaint it appears that the Company's paper for Rs. 10,000, which is the subject of the suit, was specified in the petitions for a certificate under Act XX. of 1841, already referred to, together with the papers for Rs. 9,500 and Rs. 7,000, which are included in the respondent's demand in the "property-suit," and that her claim respecting it is precisely the same as her claim for the other two papers. The only reason she assigns for not suing for it in the former suit is that, "as she was a purdanusheen, and unacquainted with reading and writing, she could not ascertain anything about the aforesaid Government paper and the interest of the same." She says, she discovered her mistake in July 1859, and insists that her cause of action arose at that time. The Zillah Judge held that the second objection was fatal to the suit, which he accordingly dismissed on that ground.

The High Court has reversed this decision for the following reasons: they hold with him that the omission to include this item in the first suit was an oversight; that she knew of the existence of this paper before she brought her first suit, and might have included it therein; and that the real question to be decided was whether that omission, neglect, or oversight was sufficient to bar her present claims under the law fairly applied. This question they decide in the negative, on the ground that it was clear she was not actuated by any fraudulent or dishonest motive; that the stamp paid on the first suit would have covered also this paper; that she cannot have omitted this claim in order to bring the case within the cognizance of a particular Court; and that, although it may be desirable for the ends of justice that the various items claimed by a plaintiff should form the subject of one

single action, yet there was nothing in the law to make it imperative upon her to include every item of such a claim as hers in a single suit.

To these reasons their Lordships cannot assent. If the words of a law are clear and positive, they cannot be controlled by any consideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been the reasons for enacting it. The words of this law are: "If a plaintiff relinquish *or omit to sue for* any portion of his claims." It plainly includes accidental or involuntary omissions, as well as acts of deliberate relinquishment. In their Lordships' opinion, the only ground on which (if at all) the judgment of the High Court could be supported, is that which is somewhat doubtingly expressed by the Judges in the following sentence: "Nor do we think that, under the circumstances of the case, the plaintiff may not fairly plead that she has a distinct and separate cause of action for the recovery of this piece of paper made over to the defendant on a particular date." Their Lordships think that the correct test in all cases of this kind is whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation of the former suit, and they have accordingly considered whether the present suit can be maintained on that ground. But the cause of action in the former suit of the respondent seems to them to be the refusal by the husband to restore, or his misappropriation of, the wife's property, which she says she intrusted to him. There is nothing to distinguish the deposit of this particular Company's paper from the deposit of those which she deposited with it, and has recovered in the former suit. It was a mere item of her demand, and is admitted on the face of her present plaint to have been omitted from it, for no other reason than the very insufficient one before mentioned. If she was justified in instituting a separate subsequent suit for this particular Company's paper for 10,000 rupees, she would have been equally justified in making each one of the Company's papers which are comprised in the "property-suit" successively the subject of an independent suit. Their Lordships are of opinion that the ruling of the Zillah Judge on this point was correct, and that the suit was properly dismissed. This being their view, it is unnecessary to say anything on the question of limitation. They are disposed, however, to think that the claim being founded on an alleged breach of trust was not, as pleaded, subject to limitation, either under the old law or under Act XIV. of 1859, which, the suit having been commenced in December 1861, seems to be the law applicable to it. If the plaintiff had failed to prove a breach of trust, but had established some other title to relief, the question of limitation might have arisen. But this could only happen upon a trial of the suit on its merits.

Restitution Suit.

Their Lordships will now address themselves to the novel and difficult questions raised by the appeal "in the restitution-suit."

The first is that which has been strenuously argued at the bar, though it does not appear to have been raised in the Courts below, or even in the respondent's case, *viz.*, whether any suit by a Mussulman husband will lie in the Civil Courts of India to enforce his marital rights under the Mahomedan Law, by compelling his wife, against her will (she being a free agent, and not detained by others), to return to cohabitation with him. If the law which regulates the relations of the parties gives to one of them a right, and that right be denied, the denial is a wrong; and, unless the contrary be shown by authority, or by strong arguments, it must be presumed that for that wrong there must be a remedy in a Court of Justice. Of authority negativing the jurisdiction there is none. It has been argued that the proper remedy, if there be one, is the denial of maintenance to the rebellious wife, or, at most, a suit for damages; because a suit to compel the wife to return to her husband, though obviously a more complete remedy than either of them, is in the nature of a suit for specific performance; and being founded on the contract of marriage, which the Mahomedan Law regards as a civil contract, the Court entertaining the suit must be prepared to enforce all the obligations, however minute, which, according to that law, flow from the contract, whichever party has a right to insist upon them. And referring to the definition of some of those obligations, as given with somewhat prurient particularity in certain Mahomedan treatises, the learned Counsel argued that it was impossible for Courts constituted like those of British India to exercise such a jurisdiction. It may be admitted that the Courts of India would

properly decline to entertain such questions; although, amongst the Wahabees of Central Arabia, or other communities in which the Mahomedan Law is observed in its utmost strictness, the Magistrate might, perhaps, take cognizance of them. But this admission is not decisive of the question. The canonists lay down many things concerning the relative duties of man and wife which the Courts Christian, at least of our country, feel compelled to leave as duties of imperfect obligation. They do not, therefore, refuse to enforce the broad duty of cohabitation. In the words of Lord Stowell, quoted by Mr. Attorney-General, "They are content to take the wife to the husband's door, and to leave her there."

But how does this question stand upon the authorities? In the case of *Ardaseer Cursetjee* v. *Perozeboye*,* 6 Moore's Indian Appeals 390, in which it was here decided that a suit for restitution of conjugal rights between Parsees, and, *à fortiori*, one between Hindoos and Mahomedans, did not lie on the ecclesiastical side of the Presidency Courts. Dr. Lushington, in delivering the judgment of the Committee, says: "The Civil Courts in India can bend their administration of justice to the laws of the various suitors who seek their aid. They can administer Mahomedan Law to Mahomedans, Hindoo Law to Hindoos; but the Ecclesiastical Law has no such flexibility." And, after ruling that the Court below had not the jurisdiction which it claimed, he adds: "But we should much regret if there were no Court and no law whereby a remedy could be administered to the evils which must be incidental to married life amongst them (the Parsees). We do not pretend to know what may be the duties and obligations attending upon the matrimonial union between the Parsees, nor what remedies may exist for the violation of them; but we conceive that there must be some laws, or some customs having the effect of laws, which apply to the married state of persons of this description." And he afterwards observes: "Such remedies (the remedies afforded by their own usages) we conceive that the Supreme Court on the civil side might administer; or at least remedies as nearly approaching to them as circumstances would allow." It may be said that those dicta, though proceeding from so high an authority, are extra-judicial, and merely indicate an opinion that suits of this kind might possibly be entertained by the Civil Courts of India. The Attorney-General, however, has cited positive authorities which support the jurisdiction, and show the principles upon which it ought to be exercised. These are the cases of *Mussamut Hingu*, decided in 1832, and reported in 6 S. D. A. Reps., p. 200; of *Mussamut Ameena*, decided in 1841, and reported 7 S. D. Reps., p. 27; and the case of *Sona Chand Bibi*, decided in 1848, and reported in the Reports of the Bengal Sudder Court for that year at p. 795. In the last of these cases the suit was dismissed on the ground that the marriage was not proved, but the jurisdiction was not questioned. The second case may be distinguishable from the present on the ground that the wife was of tender years, and under the control of the co-defendants in the suit. But, in the first case, the wife was clearly of full age, and a free agent. The co-defendant in the suit, though charged with harbouring her, had little more control over her than the co-defendant in the present case had over the respondent. The suit, which went through three Courts, was resisted by the wife on grounds personal to herself; and it was finally decided that, according to the Mahomedan Law, by which the question was to be decided, the plaintiff had a right to the possession of his wife, and she was compelled to return to him. It does not very clearly appear by what process the judgment in this case, or in that of Mussamut Ameena, was to be enforced. From some passages it might be inferred that, in the event of disobedience, the wife was to be given bodily into her husband's hands. Whether this could be done under the new Act of Procedure, which now regulates the Civil Courts of India, may well be doubted. Disobedience to the order of a Court directing the wife to return to cohabitation would seem to fall within the 200th Section of the Code, and to be enforceable only by imprisonment, or attachment of property, or both.

Upon authority, then, as well as principle, their Lordships have no doubt that a Mussulman husband may institute a suit in the Civil Courts of India, for a declaration of his right to the possession of his wife, and for a sentence that she return to cohabitation; and that that suit must be determined according to the principles of the Mahomedan Law. The latter proposition follows, not merely from the imperative words of Regulation IV. of 1793, Section 15, but from the nature of the thing. For since the rights and duties resulting from the contract of

* *See* Weekly Reporter, Vol. IV., page 91.

marriage vary in different communities; so, especially in India, where there is no general marriage-law, they can be only ascertained by reference to the particular law of the contracting parties.

The matrimonial law of the Mahomedans, like that of every ancient community, favors the stronger sex. The husband can dissolve the tie at his will, subject to the condition of paying the wife her dower and other allowances; but she cannot separate herself from him, except under the arrangement called khoola, which is made upon terms to which both are assenting parties, and operates in law as the divorce of the wife by the husband. It cannot, we think, be doubted that, whilst the tie subsists, his power over her is considerable. The cases already cited are to the effect that he may compel her to return to his house if she has left it. We do not find this expressed in the Hedayah, which speaks only of her forfeiting her right to maintenance if she be disobedient or refractory, or go abroad without her husband's consent, until she return and make submission (vol. i., p. 394); but it seems implied throughout that she, from the time she enters his house, is under restraint, and can only leave it legitimately by his permission, or upon a legal divorce or separation made with his consent. In fact, the principle of keeping a man's harem in seclusion and under his control is so essential a part of the framework of oriental society that it is naturally assumed and taken for granted by a Mussulman expounder of the law.

On the other hand, the law assures to the wife considerable rights as against her husband. She may insist on maintenance according to her rank and his ability; and, if he fails to give it, she may enforce that right before the Kazee (1 Hedayah, Book IV., Chap. XV., Section 1, pp. 393, 394). If he has power to keep her within the zenanah, and to prevent access to her, subject to certain qualifications, he is bound to provide her with a separate apartment, exclusively appropriated to her use (p. 402). As to personal violence, there are certainly passages in the Hedayah which, founded on a text in the Koran, imply that the husband may use it for correction; but this right of corporal chastisement is expressly said to "be restricted to the condition of safety;" and it may be questioned whether these authorities go the full length of the Futwah at p. 14 of the record (*see* Hedayah, Vol. II., pp. 75-81). The Mahomedan Law, on question of what is legal cruelty betwe man and wife, would probably not dif materially from our own, of which one the most recent expositions is the follo ing: "There must be actual violence such a character as to endanger perso health or safety; or there must be a reaso able apprehension of it. The Court, Lord Stowell said, has never been drive off this ground."

If, however, it be granted that, accor ing to Mahomedan Law, the husband ma sue to enforce his right to the custod of his wife's person; and that, if h defence be cruelty, she must prove cruel of the kind just described, it by no mea follows that she has not other defences the suit which would not be admitted by o Ecclesiastical Courts in a *suit for the r* stitution of conjugal rights. The marriag tie amongst Mahomedans is not so indi soluble as it is amongst Christians. Th Mahomedan wife, as has been shown abov has rights which the Christian—or at lea the English—wife has not against her hu band. An Indian Court might well adm defences founded on the violation of thos rights, and either refuse its assistance the husband altogether, or grant it onl upon terms of his securing the wife in th enjoyment of her personal safety and h other legal rights; or it might, on a sufficie case, exercise that jurisdiction which attributed to the Kazee by the Futwah p. 32 of the record (if the law, indee warrants such a jurisdiction), of selecting proper place of residence for the wife, othe than her husband's house.

Enough has been said to show that, i their Lordships' opinion, the determinatio of any suit of this kind requires careful cor sideration of the Mahomedan Law, as well a strict proof of the facts to which it is to b applied. Has the present case been so trie and determined in the Courts below? The Lordships are constrained to say that thi has not been the case. In the first plac they think that the *ratio decidendi* adopte by the Judges of both Courts is erroneou The Principal Sudder Ameen held that op pression had been proved (the correctness o his conclusion will be hereafter considered He did not then proceed to consider whethe the oppression was so far beyond the bound of marital authority, under the Mahomeda Law, as to constitute an answer to the sui He seemed to think that oppression onc

oved, the case was taken out of the ahomedan Law, and was to be decided on hat the Court, upon general principles, ight deem to be expedient for the security the wife's person. He then proceeded argue, apparently without the slightest undation of proof, that the wife, having een ill-treated, had probably been unfaith-il; and that, if she were restored to her usband, he was not unlikely to revenge imself by taking her life. He afterwards rgued, with more reason, upon the danger f restoring her to one who had been ecreed liable to pay her a very large sum f money.

The facts upon which the Judges of the igh Court proceeded were that the Ma-istrate had seen fit to release the respond-nt from her husband's house, and that a ecree had passed against him for having nade away with her property for a large um, of which they overstated the amount. They appear to have considered that, ac-ording to the Mahomedan Law, these facts were not an answer to the suit; and they hen say: "This being so, are we required o decide this case in conformity with the principles of the Mahomedan Law? Are we to compel the defendant to return to her husband, convinced as we are that she should not be forced to return? If, under the Mahomedan Law, no wife can separate herself from her husband under any circumstances whatsoever, the law is clearly repugnant to natural justice, and we are not bound to follow it. The Mahomedan Law giving no relief to a woman, be the conduct of the husband ever so bad, it is a case to be disposed of by equity and good conscience. And on these principles we have no hesitation in saying that the grounds upon which the defendant has separated from her husband justify her in that step," &c.

The passages just quoted, if understood in their literal sense, imply that cases of this kind are to be decided without reference to the Mahomedan Law, but according to what is termed equity and good conscience, *i. e.*, according to that which the Judge may think the principles of natural justice require to be done in the particular case.

Their Lordships most emphatically dissent from that conclusion. It is, in their opinion, opposed to the whole policy of the law in British India, and particularly to the enactment already referred to (Regulation IV. of 1793, Section 15), which directs that, in suits regarding marriage and caste, and all religious usages and institutions, the Mahomedan Laws with respect to Mahomedans, and the Hindoo Laws with regard to Hindoos, are to be considered as the general rules by which Judges are to form their decisions; and they can conceive nothing more likely to give just alarm to the Mahomedan community than to learn by a judicial decision that their law, the application of which has been thus secured to them, is to be overridden upon a question which so materially concerns their domestic relations. The Judges were not dealing with a case in which the Mahomedan Law was in plain conflict with the general municipal law or with the requirements of a more advanced and civilized society—as, for instance, if a Mussulman had insisted on the right to slay his wife taken in adultery. In the reports of our Ecclesiastical Courts there is no lack of cases in which a humane man, judging according to his own sense of what is just and fair, without reference to positive law, would let the wife go free; and yet the proof falling short of legal cruelty, the Judge has felt constrained to order her to return to her husband.

In what they have just said their Lordships must be taken to object only to the general supersession of the Mahomedan Law as the *ratio decidendi* in cases of this description, which seems to them to be implied in the judgments under review.

They do not mean to lay down that it was sufficient for the decision of the case to show that, according to the Mahomedan Law, the husband has a right to the custody of his wife, or that there was no answer to his suit unless it could be shown that the wife had been separated from him either by Talâk or Khoola, either of which would dissolve the *vinculum*. This assumption, which seems to have been made by the Judges of the High Court, is, their Lordships think, erroneous. It seems to them clear that, if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage-contract imposes on him for the benefit of the wife might, if properly proved, afford good grounds for refusing to him the assistance of the Court. And, as their Lordships have already intimated, there may be cases in which the Court would qualify its interference by imposing terms on the husband. But all these are questions to be carefully considered, and considered with some reference to Mahomedan Law.

Before, however, any of these principles can be applied, the facts to which they are to be applied must be established by legal proof; and this, their Lordships are of opinion, has not been done in the present case. Besides the evidence on the futile and now abandoned issue about freemasonry, there is little evidence in the cause.

The Zillah Judge's judgment in the "property-suit" was put in evidence. The fact, therefore, that the appellant had been decreed liable to make good a large sum of money to the respondent in respect of the property which he had misappropriated was established; but the proof of personal cruelty rests almost entirely on the proceeding of the Magistrate. That proceeding is neither one *inter partes* nor even a conviction of the appellant upon a criminal charge. It was treated by the Nizamut Adawlut (Record, p. 33) as being the record of an act done by a police-officer, and not the judicial proceeding of a Magistrate. It is, therefore, difficult to see how, in strictness, it can be evidence at all against the appellant; but at most it proves only that the Magistrate set the lady free from what he considered improper restraint.

To establish a case of cruelty as a defence to the suit, the respondent might have called the Magistrate, if then still in India, to speak to the state in which he found her when he set her free. She might also have given such evidence of her treatment as she adduced in the "property-suit," but which, whatever were her reasons for it, she did not adduce in this suit. And, lastly, she might have given her own testimony, which it is most desirable to have on such an issue. She has failed to do any of these things; and it is impossible to say that the Courts below had before them, in proof, the facts from which any Court could infer that a defence on the ground of cruelty had been established.

From what has been said, it must be obvious that their Lordships are not prepared to affirm the decrees under appeal in this suit. They do not, however, feel themselves in a condition to make a final decree, which would put an end to this painful litigation. They will not visit upon the respondent the mismanagement of her cause by sending her back at once to her husband. Enough has been shown to render it doubtful whether she can be restored to his zenanah with safety, at least whilst the relation of debtor and creditor continues to subsist between them, unless proper security for her protection is taken. It may ultimately out that she ought not to be sent back a Their Lordships must, therefore, unwill recommend that this cause be remitted t High Court, with directions to put the s in a course of re-trial, and with powe necessary, to amend the issues or frame ones. If cruelty be relied upon as a defe there should be a distinct issue as to the of cruelty.

Their Lordships, however, cannot suggesting, for the consideration of the ties, that it is for the interest, the happi and the respectability of both to settl questions still open between them by cable arrangement rather than by fu litigation. They have surely friends might effect such an arrangement betv them.

Their Lordships have now only to capitulate the several recommendations w they will humbly make to Her Majest these appeals. These are :—

1st.—That the appeal of the appel Buzloor Ruheem, in the "property-suit," dismissed, except so far as it relates t liability to pay the mesne-profits of shares in the Dum-Dum and Narain Mu gardens jointly with the appellant Ju nath Bose; that the appeal of the last-na appellant in the same suit be allowed; that the decree of the High Court be am ed by omitting so much thereof as relat the shares in those gardens, and by direc in lieu thereof, that that portion of th spondent's claim be dismissed with and that the said decree be in all othe spects confirmed.

2ndly.—That in suit No. 256 of 186; decree of the High Court be reversed that, in lieu thereof, the decree o Zillah Judge dismissing the respon suit, with costs, be affirmed, with the of the appeal in the High Court.

3rdly.—That in the "restitution" the decrees of the High Court and Principal Sudder Ameen be reverse the cause be remitted to the High with directions to have the same re-t fresh evidence, and with power to am issues, or to frame new issues, if the see fit to do so.

That the respondent should pay th of the appeals in suit No. 256 of 18 in the "restitution-suit." That she also pay the costs of the appeal of Jud Bose in the "property-suit." An the appellant, Buzloor Ruheem, shou the costs of his appeal in that suit.

The 17th July 1867.

Present:

The Master of the Rolls, Sir James W. Colvile, Sir Richard Torin Kindersley, and Sir Lawrence Peel.

Mortgage—Deposit by Mortgagee (to save estate from sale for arrears of revenue)—Section 9, Act I. of 1845—Hindoo Widow.

On Appeal from the High Court at Calcutta.

Nugender Chunder Ghose and others

versus

Sreemutty Dossee and others.

An estate, mortgaged, was about to be sold for arrears of Government revenue, when it was saved from sale by the mortgagee depositing a sum sufficient to discharge the revenue. The mortgagee brought a suit against the person in possession of the talook, a Hindoo lady, widow of the original mortgagor, seeking under Section 9, Act I. of 1845, to obtain re-payment from her personally of the money paid to save the sale of the talook, not making the reversioners defendants, and not praying that the talook in its entirety might be sold to pay the amount due. A decree was given in that suit to the mortgagee. On execution of that decree, the reversioners intervened.

HELD that the mortgagee and those claiming under him have no charge on the estate, and are not entitled to have it sold in its entirety to pay the amount which was paid in to stop the sale of the estate. The action brought under Section 9, Act I. of 1845, was only a personal action, and the decree gave no remedy against the land, the sale of which for arrears of revenue had been stopped by the deposit. In such a suit the question is, not whether the person who pays the arrears acquires thereby a charge on the talook which he saves from sale, but whether he seeks to enforce that right: he must do so in a suit properly framed for that purpose, and not merely in a suit which is confined to a personal remedy against the person in possession of the talook. If the person who so pays the arrears of rent seek re-payment only, under the Section and law cited, as against the person in possession of the talook, who has only a limited interest therein, and confines his suit to that object, the decree so obtained against the person in possession can only be made effectual against the property of that person, including such interest as he had in the talook. This ruling does not affect the general doctrine that, in a suit brought by a third person, the object of which is to recover or to charge an estate of which a Hindoo widow is the proprietress, she will, as defendant, represent and protect the estate, as well in respect of her own as of the reversionary interest.

THIS is an appeal from a decree of the High Court of Judicature at Fort William of 15th December 1862, reversing the decision of the Zillah Judge. The question is whether, under the circumstances set forth in these papers, the appellant is entitled to have a lien upon the talook described as Turruff Kalikapore, recorded as No. 109, as against the respondents, who are interested in that talook, in respect of the arrears of revenue due from that talook, which have been paid by the appellant.

The respondents do not appear, and it is therefore incumbent on the Court to examine closely whether the appellant has made out his case, and has established his right to have the talook sold to discharge that amount.

The facts are shortly as follows: Hurrololl Mitter had become the owner of this talook by purchase previously to the year 1842.

In May 1842 he executed a mortgage in due form to Nobokisto Singh to secure 43,340 rupees with interest at 12 per cent. per annum.

Hurrololl Mitter, the mortgagor, died, leaving Sreemutty Kaminee Dossee, his widow, surviving him. She had no child, and after his death continued in possession of his talook as his widow.

Hurrololl Mitter, however, had had a daughter by a previous marriage, the respondent, Sreemutty Dossee, who is the mother of two infant sons, the grandsons of the mortgagor, Hurrololl Mitter. Nobokisto Singh, the mortgagee, died shortly afterwards, and left Sreemutty Gourmonee Dossee, his widow, who, in that character, became entitled to all the rights of her husband as mortgagee of this talook.

The revenue due to the Government for this talook was not paid by the widow of Hurrololl Mitter, the mortgagor, and, in December 1849, 10,317 rupees were due in respect of such revenue.

In consequence of the non-payment of this arrear, the talook would have been put up for sale by the Government Collector, and would have been sold according to Act I. of 1835, discharged from the mortgage and from all other incumbrances. In order to save the mortgage and the talook, Gourmonee Dossee borrowed from Anundonarain Ghose, on the last day for payment of the revenue, which was the 28th of December 1849, the amount necessary to discharge the revenue, *viz.*, 10.317 rupees, and he deposited that amount with the Collector just before sunset on that day.

The appellants are two of the sons and heirs of Anundonarain Ghose, who is dead, claiming under a transfer made to one of them by Gourmonee Dossee of her rights to and interests in the talook, under her decree against Kaminee Dossee of the 29th March 1853, which will be afterwards mentioned; and accordingly they have the same rights and powers which she possessed as regards this talook under that decree, and not further. The question there is the same which is raised on this appeal, *viz.*, whether the appellants are entitled to a charge on this talook, and to have it sold in its entirety to pay the amount of the money so paid to the Government Collector in December 1849.

For the purpose of determining this question, it is desirable to consider what, after such payments, the rights of Gourmonee Dossee were against Kaminee Dossee and the talook itself, and the course she adopted.

Considering that the payment of the revenue by the mortgagee will prevent the talook from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the talook as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the talook as against all persons interested therein for the amount of the money so paid. But their Lordships are of opinion that this is not the form in which the question comes before them, and that what they have to decide is not whether such a charge originally existed, or whether it does now subsist, but whether the appellants can enforce such a charge in the present suit. For this purpose it is necessary to refer to the steps taken by Gourmonee Dossee to obtain payment. There were two courses open to her: she might have instituted a suit to enforce the mortgage, and to tack to the mortgage the amount of the revenue paid by her to save the estate, and to have the estate sold to pay that amount; or she might proceed under the 9th Section of Act No. I. of 1845. She might probably have united both these objects in one plaint; but the course which she did adopt was to sue the widow Kaminee alone, under the 9th Section of the Act No. I. of 1845, not making the persons interested in the reversion after her decease party-defendants to that suit, and not praying that the talook in its entirety might be sold to pay the amount due to her.

The plaint is set forth in page 7; it do not raise any claim against the estate i self, the claim is against the widow Kamine personally. It states, *first*, that the fema defendant, for the purpose of doing aw with the mortgage-loan, threw the talo into arrears, and was endeavoring to hav it sold; *secondly*, that the female plaintif for the purpose of protecting her right and preserving the talook from sale, bo rowed the money from the father of th present appellants, and caused the paymen to be made. The words of the plaint whic follow are these: "The female plaintif has paid the money which the female defend ant ought to have repaid. The plaintif has frequently called upon her for it, but n payment at all is made up to this time; therefore, after stating the amount, the plain proceeds thus: "For the recovery of whic amount this suit is instituted against th female defendant, and plaintiff prays tha the amount claimed, together with the interest thereof, due to the date of liquida tion, be paid to her." The answer to th plaintiff merely contests the debt. It con tends that no money was due on the mor gage, and that this would appear to be th case in a suit which had been instituted b the defendant against the plaintiff, seekin for an account against the plaintiff as th executrix of the husband of the defendant It is solely an answer directed to meet t personal claim, and accordingly the repl is to the same point, and relies on the gt Section of Act I. of the year 1845. That Sec tion is to this effect:—

"It is hereby enacted that the Collecto shall, at any time before sunset of the lates day of payment, receive, as a deposit from any party not being a proprietor of the estate in arrear, the amount of the arrea of revenue due from it, to be carried to the credit of the said estate at sunset, a aforesaid, unless before that time the arrears shall have been liquidated by a proprieto of the estate. And in case the party s depositing, whose money shall have bee credited to the estate in the manner afore said, shall be a plaintiff in a suit pending before a Court of Justice for the possessio of the sum, or any part thereof, it shall be competent for the Judge of the Zillah in which such estate is situated to order the said party to be put into temporary possession of the said estate, subject to the rules in force for taking security in the case o appellants and defendants. And, if the party depositing, whose money shall have

een credited as aforesaid, shall prove before competent Civil Court that the deposit as made in order to protect an interest of ie said party, which would have been endangered or damaged by the sale of the state, he shall be entitled to recover the mount of the deposit with interest from ie proprietor of the said estate" (Act o. I. of 1845, Section 9).

This Section, therefore, clearly authorizes ie personal action, but it gives no remedy gainst the land, which it leaves to the then xisting law.

The decree which was made in this suit is, s might be expected, no decree against the ind, but it is a general decree against the efendant Kaminee. It is in these words: Let the female plaintiff get the money laimed and interest due from date of suit to ay of payment, and costs, together with nterest, according to practice, from the emale defendant. Costs, on the part of the emale defendant, are charged to her."

This decision was appealed from and afirmed; but the only point which seems to have een argued and decided in that suit, either n the original hearing or on the appeal, was whether, while the other suit already menioned was pending for an account between he same parties, and in which Kaminee Dossee, defendant in this suit, claims a large alance to be due to her from Gourmonee Dossee, the plaintiff in the suit, which is the oundation of the present proceedings, plaintiff, as mortgagee, before the fact that anything was due to her had been ascertained, had such an interest in the talook as entitled her to pay the arrears of the revenue. If she had, it followed as of course that, under the 9th Section of the Act I. of 1845 already mentioned, she could recover the amount in the suit in question.

Shortly after this, Gourmonee Dossee assigned the decree and all rights under it to Girenderchunder Ghose, the son of Anundonarain Ghose, in consideration of the money lent to discharge the arrears, in whose place subsequently the appellants, the sons of Anundonarain, were substituted, and who have all the rights that Gourmonee Dossee possessed.

When execution was sought to be enforced against Kaminee Dossee by a sale of the whole talook, the respondent Sreemutty Dossee, the daughter of Hurrololl Mitter, and the mother of his two grandsons, intervened to prevent the sale of the entirety, insisting that, as Kaminee Dossee was a childless widow, the son of Sreemutty Dossee, who was then a minor, had a reversionary interest in the talook, which could not be sold to pay a personal debt of Kaminee Dossee. When the intervention took place, it appears that then, for the first time, the holder of the decree raised the claim that, as the talook in its entirety had been saved from sale by the payment of the arrears of the revenue, the talook in its entirety was liable to be sold in order to obtain repayment of that amount.

This question was brought before the Principal Sudder Ameen in March 1856.

He was of opinion that, under that decree, the claim could not be maintained. He refers to a case in the Sudder Dewanny Adawlut, a decision of 16th May 1841, which determines that a decree against a Hindoo widow cannot be executed against the estate of her deceased husband, except when it is clearly specified in the decree that the estate is liable for it. The case, when referred to, fully bears out this construction. The words of the judgment are these: "The decree is against *B* for herself—not against *B* as guardian of *C*, then a minor. *B* had only a life-estate as widow, and the family-property is not liable to sale for the personal debts. Whether this was originally a personal debt, has not been judicially determined. But the decree, as it stands, is against *B* personally, and can issue only against her and her heirs. *C* is not her heir, and the family-property is not her property, nor can that property be held liable till a decree be given for it." (Rajah Hurrendronarain Roy, p. 8.)

The result of this decision was, that the application to make the talook generally liable to pay the debt was refused, on the ground that the question could not be taken into consideration in an execution-case, but that the question ought to be determined in a civil action. This order was affirmed on appeal. Shortly after this, the present appellants were substituted for Girenderchunder Ghose; and thereupon, in August 1859, the suit was instituted on which the present appeal has arisen. It was instituted by George Smoult Fagan, who had been intermediately appointed receiver of the estate of Anundonarain Ghose, deceased. The plaint in this suit is set out in page 5 of Appendix in the following terms:—

"The particulars of the case are these:

"The defendant Gourmonee Dossee borrowed a sum of money from the estate of

Anundonarain Ghose, deceased, to pay the rent of talook No. 109, Turruff Kalikapore and others, as per the touzee of the Collectorate of this zillah, the annual sudder jumma of which is 25,730-3¼ rupees, for the protection of her interest as mortgagee of the talook. For the recovery of the said sum of money, she obtained a decree from this Court in suit No. 97 of 1851 against the defendant Kaminee Dossee, which decree the decree-holder Gourmonee transferred to Govind Chunder Ghose, the then receiver to the estate of Anundonarain Ghose, under a deed of conveyance executed on the 17th February 1855, in lieu of the money due from her to the said estate. When, consequent on the execution of the decree by the said receiver, a proclamation for the sale of the talook was issued, objections were raised by Sreemutty Dossee and the fictitious putneedars, defendants, whereupon, by a summary order passed on the 18th of March 1856, the sale of the talook was stayed. Hence has arisen the cause of this suit. I, as the present receiver to the estate of Anundonarain Ghose, bring this suit to recover the amount of the said decree, together with interest and costs according to the scale below furnished."

But this plaint does not seek to obtain a determination that the money paid for the arrears of the revenue constituted a charge upon the talook: all that it does is to constitute a suit to recover the amount of the decree with interest and costs, and to have the talook sold for that purpose. The manner in which this is put by the Judge of the Civil Court is that the suit is, by the agreement of all parties, wholly contingent on the decree obtained in the first suit. He states that the decree "was not one in restriction of the remedies open to the plaintiff, so as to confine the decree-holder to remedies personal to Kaminee Dossee; she was in possession of the estate. The action was brought against her in that character and capacity, and the law makes the proprietary interest responsible for any sums advanced to protect an interest in the estate. The decree being passed upon the recitals in the declaration, that cannot now be impeached upon statements that no mortgage existed; we must take the fact, as found, the case having gone to decree against Kaminee, as the party in possession of the estate." (Appendix, page 144.)

The Judge then proceeds, after showing that the action was one, not merely personal against Kaminee, but that it also bound her, in her character as possessor, to answer the issues in favor of the plaintiff with costs, as between the plaintiff and Kaminee Dossee and Sreemutty Dossee. From the decree, an appeal was preferred to the High Court of Judicature, when, on the 13th December 1862, a decree was pronounced, reversing the decision of the Court below. It is important to observe that, in the opinion of the Judges of the High Court, they had only to decide the question, whether, by payment of the rent in arrear, the person who had such an interest in the talook, as to entitle him to pay the arrear, and who thereby saved the talook from being sold, did not thereby acquire a lien or charge on the talook to the extent of the money so paid and interest thereon; but that the question they had to decide was simply and merely whether the equity could be enforced in a suit brought under the provisions of Section 9 of Act I. of 1845, which was confined to the objects authorized by that Section, and which did not proceed against the persons who had an interest in the property in succession after the death of the widow in possession. This will appear plain by the passage in the judgment at the bottom of page 176, and top of page 177, which is to this effect, *viz.*: "The only point which we have to determine in this appeal is whether, as the decree in the suit brought against Kaminee Dossee by Gourmonee Dossee for the recovery of a sum of money paid to protect her own interest as mortgagee, and to save the estate on which she held the mortgage from sale, though personal in its terms against Kaminee Dossee does or does not, under Section 9, Act I. of 1845, give, to use the Judge's terms, to the decree-holder a statutory lien on the estate. Were the case one of first impression, we should even then have little hesitation, looking to the plain terms of the law, which simply gives a right of action against the proprietors of the estate in declaring that the decree in a suit brought under the Section of the law above cited is only a personal one and gives no equitable lien on the estate to the decree-holder, so that the property itself in the hands of the person on whose account the payment was made, or any purchaser from him, is liable for the amount decreed."

They proceed to point out a distinction between the case cited by the respondent in that appeal and the present case, and then decide that the decree against Kaminee Dossee was a personal one against her, and that, consequently, the action of the Court in execution must be confined to her interest

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her husband's interest in the estate, and t the rights of Kaminee's husband in the ıte, or the portion of the estate upon which equitable lien was acquired, cannot be ught to sale. They, therefore, reverse the ision of the Court below, and allow the eal of Sreemutty Dossee with costs. on the fullest consideration that their dships have been able to give to this e, they are of opinion the Judges of the h Court came to a correct conclusion to the construction of Section 9 of Act I. 1845, and the decision of the High Court correct, and ought to be affirmed.

They repeat that it is not, in their opinion, question whether the person who pays arrear of the rent does not acquire reby a charge on the talook which he es from sale, but whether, if he seek to force that right, he must not do so in a t properly framed for that purpose, and merely in a suit which is confined to a sonal remedy against the person in session of the talook. If the person who pays the arrears of rent seek repayment ly under the 9th Section of Act I. of 45, as against the person in possession of talook, who has but a limited interest rein, and confines his suit to that object, ir Lordships concur with the opinion of High Court that the decree so obtained inst the person in possession can only be de effectual against the property of that rson, including such interest as she had the talook.

That this was the character of the suit this case originally, is shown by the eadings in the case, and by the observan of the Zillah Judge in the passage eady cited.

That the present suit, in which this apal is presented, was only one supplemental to the original suit, and brought to enforce and extend the decree so obtained, is also shown by the consideration of the plaint itself, and observations already cited of the Zillah Judge in pronouncing his decree, which fact is confirmed by the observation of the Judges in the High Court. Their Lordships think that it is impossible for them, in a case where the respondents do not appear, to upset a decision of the High Court which, in substance, only affirms that an action brought under Section 9 of Act I., 1845, is only a personal action, and that, in an action which was personal against Kaminee Dossee, as the possessor of the talook, only her property and her interest in the talook can be affected, and that an equity which the plaintiff possessed, and which she might have enforced against the owners in reversion also, cannot be enforced against them in a suit brought to extend and enforce a personal decree obtained against the possessor of the limited interest.

Their Lordships wish it to be understood that they leave unimpaired the general rule that, in a suit brought by a third person, the object of which is to recover, or to charge an estate of which a Hindu widow is the proprietress, she will, as defendant, represent and protect the estate, as well in respect of her own as of the reversionary interest. In the present case she is charged by the plaintiffs with having sought to destroy the estate by causing it to be sold for arrears of revenue. If such a charge be true, the reversioners are entitled to recoup out of her life-profits the money which is advanced to avert a sale, if they redeem, as they are entitled to do, the actual salvor; and it would be obviously inequitable for a person with such knowledge of the dealings of the proprietress, determining to salve the estate, to seek indirectly its destruction by a sale of the whole estate under an ordinary execution, without

giving the reversioners the means of protecting their interest by making them parties to a suit the object of which, by a mortgagee who advances to save the estate, should properly be to have an additional charge declared in his favor on it, subject to redemption, and, in default only of redemption, seeking a sale.

Their Lordships, therefore, will humbly advise Her Majesty that the appeal ought to be dismissed.

The 17th July 1867.

Present:

The Master of the Rolls, Sir James W. Colvile, Sir Richard Torin Kindersley, and Sir Lawrence Peel.

Mooktearnamah (Execution of)—Absence of legal proof.

On Appeal from the High Court at Calcutta.

Seetul Pershad

versus

Mussamut Doolhin Badam Konwur.

The issue being as to whether a certain mooktearnamah, which purported to have been signed by the respondent, was valid or not, the validity of the mooktearnamah was pronounced against, as there was no legal proof of its execution, and the absence of legal proof was not compensated by any legitimate inference arising out of or by any of the facts disclosed by the other parts of the case, the whole of the transactions relative to the execution thereof being of very questionable character.

THIS is an appeal from a decree of the High Court of Judicature at Calcutta, which reversed the decision of the Civil Court of Shahabad. The question to be decided in this case is the validity or invalidity of a mooktearnamah, appearing to have been executed by the respondent in favor of Hazaree Lall. The case, as stated by the appellant, is to this effect:—

Five brothers, of the name of Rajah Singh, had been owners of a talook in the zillah of Shahabad, called talook Roopas. One of them, Kalee Pershad Singh, died leaving surviving him the respondent Doolhin Badam Konwur, his widow.

Kishen Pershad Singh, one of the surviving brothers, was the manager.

The Rajah of Doomrao, who was connected with the family, the respondent being his sister-in-law, obtained a decree against the co-sharers in the talook for money borrowed from him by Kishen Pershad Singh to pay the revenue in arrear. This decree bore date 23rd December 1859. Before 1860 the appellant Seetul Pershad had obtained a decree in like manner against the co-sharers of the talook, and another creditor, named Ram Pertab Singh, had obtained a third decree. No steps had been taken to enforce these decrees until 1866. In the early part of that year the Rajah of Doomrao obtained an order for the sale of the talook to satisfy his decree; but prior to the sale he purchased the two other decrees obtained against the co-sharers of the talook.

The talook was sold on the 2nd July 1866, and the Rajah of Doomrao was the purchaser at the sum of 64,000 rupees. The bill upon the appellant alleges that an agreement took place between the respondent Badam Konwur and the Rajah of Doomrao, by which she was to be put into possession of the talook in the following manner, viz. That the respondent Badam Konwur should execute the mooktearnamah in question appointing Hazaree Lall, who was a servant of hers, her mooktear, to borrow 1,80,

ees from the appellant, to be paid to the
h of Doomrao; that thereupon the
h was to execute an utlanamah of the
ok in favor of the respondent; that then
zaree Lal was to execute a kistbundee, or
alment-bond, on the part of the respond-
, and to deliver this to Seetul Pershad,
appellant; and, finally, that a farming
ah, on the part of the respondent, was
e executed in favor of Mussamut Dool-
Champa Konwur, at a rent of 19,000
ees per annum for forty-six years, of
ch rent 14,725 rupees were to be applied
ayment of the Government revenue, and
00 rupees for the liquidation of the
cipal amount of the instalment-debt.
e total amount of this is 18,725 rupees,
ch would leave a balance of 275 rupees
the respondent.

The appellant further alleges that, upon
arrangement being come to, and for the
pose of carrying it into execution, the
e instruments were executed, *viz.*, the
of the talook to the respondent, the
ow; the lease to the respondent,
ampa; and the kistbundee, or instalment-
d, in favor of the appellant, and that the
ount of 1,80,000 rupees was paid to the
jah of Doomrao, or the amount was ac-
nted for to him by Seetul Pershad, who
ed as a general banker, and was also the
surer of the Rajah of Doomrao.

The appellant further alleges that Champa
nwur, the lessee, entered into possession
the talook, paid the first monthly instal-
nt to the appellant, but paid nothing
re; thereupon the appellant paid the
vernment revenue, and instituted the
t to recover against the respondent the
n of 1,98,000 rupees for principal and
erest on the debt due to him, and also
amount paid by him for Government
venue, with interest. Such is the account
the transaction given by the appellant,
d sought to be established by the evidence
oduced. The respondent denied that she
r granted or executed any mooktear-
mah to Hazaree Lall, or to any other
rson. Whether she had or had not execu-
d this mooktearnamah was the first, and,
deed, the only material issue settled for
ljudication in this case.

In support of the appellant's case, the in-
rument itself was produced, purporting to
signed by the respondent, and to be attest-
d by three witnesses, Bhojawun Singh,
looghoonath Singh, and Baboo Hurrechur-
hurn Singh, and to be signed, sealed,
and registered by the Khazi of Chainpoor. The appellant called as a witness the Khazi himself, from whose deposition it appears that the instrument was brought to him by Hurrechurchurn Singh, ready executed and attested by Bhojawun Singh and Rooghoonath Singh, both of whom accompanied him on that occasion. The Khazi deposes that Hurrechurchurn Singh told him the reasons why the instrument had been executed by the respondent; but he does not state that Hurrechurchurn Singh, or either of the two witnesses who had then attested it, represented that he had been present at the execution of it. The Khazi further deposes that he knew Hurrechurchurn Singh of old, and, therefore, he caused his attestation on the mooktearnamah to be made in his (the Khazi's) presence. Hurrechurchurn Singh, on whose representation the Khazi seems to have relied in registering the instrument, was not produced as a witness in the cause. The appellant alleged that he was kept out of the way intentionally to defeat his (the appellant's) claim, but no evidence was adduced in support of that allegation. Bhojawun Singh, one of the witnesses to the instrument, was summoned as a witness by the appellant; and a person answering to that name appeared before the Civil Court; but he declared that he was unable to read or write, and that he knew nothing about the mooktearnamah. This person having been confronted with the Khazi, the Khazi declared that he was not the witness who had appeared before him. The real witness Bhojawun Singh was not produced.

The remaining witness, Rooghoonath Singh, stated that he could not read or write, and denied that he had attested any mooktearnamah. Steps were taken to confront the Khazi with this witness for the purpose of identifying him, but without success. The appellant says that the witness had absconded to avoid identification. Neither the appellant nor the respondent produced or examined Hazaree Lall, the supposed mooktear. The appellant states that he made every effort to do so, but ineffectually, and he suggests that Hazaree Lall was kept out of the way by the respondent, whose servant he was. It is stated in the judgment in the High Court of Judicature that he was forthcoming after the decision of the case in the Civil Court, but no attempt was made on either side to produce him for examination when the case was heard on appeal.

In the circumstances above stated, the Judge in the Civil Court disregarded the absence of legal proof of the execution of the mooktearnamah by the respondent, and, considering that the rest of the evidence afforded the strongest presumption of its genuineness, gave a decree in full to the appellant. On appeal to the High Court of Judicature, this judgment was reversed, the Court finding that the execution of the mooktearnamah was not proved, and that the absence of legal proof was not compensated by any legitimate inference arising out of, or by any facts disclosed by, the other parts of the case.

With this opinion their Lordships concur. They agree with the learned Judges of the High Court in considering the whole of the transactions relative to the sale and subsequent gift of the talook in respect of which the loan was incurred, as transactions of a very questionable character.

The claim is made for 2 lacs and 9,978 rupees; this amount includes the payments of the Government revenue, yet the property was sold by auction for 64,000 rupees. The Judge in the Civil Court considered the discrepancy in value between 64,000 rupees, the amount of sale, and the 1,80,000 rupees, the amount of the loan, as evidence that the sale was collusive; but their Lordships see no reason to assume that one sum more than the other represents the real value of the talook. The Judges of the High Court considered all this a mere paper-transaction, without any real transfer of property. The following circumstances in the case may be referred to as confirming this view. The decree of the Civil Judge in favour of Seetul Pershad includes the payment of the Government revenue, but the receipts produced are given in the name of Kishen Pershad Singh, the manager of the co-sharers. It appears that no change has been made in the Collector's books, and that Kishen Pershad Singh remains now, as he has heretofore been, the person liable to pay the Government revenue, and to whom the receipts for payment are given. This circumstance affects seriously the argument on which the appellant mainly relied, *viz.*, the fact that the respondent is in the possession of the estate, and that this is not disputed by her; but, if this possession is merely nominal, it is consistent with the view taken by the High Court that the whole matter is nothing more than a paper-transaction, while the actual *bond-fide* possession of the respondent is inconsistent with the absence any change in the books of the Col and with the Government revenue bein paid by Kishen Pershad Singh.

In addition to this, the decree tak consent in 1852; the purchase of thi decrees, one from the appellant, a other from a stranger; the delay in s ing them; the circumstance that Ha Lall was the mooktear of Kishen Pe Singh and of all the co-sharers; th respondent as well as Champa Konw person to whom the lease of the tal granted, are ladies secluded in the z and never appearing in public: all a cumstances which cast a grave suspici the case, and tend to support the sugg of the learned Counsel for the respo which also seems to have been adopt the Judges of the High Court, *viz.*, the whole transaction was a scheme con ed between the Rajah of Doomrao Kishen Pershad Singh, to whom he allied by marriage, to make it appear the estate had been bought by the R and that it did not belong to the Pe Singh family, while the real ownership possession were to remain unaltered.

The mooktearnamah itself is taken registered by the Khazi, and not by English Resident at Agra, as the other were. The witnesses to the instru itself are three, two of them are unab sign their own names, and their attesta is worth next to nothing; the third, Ba Hurrechurchurn Singh, only signed the strument at the request of the Khazi, does not pretend to have been present w the respondent signed. In truth, there no attempt whatever to prove the signat of the respondent herself by any one p sent at the time of such signature.

On the review of all the circumstan of the case, their Lordships concur in opinion expressed by the Judges of High Court of Judicature, that there is legal proof of the execution of the mookte namah, and that the absence of such pro is not compensated by any legitimate infe ences to be drawn from the other facts dis closed in this case. Their Lordships wil therefore, humbly advise Her Majesty dismiss the appeal with costs.

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The 18th July 1867.

Present:

The Master of the Rolls (Lord Romilly), Sir James W. Colvile, Sir Edward Vaughan Williams, Sir Richard Torin Kindersley, and Sir Lawrence Peel.

Will—Mohunt.

On Appeal from the High Court at Calcutta.

Greedharee Doss Mohunt

versus

Nundokishore Doss Mohunt.

D, a mohunt, appointed *L* by will to be his successor and representative in the mohuntship, and as such representative to perform the religious duties in the usual manner; and he further directed *L* to instruct *G* in the Shasters, and when *L* found himself incapable of fulfilling the duties, *L* was to appoint *G* to be mohunt in *L's* place.

The present suit was brought by *G* to recover the mohuntship and the lands belonging thereto. HELD on a construction of the will that it did not give *G* an absolute, positive, unqualified right at any time to the mohuntship, even on the incapacity of *L* to perform the duties of mohunt; that, until *L* became incapable, no trust or duty is suggested; that, even when *L* became incapable, it was no more than a gift in the nature of a precatory trust. HELD also that, on the evidence, *G* had failed to establish *his own title* to be mohunt, and that the present suit was so framed that it could not in it recover the mohuntship *on the mere infirmity of the defendant's title.*

The only law as to mohunts and their offices, &c., is to be found in custom and practice, which is to be proved by testimony.

There cannot be two existing mohunts, and the office cannot be held jointly.

THEIR Lordships do not think it necessary to hear Counsel on behalf of the respondent in this case.

They have come to the conclusion that the decision of the High Court of Judicature is proper to be affirmed by Her Majesty.

It is an appeal from the High Court of Judicature at Fort William, which reversed a decree of the Principal Sudder Ameen of Zillah East Burdwan, which was in favor of the appellant; and the only facts in the case to which their Lordships think it necessary to refer are those which I am about very shortly to state.

It appears that Gopal Doss was the mohunt of the akra, a religious institution wealthily endowed at Rajgunge, in the Zillah Burdwan. In the year 1857, being afflicted with illness, and expecting shortly his dissolution, he made his will. The will is set forth in various places in these proceedings. It is addressed to Ladlee Doss. In it he refers to the illness he was laboring under, and, after referring to the akra of Rajgunge and the subordinate akras, he says:—

"There is no one among my chelas (*that "is*, my disciples) so fit, wise, virtuous, and "leaving (*sic* in record) towards religious "men, that I can entrust him with the per- "formance of those duties so as to protect the "said immoveable and moveable properties, "&c., and perform the religious ceremonies "after my death; consequently, I think it "expedient and necessary to make arrange- "ments during my own life, whereby the said "worship and the entertainments of the "guests, &c., will continue as they now do, "and whereby the properties annexed thereto "may be properly managed."

Then, addressing himself to Ladlee Doss, he says:—

"As you are my gooroo brother (*that is*, "my spiritual), and specially since the time "of my late gooroomohassy and my election "to the guddee, you by your ability, wis- "dom, and virtue and good conduct have "satisfactorily fulfilled the several duties "relating to the akras in your capacity "as adhicarry (head) of the akras, and "you have authority over everything, I "have, therefore, a firm conviction that, if "you are appointed mohunt in my place, "the properties belonging to those several "akras will be properly managed, and the "religious rites which are performed there "will have perfect justice in your hand. "Therefore, of my own free will, and in a "sound state of mind, without any compulsion "and coercion, I execute this my last will, "whereby I make the following promise and "arrangement: If the present sickness "prove, which God forbid, fatal to me, you "will succeed me in my absence in the "guddee as the next mohunt, and have "your own name entered as proprietor "in the records of all those properties in "substitution of mine, and take charge of "all the properties, both real and personal, "belonging to the said akras, and keep "in safe custody the gold and silver "ornaments and plates, and brass uten- "sils belonging to the idols at those "akras, and receive the outstanding debts "due to the akras, and pay the debts due by "them, and, thus representing me every "way, you will perform the religious "duties in the usual way. Of my chelahs

"(disciples) Sreejoot Greedharee Doss is "a little intelligent, but he is of immature "age. If he studies the dhurmo shastro "*(that is,* the religious books) for a short "time, he may become a fit person; therefore, "you shall keep him under you, and in- "struct him in the dhurmo shastro and "other books studied by mohunt. When "you will find yourself incapable of fulfilling "the duties aforesaid, you will appoint the "said Greedharee in your place as mohunt. "You shall not be able to act otherwise. "To this purport I make my will, and after "my death any demand or objection by any "person against it will not be admissible; "but if, by the grace of God, I recover from "illness, then this will shall cease to take "effect, and I shall continue mohunt as I "used to do."

In this case two questions arise on the construction of this will, and another independently of the will itself. The question on the construction of the will is, whether there is an absolute gift of the mohuntship to the appellant Greedharee Doss, as soon as he becomes competent to perform the duties, or whether the gift of the mohuntship is in reversion after the incapacity of Ladlee Doss. The question independent of the will is, whether, if there be such a gift contained in the will, there exists such an authority within the power of a mohunt as to enable him to make such a gift.

Their Lordships are of opinion that the points which depend on the contents of the will itself must be decided against the appellant on the present occasion. They think, in the true construction of the will, that it does not give the appellant an absolute, positive, unqualified right at any time to the mohuntship, even on the incapacity of Ladlee Doss to perform the duties of mohunt. They think, until Ladlee Doss becomes incapable, no trust or duty is suggested, and that, even when Ladlee Doss becomes incapable, it cannot be put higher than Sir Roundell Palmer himself put it, *viz.*, as a gift in the nature of a precatory trust—that is, one requesting Ladlee Doss to perform the wishes of the testator, and to appoint the appellant his successor, provided he found that the incapacity which then existed in the appellant (who was not then of sufficient age to be appointed mohunt), should cease to exist at the time when Ladlee Doss was unable to perform those duties.

It is, therefore, clearly unnecessary f their Lordships to consider the second poi whether, in point of law, a grant of a m huntship can be made by any holder of a office with the superadded obligation imposi on the grantee the necessity of followi the wishes of the grantor, as to the per whom he is to appoint to be his success in that office.

It is to be observed that the only law to these mohunts and their offices, function and duties, is to be found in custom a practice, which is to be proved by tes mony; and no evidence has been adduce before their Lordships to show that any suc appointment has ever been made in reve sion on any former occasion.

The only question, therefore, which the Lordships have to consider on the presen occasion is, whether in this state of circum stances, in the events which have subse quently occurred, the appellant has obtaine any right which can entitle him to b placed in that particular situation on th decease of Ladlee Doss, in the absence o any compliance by him with the wishes o his testator or grantor.

The facts are these: Gopal Doss, af executing his will, died in June 1857, a thereupon Ladlee Doss was installed invested as mohunt; and it is to be obser ed that the other mohunts placed the sa construction upon the will that their Lor ships have placed, by electing him. Ac cordingly, so did the Maharajah, who, chief benefactor and patron, invested h with the full mohuntship, and gave the ticca, or mark of investiture. He not merely appoint Ladlee Doss adhic or agent, which, according to the content of Sir Roundell Palmer and Mr. Le was the extent of his authority. It is pl therefore, that they considered him to entitled to have the full mohuntship, a he was fully invested with the ticca acco ingly.

Mr. Leith has called their Lordships' tention to some evidence which was intend to show that there was a double ticca. W the nature of that double ticca was does very clearly appear. This seems to be cle from all the evidence in this case, as far it has been brought under their Lordshi attention, that there cannot be two exist mohunts, that the office cannot be h jointly, and that, therefore, if there wa double ticca at all, it must have been a ti

f

of the office in reversion after the existence of the incapacity of Ladlee Doss to perform the duties. But the evidence upon that point, and the law adduced upon the subject before their Lordships, fail entirely to satisfy their minds that any such species of investiture was according to the rules and customs of these mohunts, or that any such mohuntship can be given in reversion.

They, therefore, consider that Ladlee Doss was invested as the mohunt of the akra.

This was the view also taken in the Court in India when the suit was instituted in September 1859 by the appellant against Ladlee Doss, insisting that he was entitled to be appointed on the ground that he was then capable, and that his right arose as soon as he was so. He appealed from that decision, and the decision was affirmed.

Mr. Leith.—He withdrew his appeal.

The Master of the Rolls.—Yes, he withdrew the appeal, but not till after the death of Ladlee Doss.

Ladlee Doss died on the 5th of November 1860, and upon his death Nundokishore Doss received the ticca.

Their Lordships are of opinion that it is not necessary for them—nay, more, that it is very undesirable for them, to go into the question of whether the respondent was duly appointed mohunt or not. They are of opinion that that is not the question which they have to determine; because, for the present appellant to succeed in this case, he must succeed by force of his own title, and not by the infirmity of the respondent's title.

Mr. Leith suggested that the mohunt, or any person connected with the establishment of the akra, would have a right to contest the appointment of the respondent as mohunt, and he insists that it has become necessary that that question should be determined. If that be so, their Lordships are of opinion that it must be raised in a suit properly framed for that purpose. Without expressing any opinion upon the point itself, they are of opinion that this is not a suit properly framed for that purpose.

Their Lordships observe also that the Judges of the Court of Appeal, the High Court of Judicature, make use of these expressions, which are strongly confirmatory of this view of the case. "We can understand," they say, "a suit being brought to set aside the election of the defendant, and to order the mohunts to make a new election; but this was not a suit to set aside the election, but to put the plaintiff in possession of the whole estate. So it was in the case cited. It was a suit to recover the office of mohunt, together with the lands attached to it. Supposing we thought the election of the present defendant an improper one, what authority have we to direct a new election?"

This is the view which their Lordships took of the case below, and their Lordships here have only had to consider whether, upon

the case brought before them, the appellant has made out his title?

It is not for them to consider whether he has shown any infirmity whatever in the title of the respondent, but whether he has made out a satisfactory case to entitle him to recover the office and the land and property belonging to the office of mohunt.

Upon a complete review of the case, their Lordships are of opinion, both on the construction of the will, and the evidence brought before them of the facts which have occ throughout (which they think it unnece to detail with greater minuteness), th appellant has completely failed in t tempt to get up his own title, and that, sequently, the decision of the Court b which simply asserts that he has fai establish any title of his own, ought affirmed; and their Lordships will hu advise Her Majesty to direct that thi peal be dismissed with costs.

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